Germany*

I. German Unification—New Legislation to Promote Investment in Eastern Germany

Throughout 1990 legislative activity in Germany focused on the legal groundwork first to create the economic, monetary, and social union between eastern and western Germany and later to achieve full political and constitutional unity.[1] While the tide of new legislation regarding unification gradually ebbed, the all-German Bundestag has been called upon to cure deficiencies in the new laws to make them more effective.

Thus, in March 1991 the Act to Remove Investment Obstacles[2] became effective, amending inter alia the Act Concerning Open Property Issues adopted in connection with the Unification Treaty.[3] Even though the principle of restitution of former owners to their position prior to communist expropriation is upheld, the new Act grants priority to investors who are willing to make substantial new investments in the real property concerned, leaving the prior owner with a claim to compensation rather than restitution. According to the new Act a party acquiring real estate from the authorities in the five new states (comprising the former East Germany) may obtain a certificate of title enabling the new owner to have his title registered with the land register irrespective of prior registrations. This is expected to expedite the rebuilding of land registers in the five new states and thereby provide a reliable basis to determine issues of title to real estate.

Other parts of the Act are intended to alleviate the risk that investors will be faced with environmental liability to third parties. Under the General Environmental Act adopted in 1990 investors could apply for an exemption from the costs for a clean-up ordered by the authorities;[4] however, it left the investor with the general risk of liability to third parties. The new Act enables the state authorities to issue a certificate of indemnification against third-party environmental liability to new owners of potentially contaminated real estate or businesses owning such land (including companies whose ownership has changed following an acquisition).

In the period following unification non-German investors have been relatively reluctant to consider investing in eastern Germany, leaving the stage primarily to

*Prepared by Burkhard Bastuck, Partner, Bruckhaus Westrick Stegemann, New York, U.S.A. & Düsseldorf, Germany; Doctor of Laws (University of Bonn, Germany); LL.M. (University of Pennsylvania); Member, New York Bar, Düsseldorf Bar.

1. *See generally,* Bastuck, *Unity, Law, and Freedom: Legal Aspects of the Process and Results of German Unification,* 25 INT'L LAW. 252 (1988).

2. Gesetz zur Beseitigung von Hemmnissen bei der Privatisierung von Unternehmen und zur Förderung von Investitionen in den neuen Bundesländern, Bundesgesetzblatt, Teil I [BGB1. I] 766.

3. *See* Bastuck, *supra* note 1, at 262.

4. *See id.* at 263–64 (detailing the General Environmental Law [Umweltrahmengesetz] of June 29, 1990).

western German businesses, including western German subsidiaries of foreign companies. The new legislation is also intended to foster investment by non-German investors by further removing administrative obstacles in the five new states. In addition, the Treuhandanstalt is now actively promoting the sale of eastern German businesses outside of Germany, including the United States, through investment banks and a new representative office opened in New York in the fall of 1991.

II. Corporate Law

A. New Case on Shareholder Liability

The Federal Supreme Court will soon have the opportunity to elaborate further on the requirements for shareholder liability in a group of companies context when it reviews a 1990 decision of the Cologne Court of Appeals.[5]

The defendant, an individual, had been the only shareholder of a GmbH, a limited liability company engaged in the reproduction and sale of video films, and had owned substantial shareholdings in several other film businesses. When the GmbH experienced financial difficulties, the defendant formed a new company, shifted the GmbH's business over to the new company and let the GmbH go bankrupt. Creditors of the GmbH sued the shareholder defendant personally for their claims against the GmbH.

In continuing the reasoning applied in recent Federal Supreme Court cases[6] the Cologne Court of Appeals held for the plaintiffs. According to the court, the defendant's actions demonstrated that as a shareholder in several companies engaged in the same industry, he had been treating the GmbH like a division of a larger enterprise as part of an overall group strategy. While in certain instances a shareholder of a group of companies might show that the individual company's failure was due to extraneous circumstances, such as the bankruptcy of a major customer or the decline of the economy in general, the burden of proof was on the shareholder to show that the problems were not attributable to the overall group strategy. Generally it would not suffice to assert that the company had gone bankrupt because receivables had been uncollectible.

If the case is upheld by the Federal Supreme Court, it would further expand the concept of shareholder liability in a group company context by not limiting liability to the defunct company's stated capital and by allowing third-party creditors to take direct recourse against the shareholder rather than requesting the shareholder to infuse capital into the company. The case also makes it clear that

5. Oberlandesgericht[OLG] Köln, Zeitschrift für Wirtschaftsrecht [ZIP] 1990, 1075, May 2, 1990.

6. (Autokran), Bundesgerichtshof [BGH] [Federal Supreme Court], Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 95, 330; (Tiefbau), BGH, BGHZ, 107.

the corporate veil will not shield the shareholder from personal liability if the shareholder is engaged in a number of similar businesses all of which are centrally managed and guided by an overall group strategy.

B. Federal Supreme Court Takes Bite Out of Strike-Suits

While derivative suits are basically unknown in German corporate practice,[7] any shareholder of a stock corporation may individually file a lawsuit against the corporation to contest the validity of a shareholder resolution if the shareholder believes that the resolution violates the law or the bylaws of the corporation. Under ordinary circumstances the execution of the resolution is halted pending the outcome of the litigation, preventing commercial registers from registering such fundamental corporate actions as mergers, increases of capital, or changes in the corporation's bylaws.

This right has developed into a powerful tool in the hands of individual shareholders, forcing management to discuss substantial payoffs to persuade shareholders to withdraw their lawsuits in order to remove legal obstacles to important new financing or reorganization measures. Indeed, certain shareholders have filed suits with the intention of extracting large amounts of money from a corporation in exchange for the withdrawal of their complaints.

The Federal Supreme Court has now eased the grip of such suits on corporations, allowing management and authorities to go ahead with the implementation of a shareholder resolution if the contestation is evidently frivolous. The Court first established the ground rules governing frivolous contestation suits in the *Kochs-Adler*[8] and *DAT-Altana II*[9] cases decided in 1989. The Court said that a contestation suit would not be heard if a shareholder had brought the suit with the intention of inducing the corporation to make a payment to which the shareholder was not otherwise entitled. In making the determination, courts should consider all the facts presented, in particular whether the shareholder's conduct during the settlement negotiations with the corporation's management indicated a strong pecuniary interest in the outcome of the case.

In two recent decisions, the Federal Supreme Court has confirmed the rules developed in the *Kochs-Adler* and *DAT-Altana II* cases. In the first case,[10] several shareholders filed a suit to void a shareholder resolution approving the merger of the corporation with another corporation. Contrary to the court of appeals, the Federal Supreme Court said that commercial registers could implement a con-

7. Liability suits against the management of stock corporations may be brought only by shareholders representing at least 10 percent of the company's stated capital, Aktiengesetz [Stock Corporation Act], § 147(1).
8. (Kochs-Adler), BGH, May 22, 1989, Wertpapier-Mitteilungen [WM] 1989, 1128.
9. (DAT-Altana II), BGH, Dec. 18, 1989, ZIP 1990, 168.
10. (Hypothekenbank-Schwestern), BGH, July 2, 1990, ZIP 1990, 985.

tested shareholder resolution even if a contestation suit was still pending, provided that the suit was considered frivolous under the *Kochs-Adler* test. The *Hypothekenbank - Schwestern* court decided that the requirements of the test had not been met and upheld the lower court's decision to halt registration of the merger until the contestation suit had been ruled upon. In the second decision[11] the Federal Supreme Court said that the issue of frivolous contestation suits was settled, reiterating that in making the determination under the *Kochs-Adler* test the plaintiff's responses to the corporation's settlement proposals were to receive special attention.

C. No Shareholder Appraisal Rights on Issuance of Profit Participation Certificates (Genuss-Scheine)

German corporate law adheres to the principle that upon the issuance of new shares, existing shareholders have an absolute right to subscribe to a proportionate share of the new stock to maintain their relative shareholder position. This right may be excluded only if the management gives a reason for such exclusion.[12] This principle of shareholder appraisal rights exists only where stock is issued; it does not apply to the issuance of debt instruments.

These rules have now been held to apply also where the securities issued are so-called *Genuss-Scheine* (profit participation certificates). Such certificates usually carry certain preferential rights to profits while not granting any voting rights; the corporation's indebtedness is carried on its books as debt rather than equity. In accord with the opinions of leading commentators on the topic the District Court of Bremen held that shareholders had no appraisal rights in the issuance of profit participation certificates, as such certificates represented debt and were not to be treated like stock.[13]

D. GmbH & Co. KG No Longer Exempt from EC Publication Directives

The GmbH & Co. KG, a peculiar corporate creature of German descent, had previously enjoyed special treatment under the various publication directives of the EC requiring corporations in the Member States to follow uniform guidelines in establishing and publishing their financial statements. Until recently, these directives had applied to corporations but not to partnerships. Since the GmbH & Co. KG is a limited partnership whose only general partner is a GmbH (that is, a close corporation), it had been exempt from the publication directives.

11. (SEN), BGH, Oct. 29, 1990, ZIP 1990, 1560.
12. Stock Corporation Act, § 186(3), (4); *see also* BGH, Mar. 13, 1978, BGHZ 71, 40; BGH, Apr. 19, 1982, BGHZ 83, 319.
13. Landgericht [LG] Bremen, Nov. 2, 1990, WM 1991, 134.

A new Council Directive amending certain existing directives[14] has now terminated the special privilege of the GmbH & Co. KG by extending the scope of application of the publication directives to partnerships and limited partnerships whose general/unlimited partners are corporations to which the directives already apply. The new directive will have to be transformed into national law by the end of 1992 and will apply for the first time to fiscal years beginning on or after January 1, 1995.

III. Banking Law—Brokers May Have Duty to Inform About Investment Risks

In connection with the establishment in 1989 of the German Commodities Exchange,[15] changes in the Stock Exchange Act have substantially limited the reach of the so-called gambling defense, which allowed noncommercial customers to walk away from futures transactions and claim the repayment of losses incurred by brokers on their behalf. Under the new law the defense is no longer available if a registered broker sufficiently informed the customer about the risks involved in the type of transaction the broker carried out on the customer's behalf and the fee structure applied.[16]

In a recent decision, the Federal Supreme Court expanded the scope of the broker's duty to disclose, in the context of stock option and stock index option transactions.[17] The customer, an inexperienced housewife, lost substantial amounts of money as a result of unsuccessful stock option and stock index option transactions carried out in Chicago. In addition, the broker requested that she pay a 10 percent transaction fee. Finding that the information supplied in the broker's standard business conditions was insufficient, and that the broker had failed to inform the customer fully of the risk of a total loss of funds and of the impact of the fee arrangement, the Court held that the broker had breached his duty to disclose and was, thus, liable to the customer for damages.

Even though the case was decided under the stricter law now amended, it is interpreted by scholars as demonstrating that the new, more liberal rules in the Stock Exchange Act must not be mistaken for a carte blanche for brokers and investment advisers to take in orders for high-risk securities transactions on the basis of preprinted disclosure statements. Brokers will now have to tailor the information to be supplied to the type of transaction involved in the particular case.[18]

---

14. Council Directive 90/604, 1990 O.J. (L 317) 57.

15. [Deutsche Warenterminbörse (DTB)].

16. Börsengesetz [Stock Exchange Act] §§ 52-*et seq.*. (as amended in 1989 by BGB1. I 1412); BGH, July 11, 1988, BGHZ 105, 108.

17. BGH, Nov. 27, 1990, ZIP 1991, 87.

18. Schwintowski, Entscheidungen zum Wirtschaftsrecht [EWiR] § 53 Börsengesetz [BörsG] 4/91, 259.

IV. Taxation—Capital Transfer Tax Abolished

In the past the transfer of securities had been subject to a capital transfer tax[19] of up to 0.25 percent on the amount of the consideration, which could only be reduced to half the rate or be avoided in certain cross-border situations. In an attempt to make the German capital markets more attractive, in particular to foreigners, the German Legislature abolished this tax altogether, effective January 1, 1991. The capital transfer tax had also applied to the transfer of GmbH shares in negotiated share-purchase transactions and was usually paid by the buyer, thereby increasing acquisition costs. As a result of the abolition of the tax, capital transfer taxes will no longer be a consideration in the acquisition of GmbH shares or stock in German corporations.

V. Civil Procedure

A. Berlin Court Refuses to Enforce U.S. Product Liability Judgment

Recent developments in American product liability law and its application in the American courts have received widespread attention from German scholars and industry alike and invariably have met with sharp criticism. An often liberal application of the no-fault standard of liability, multimillion-dollar damage awards, extensive pretrial discovery, and the use of juries in highly complex civil litigation are the main targets of this criticism. A Berlin District Court decision[20] refusing to enforce a Massachusetts Superior Court decision in Germany reflects the degree of estrangement between modern civil and U.S. law approaches to product liability litigation.

According to the opinion of the Berlin Court, the plaintiff, an American worker, had suffered injuries to her hand when operating a machine manufactured by the German defendant and supplied to the plaintiff's employer. Upon encountering a mechanical defect, the plaintiff, who had worked at the machine for a long time and was familiar with it, turned the machine off and reached into it, thereby triggering a chain of events which eventually led to the injury. After extensive pretrial discovery and a jury trial, the Massachusetts Superior Court awarded damages and interest in the amount of $482,905.50.

In the opinion of the Berlin court, the U.S. judgment was incompatible with German principles of substantive and procedural law and violated German public policy. The court noted that the U.S. judgment failed to state the defect that the defendant could be held accountable for. In order to meet German minimal fairness tests, there would have to be a finding of some breach of duty on the manufacturer's part. For the plaintiff to show that there was, at least theoretically, some other

19. Kapitalverkehrsteuer [Capital Transfer Tax]; Börsenumsatzsteuer [Stock Exchange Sales Tax].
20. LG Berlin, June 13, 1989, Recht der Internationalen Wirtschaft [RIW] 1989, 988.

technical solution that would have avoided the injury was insufficient. Furthermore, in the Berlin court's opinion, the U.S. court had grossly disregarded the plaintiff's own negligence in tampering with the machine, which under German law might have precluded any recovery at all. The court also noted that the U.S. judgment had failed to state how the U.S. court arrived at the amount of damages awarded. In addition, the U.S. court awarded interest on interest, which under German law is not available. Finally, the Berlin court noted that the amount of pretrial discovery conducted in the case was incompatible with German procedural law, which does not recognize discovery at all and prohibits litigants from requesting means of evidence from the opposing party.

In refusing to enforce the U.S. judgment altogether the Berlin court went beyond suggestions by scholars to try to reach for some middle ground by enforcing a U.S. damages judgment only partially.[21] According to the court this would encroach even more upon the foreign court's independent reasoning.

B. New Act Simplifies Out-of-Court Settlements

In 1990 the German Bundestag adopted the Act to Simplify the Administration of Justice.[22] Besides dealing with such issues as adjustments of the amounts required for an appeal as of right and the filing of motions outside the oral hearing, the Act introduces a new device to help parties in obtaining a self-enforceable out-of-court settlement instrument.

In the past an out-of-court settlement could be enforced only if the claimant went through a full-fledged court proceeding to obtain a judgment on the settlement or if the settlement instrument itself was incorporated in a notarial deed containing language subjecting the debtor to immediate execution without further court action. Under the new rules the parties may make a settlement agreement in writing, have their attorneys countersign the settlement, and then take it to court to obtain a confirmation similar to the confirmation of an arbitration award, which does not include a *révision au fond.* As an alternative, they may request a notary to confirm the settlement, including the execution clause.

VI. Antitrust

A. Federal Cartel Office May Prohibit Consummation of German Part of Foreign Merger

In a decision concerning the consummation of the German part of an acquisition carried out abroad, the Federal Cartel Office confirmed its policy of en-

21. Stiefel, *Die Vollstreckbarkeit U.S.-amerikanischer Schadensersatzurteile exzessiver Höhe,* VERSICHERUNGRECHT [VersR] 829, 842 (1987). This approach was adopted by the Düsseldorf Court of Appeals in a decision of May 18, 1991, concerning punitive damages in connection with a sexual abuse conviction. RIW 1991, 5094; *see also* Slehr, *Zur Anerkennung und Vollstreckung ausländischer Verurteilungen zu "punitive damages,"* RIW 1991, 705.

22. Act of Dec. 17, 1990 (Rechtspflege-Vereinfachungsgesetz), BGBl. I 2847.

forcing the German merger control laws with respect to foreign mergers having substantial effects on the German market.[23] Linde AG, a German manufacturer of commercial vehicles, had agreed to acquire the forklift business of a U.K. corporation, The Kaye Organisation Ltd., including the shares in German and other subsidiaries held by Sir Emmanuel Kaye, the owner of The Kaye Organisation. In accordance with the requirements of German merger control law, Linde filed a premerger notification letter with the Federal Cartel Office asking for an approval of the project. When the Office indicated that it intended to prohibit the merger for German purposes, the parties agreed to transfer the shares in the German subsidiary to a new German company formed by Sir Emmanuel Kaye for this purpose and consummated the non-German part of the transaction, thereby complying with the prohibition to consummate the transaction in Germany prior to the Federal Cartel Office's determination.

The Federal Cartel Office eventually confirmed its initial position by issuing a ruling enjoining the consummation of the German share transfer to Linde. According to the Office, Linde held a dominant position in the German forklift and related markets, which would be strengthened by the acquisition of Kaye's German subsidiary. The Office reiterated that it had jurisdiction to rule on the case because the project would have effects in Germany.[24] According to the Office even the consummation of the non-German part of the transaction alone would strengthen Linde's position in Germany. However, the Office felt unable to prohibit the entire transaction for reasons of public international law and confined its ruling to the German part.

The case illustrates that in order to avoid the partial invalidity of the deal and the potential imposition of fines, the parties to a foreign merger will have to keep German merger control policies in mind if the transaction has effects within Germany. Also, in appropriate circumstances a violation of German law may be avoided by isolating the German part of the transaction and dealing with it separately.

B. Federal Cartel Office Loses Out on Industry in Gasoline Pricing Dispute

The Federal Cartel Office lost an important, perhaps final, round in its fight against simultaneous substantial increases in the price of gasoline when the Berlin Kammergericht invalidated a preliminary injunction issued by the Cartel Office ordering the major oil companies not to charge gasoline prices exceeding a specified threshold amount.[25] When the Persian Gulf crisis began in the summer of 1990, all leading oil companies substantially increased the price of gas-

23. Decision of Mar. 3, 1989 (Linde-Lansing), Wirtschaft und Wettbewerb [WuW] 9/1989 at 765.
24. Act Against Restraints of Competition [GWB], § 98(2).
25. Kammergericht [KG], Dec. 12, 1990, WuW/E 4640.

oline in the Hamburg area, arguing that the price increases were motivated by the negative political developments in the world's main oil region and subsequent price changes at the Rotterdam spot markets. The Federal Cartel Office alleged that the major oil companies jointly enjoyed a dominant market position and abused their position by increasing prices at that time and by those amounts. Since such conduct violated pertinent antitrust law,[26] the Office issued a preliminary injunction.

The Berlin Kammergericht disagreed, stating that it was not appropriate for the Federal Cartel Office to second-guess the business decisions of players in the market. In order to find that a law had been violated, there would have to be "a degree of certainty not diminished by serious doubts surrounding the alleged violation of law." This was especially true in markets that were subject to frequent price fluctuations. The Federal Cartel Office based its injunction on assumptions rather than on facts enjoying the required degree of veracity. In conclusion, the Kammergericht found that the injunction should not have been issued.

The Kammergericht's decision has been interpreted by commentators as setting extremely high standards for the issuance of preliminary orders in price control situations, thereby rendering the Office's power to issue preliminary orders in such cases virtually obsolete.

VII. Lawyers

A. New Rules Expected to Liberalize Ethical Standards

Until 1987, the practice of law in Germany had been heavily regulated by rules prohibiting multicity law firms and the establishment of branch offices in other German cities, banned advertising completely, and generally imposed strict standards of courtesy among fellow lawyers. Since the Federal Constitutional Court, in 1987, declared that the then-current Rules of Professional Conduct were unconstitutional,[27] the members of the profession have attempted to fill the void with new rules, yet so far without success. Meanwhile courts have demonstrated a more liberal tendency in approaching issues of professional conduct. Thus, the Federal Supreme Court struck down the long-established rule of professional courtesy that prevented a lawyer from filing a motion for a default judgment if the lawyer's adversary and member of the same local chapter failed to show up at an oral hearing in court.[28]

While the debate surrounding the creation of new rules of professional conduct continues, lawyers have taken the initiative and restructured their firms to create new facts the legislature will no longer be able to overlook. Multicity law firms

26. GWB § 22(4).
27. Entscheidungen des Bundesverfassungsgerichts [BVerfGE], July 14, 1987, 76, 171.
28. BGH, May 14, 1990, Neue Juristiche Wochenschrift [NJW] 1990, 1719.

already exist in great numbers, rendering the former prohibition against multicity firms obsolete. In the meantime, the Federal Supreme Court has recognized in principle the legality of the multicity firm. The advertising practice has also become more moderate. For example, German lawyers now state their firm affiliation in publications and public presentations, a practice formerly considered unethical.[29] These practices will eventually have to be incorporated in an amendment to the Federal Attorneys' Act. The new law will also have to address the issue of whether attorneys should be allowed to form professional corporations in the form of "Attorneys' GmbHs," a concept to which a majority of local chapters have already expressed their opposition.

B. Admission of Non-German Lawyers to Practice

In an effort to liberalize the professional services market in Germany for citizens of EC Member States, the German Bundestag amended the Federal Attorneys' Act in 1989 to allow lawyers admitted in other EC Member States to open offices in Germany and practice EC law and the law of their home jurisdiction. Lawyers from other states may also practice EC law and their home country's law if reciprocity with that state is assured.[30] Effective January 1, 1991, EC citizens may now obtain full admission to the German bar without going back to school if they pass a fitness examination testing basic knowledge of German law.[31]

The new Act, which transforms the Council Directive on the Recognition of High School Diplomas[32] into German law, applies to members of the bars of Member States such as avocats in Belgium and France and barristers and solicitors in the United Kingdom. It gives details of the topics to be covered in the examination such as knowledge of the German Civil Code (BGB), the Commercial Code, and labor, constitutional, and criminal law. It also contains provisions on the administration of the examination and elaborates on the principle that a foreign attorney who passes the examination will be treated as a fully qualified attorney and may become a member of a local attorneys' chapter. As mentioned above, the Act does not apply to non-EC citizens, who will be limited to practicing EC and their home law.

29. BGH, Sept. 18, 1989, NJW 1989, 2890; BGH, Oct. 29, 1990, NJW 1991, 49.

30. Act of Dec. 13, 1989, BGBl. I, 2135 (amending §§ 206–207 of the Federal Attorneys' Act). However, a lawyer may not solicit new clients by inviting nonclients to attend a practice presentation, BGH, July 4, 1991, BB 1991, 1735.

31. BGBl. I [1990] 1349.

32. Council Directive 89/48, 1989 O.J. (L 19) 16.