Shareholders' Rights to Challenge the Decisions of the Assembly of a Publicly Traded Corporation Debated at the 63rd Deutscher Juristentag (German Lawyer's Conference).

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[1] The section of the 63rd German Lawyer's Conference devoted to commercial law dealt with the paper presented by Professor Theodor Baums of the University of Frankfurt Law School. Professor Baums' presentation took a position in the heated debate surrounding proposals from some sectors to cut back and from other sectors to expand shareholder voting and veto rights at the general assembly meetings of Germany's publicly held corporations. A comparison of the German and the American system reveals striking differences concerning both the magnitude and effect of actions to rescind (resp.: actions for avoidance). The German system, characterized by highly concentrated share ownership and a straight-forward practice of proxy voting, allows a growing number of suits challenging a majority decision. These suits last, on average, three years. These challenges to "Majority" decisions taken by a corporation's general assembly lead, in 85% of the cases, to a consensual settlement. But in that process, the firm loses immense amounts of money and risks harm to its reputation. The current debate centers on how (and even whether) to approach this phenomenon. The courts, having extended the legal basis of such actions from rather formal grounds to a more substantial and material reasoning, opened the way for a wider scope of shareholder rights.

[2] The American system with wide-spread ownership and an intuitive antagonism between shareholders and the firm's management also allows actions to rescind corporate decisions, but injunctive relief like direct individual suits are (in the American system) directed against the coming into force of a new rule or regulation. The predominant basis for challenges to the corporation's future decisions involves management's detrimental distribution of information to the shareholders.

[3] The German law regarding actions to rescind corporate decisions already knows two tough prerequisites that first must be met before a suit to rescind can be brought: (1) protest must be brought against the meeting's protocol; and (2) the suit must be brought within four weeks of the close of the meeting. To fight alleged "terrorist" law suits brought by individual shareholders only to do the firm harm, recent proposals for reform have included a quorum requirement, i.e. a minimum amount of shares held, and the introduction of a time requirement during which the shares must have been held.

[4] Professor Baums rejects the first proposal. The problem here mainly lies in the difficulty to define an appropriate amount of shares that should endow a shareholder with the right to bring a suit. The risk inherent in this proposal is that it can be the first step on a slippery slope that leads to a more general erosion of the shareholder's right to bring an action. The suggestion instead is for the legislature to set a quorum that must not be raised by the corporate charter but may be lowered. *De lege lata* the existing requirement of 5% (Art. 147 Sect. 3 Public Corporations Law -AktG-) needs to be lowered, proposes Professor Baums, arguing for a required maximum of 1%. Professor Baums notes a similar difficulty with the second proposal: a requirement of minimum length of share ownership runs the risk of being disproportionately arbitrary. In order to take into adequate consideration the motives of the action brought and thereby to prevent "strike suits," Professor Baums suggests a burden of proof on the plaintiff's side to show that the shares were bought *before* a suit was in fact envisioned. Among the voices in the debate is the proposal to combine both requirements (number and time).

[5] Other related topics concern a possible formalization of question-procedures during an assembly meeting as impertinent questioning often leads to dead-ends and subsequently served as grounds for future suits to rescind. Here, it appears that reforms will require that questions first be submitted in writing thereby allowing a more procedural method of Q & A in corporation general assembly meetings. Another highly debated issue concerns the attribution of fees in case an action against an assembly decision is rejected. Here, the proposal is for a flexibility based on evaluating the *ex ante* prospects and the nature of the action.