

1976

Is a German Limited Liability Company a Corporation

John K. Speer

Recommended Citation

John K. Speer, *Is a German Limited Liability Company a Corporation*, 10 INT'L L. 343 (1976)
<https://scholar.smu.edu/til/vol10/iss2/11>

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Is a German Limited Liability Company a Corporation?†

In Germany, as in a number of other civil law jurisdictions, the law recognizes a form of business organization known as a limited liability company (in German, *Gesellschaft mit Beschränkter Haftung*, or GmbH). The origin of the GmbH, by legislation in 1892,¹ came from the needs of small incorporators, in some way to assist those engaged in German colonial ventures; and, in general, to provide relief from a strict corporation law with its time-consuming and expensive requirements for organization, publicity of accounts and the necessity to determined and secure from the beginning, the full amount of capital required for an enterprise.² According to German law, there are two types of corporations, the GmbH and a corporation limited by shares (in German, *Aktiengesellschaft*, or AG). The *Aktiengesellschaft*, with a large paid-in capital requirement and narrow discretion in framing rights and duties of shareholders, management and organization of the company, corresponds to the American stock corporation.³

How closely does the GmbH relate to the American notion of a corporation? How closely does it parallel the American form of a partnership, limited partnership or close corporation? In these respects let us examine the elements of the GmbH vis-à-vis a number of elements of the American business corporation.

Formation of a Corporation

In the United States a corporation is formed by filing, or recording, the articles, or certificate, or incorporation with the secretary of state and in a county

*M.A., LL.B., Trial Attorney, Immigration and Naturalization Service Department of Justice; formerly associated with Donovan, Leisure, Newton & Irvine, New York.

†The views expressed in this article are those of the author and are not necessarily those of the Immigration and Naturalization Service or the Department of Justice.

¹See Limited Liability Company Act of April 20, 1892, *as amended*.

²SCHLESINGER, *COMPARATIVE LAW: CASES AND MATERIALS* 430 (1950); Eder, *Limited Liability Firms Abroad*, 13 U. PITT. L. REV. 193 & 197 (1952); Haskell, *The American Close Corporation and Its West German Counterpart: A Comparative Study*, 21 ALA. L. REV. 295 (1969); DeVries & Juenger, *Limited Liability Contract: The GmbH*, 64 COLUM. L. REV. 869 (1964); Winkhaus & Stratman, *GmbH: The Close Corporation in Germany—Management and Capitalization Problems for U.S. Controlled Subsidiaries*, 29 THE BUS. LAW. 1275 (1973).

³*Cf. Id.*; DeVries & Juenger, *supra* note 2, at 870.

office.⁴ Following notarization,⁵ a GmbH is formed by registration of what is called variously the partnership agreement or the articles of association (the latter, in German, *Gesellschaftsvertrag*)⁶ in the commercial register of the domicile of the GmbH (which must be within the Federal Republic of Germany) upon application of the shareholders or their attorneys in-fact.⁷ Approximate legal cost of incorporation of a GmbH, with the minimum capital of DM (Deutsche Marks) 20,000 is DM 1600.⁸

Drafting Articles of Incorporation

The incorporation paper of an American corporation is of course, the articles of incorporation, the certificate of incorporation or the charter.⁹ The usual essential matters included therein are the corporate name; the purposes or objects of the enterprise; the domicile and place of business; required data on directors and incorporators; the resident agent; capital structure; amount of subscription for shares and capital to be paid into commerce business; and, finally such matters as term of existence and exemption of shareholders from personal liability.¹⁰

In forming a GmbH, the articles of association must state, as a legal minimum, the name and domicile of the company; its purpose; the amount of the company's nominal capital; the amount to be subscribed by the original shareholders.¹¹ As in the case of an American corporation, certain optional provisions may be added.¹²

Incorporators

In the United States, incorporators are those persons unlimited in number, who sign the articles of incorporation.¹³ They may or may not be subscribers for shares in the corporation and are invariably natural persons.¹⁴ To form a GmbH,

⁴H.W. BALLANTINE, *BALLANTINE ON CORPORATIONS* 49 (Rev. ed. 1946).

⁵Winkhaus & Stratman, *supra* note 2, at 1278.

⁶See 5 MARTINDALE-HUBBELL LAW DIRECTORY DIGESTS 3153 (1971) [hereinafter cited as MARTINDALE-HUBBELL]. Stratman, *supra* note 2, at 1277. Note that incorporation of a GmbH is often accomplished in Switzerland. *Id.* at 1278. Incorporators may be represented at the events of notarization and registration by a third person if a power of attorney authorizes it. *Id.*

⁷*Id.* at 1278 & 1279. For requirements of what items must be, or should be included in the articles of association see *id.* at 1277. The domicile must bear actual relationship to the place of business. *Id.* at 1279.

⁸*Id.* at 1278.

⁹BALLANTINE, *supra* note 4 at 52.

¹⁰*Id.* at 53.

¹¹Winkhaus & Stratman, *supra* note 2, at 1277.

¹²*Id.*; BALLANTINE, *supra* note 4, at 54.

¹³See *Id.* at 58; FLETCHER, *CYCLOPEDIA OF THE LAW OF PVT. CORPS.* § 3743 (Rev. ed. 1966).

¹⁴BALLANTINE, *supra* note 4, at 54.

two incorporators are required¹⁵ who must be subscribers for shares. They may be natural or corporate persons.¹⁶

Delegation of Authority

In American corporations, authority is commonly delegated by the board of directors to appointed agents, such as the president, vice-president, secretary, treasurer and possibly cashier.¹⁷

The authority of officers and agents to bind a corporation is usually conferred by resolution of the directors, by the corporate by-laws or implied by acquiescence in a general course of business (*i.e.* apparent or ostensible authority).¹⁸ The directors, absent express authorization or apparent authority, are not individually agents of the corporation and have no power individually to bind it.¹⁹

In a GmbH there must be at least one manager, the chief one being known as *Geschäftsführer*, who is appointed by the shareholders. His authority is set forth in the partnership agreement (or articles of association) and who has full agency powers as to third parties.²⁰ Managers, additional to the *Geschäftsführer*, and known in German as *prokura* or *Handlungsbevollmächtigte*, have limited power to represent a GmbH, somewhat like officers of an American corporation.²¹ The charter could require a shareholder, also known as a quota-holder, to act as manager.²² The *Geschäftsführer* may be of foreign nationality or be a resident of a foreign country, but it is advisable that the *Geschäftsführer* or one of the *prokura* be a German resident.²³ If there are several managers, they represent the GmbH jointly, unless, by shareholder resolution, the contrary is provided.²⁴

¹⁵See Eder, *supra* note 2, at 203-204; MARTINDALE-HUBBELL, note 6 *supra*; DeVries & Juenger, *supra* note 2, at 871; Haskell, *supra* note 2, at 301; Winkhaus & Stratman, *supra* note 2, at 1277.

¹⁶See MARTINDALE-HUBBELL, note 6 *supra*; EDER, *supra* note 2, at 209.

¹⁷BALLANTINE, *supra* note 4, at 137.

¹⁸*Loc. Cit.*: FLETCHER, *supra*, note 13 §§ 438-44 & 449-51. *Cf.* estoppel of a corporation to plead *ultra vires*. See BALLANTINE, *supra* note 4, at 252; *cf.* FLETCHER, *supra* note 13 § 449.

¹⁹BALLANTINE, *supra* note 4, at 137. *Cf.* Uniform Partnership Act § 15 [hereinafter cited as U.P.A.] which provides that:

All partners are liable jointly and severally for everything chargeable to the partnership under a partner's wrongful act or omission or a partner's breach of trust and jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.

²⁰Eder, *supra* note 2, at 207-08; MARTINDALE-HUBBELL, note 6 *supra*; Haskell, *supra* note 2, at 296; Winkhaus & Stratman, *supra* note 2, at 1277, 1281 & 1282; *cf.* DeVries & Juenger, *supra* note 2, at 871 & 879-82. The *Geschäftsführer* has been compared to a director of an American corporation who acts also as chief executive officer. Winkhaus & Stratman, *supra* note 2, at 1281. *Cf.* "agency power" as a power apart from apparent authority or ostensible authority in SEAVEY, *STUDIES IN AGENCY* 200 (1949).

²¹*Id.* at 1277.

²²DeVries & Juenger, *supra* note 2, at 876; *cf.* Winkhaus & Stratman, *supra* note 2, at 1281 & 1282. The doctrine of *ultra vires* does not apply in German law. *Id.* at 1281.

²³*Id.* at 1279-80.

²⁴*Id.* at 1282.

Liabilities of Directors

The directors of an American corporation owe a duty "to use such care and diligence and give such time and attention as ordinarily careful and prudent men could reasonably be expected to exercise on behalf of such a corporation under similar circumstances."²⁵ In a Swiss incorporated company, a business organization akin in form to the GmbH, directors are liable for willful, or simple, neglect of their duties (*absichtliche oder fahrlässige Verletzung*).²⁶

The appointment of a supervisory board (*Aufsichtsrat*) for a GmbH is not mandatory unless the GmbH has more than 500 employees.²⁷ The *Aufsichtsrat* must be composed of at least one-third members from company workers; it is restricted in authority to a quashing vote on management which, however, can be overridden by a resolution of a shareholders' meeting.²⁸

Purposes and Powers

The statement of the objects, purposes or powers of an American corporation is set forth in its charter, in the articles of incorporation or other incorporation document.²⁹ The purposes of the GmbH are stated in the partnership agreement (or, as it is also known, the articles of association), in German, the *Gesellschaftsvertrag* (company contract).³⁰

Selection of a Corporate Name

The name of an American business corporation must, by the laws of most states, contain words such as "company," "corporation," "incorporated," "Inc." or "limited" to indicate status as a business corporation.³¹ Sometimes it contains the words "association," "club," "foundation," "institute," "society," "union," "syndicate," "Co.," "Corp." or "Ltd."³²

In Germany, a limited liability company must contain, in its name, the words *Gesellschaft mit beschränkter Haftung* (company with limited liability).³³ The German requirement for designation in the title of a GmbH, as a limited liability company,³⁴ is similar to the Canadian, Mexican and Argentine requirements for similar business enterprises, e.g., "limited" or "ltd." for a Canadian private company, limited company or incorporated company; "limited liability

²⁵BALLANTINE, *supra* note 4, at 158.

²⁶See Wyler, *The Swiss Company Limited by Shares*, 20 J. COMP. LEG. & INT'L L. (3d ser.) 90 (1938).

²⁷Winkhaus & Stratman, *supra* note 2, at 1288; cf. MARTINDALE-HUBBELL, note 6 *supra*; Haskell, *supra* note 2, at 296; DeVries & Juenger, *supra* note 2, at 871 & 879.

²⁸Winkhaus & Stratman, *supra* note 2, at 1288-89.

²⁹BALLANTINE, *supra* note 4, at 61.

³⁰Haskell, *supra* note 2, at 302n. 104.

³¹BALLANTINE, *supra* note 4, at 283.

³²FLETCHER, *supra* note 13 § 8889.

³³Winkhaus & Stratman, *supra* note 2, at 1278.

³⁴Eder, *supra* note 2, at 202; MARTINDALE-HUBBELL, note 6 *supra*.

company" or "Ltd." in the case of the Mexican *sociedad de responsabilidad limitada*; S.de R.L., or incorporated partnership and "limited liability" in the case of an Argentine *sociedad de responsabilidad limitada*).³⁵ A GmbH must also include the full name of one of its shareholders or indicate the type of business in which it is to be active.³⁶

Corporate Entity

In an American corporation "the shareholders are, in their corporate capacity, the holders of the rights and liabilities arising from the transactions of the [incorporated] company."³⁷ In a GmbH the nomenclature of the owners may be "shareholder"³⁸ or "partner."

A corporation can be a member of a GmbH³⁹ unlike the usual situation in a partnership.⁴⁰ The prohibition in the United States on allowing a corporation to enter a partnership is based on fears of transmitting corporate management into alien hands and of the creation of risks not originally contemplated by the corporation's shareholders.⁴¹

Corporate Reports and Financial Statements

In the United States, corporations which issue securities, registered on a national security exchange, are required by statute to file corporate reports periodically, with the Securities and Exchange Commission, for the protection of investors and, when proxies are solicited, to submit proxy statements to shareholders which detail financial information regarding proposed corporate

³⁵CANADIAN IMPERIAL BANK OF COMMERCE, DOING BUSINESS IN CANADA p. 12 (1970); TORONTO DOMINION BANK, LOOKING AT CANADA p. 16 (1970-71 ed.); Crawford, *The Mexican Limited Liability Company*, 13 TUL. L. REV. 259 (1939); Crawford, *The Argentine Limited Liability Company*, 24 TUL. L. REV. 233 (1940). By contrast, in the case of an American partnership, a firm name is desirable in the conduct of a partnership but not necessary. CRANE, HANDBOOK ON THE LAW OF PARTNERSHIP AND OTHER UNINCORPORATED ASSOCIATIONS 44 (2d ed. 1952). Thus also in the case of a German corporation limited by shares, to the corporate name—usually derived from objects of its undertaking—must be added the word "Aktiengesellschaft." MARTINDALE-HUBBELL, *supra* note 6, at 3152.

³⁶Winkhaus & Stratman, *supra* note 2, at 1279.

³⁷BALLANTINE, *supra* note 4, at 288.

³⁸MARTINDALE-HUBBELL, note 6 *supra*.

³⁹Eder, *supra* note 2, at 209; cf. *id.* at 210 and Crawford, *The Argentine Limited Liability Company*, *supra* note 35, at 242.

⁴⁰See FLETCHER, *supra* note 13 § 2520. See CRANE, *supra* note 35, at 44, which states:

It is *Ultra vires* of a corporation to become a partner: a corporation can act only through directors and officers in transferring property and incurring obligations. In a partnership, co-partners could make a corporation on a party to transactions in an irregular manner since partners are not agents subject to control of a board of directors.

Cf. U.P.A. § 6 which states that "a partnership is an association of two or more persons to carry on as co-owners a business for profit"; but cf. also U.P.A. § 2 defining "person" to include individuals, partnerships, corporations and other associations.

⁴¹CRAWFORD, *The Argentine Limited Liability Company*, *supra* note 35, at 242.

changes and proceedings.⁴² Shareholders must generally assume the initiative in obtaining inspection of corporate books and records, by suits to enforce this right, and by obtaining, from a corporation, certified financial statements.⁴³ However, most large corporations furnish annual reports to stockholders which include some accounting statements.⁴⁴

Only in cases of large-scale GmbH enterprises is an annual balance sheet and profit and loss statement filed with a court, or published.⁴⁵ No annual reports need be published or certified by an outside accountant.⁴⁶

Shareholders' Meeting and Voting Rights

In corporations organized in the United States, each shareholder votes the total number of shares he holds.⁴⁷ Practically, in the United States, shareholders' meetings are required as they may not act except at a meeting called and conducted by law.⁴⁸

In a GmbH each shareholder, or partner, has one vote, regardless of the amount of his ownership.⁴⁹ Shareholders', or quota-holders', meetings of a GmbH may be dispensed with.⁵⁰

Control of Management by Shareholders

The shareholders in an American corporation may remove directors at the expiration of the latter's term of office or, before that, for sufficient cause, and, possibly at the shareholders' pleasure, by majority vote.⁵¹ In turn, the board of directors of a corporation in the United States may remove officers or agents at pleasure, subject to corporate liability for any breach of contract.⁵² The board of directors is the supreme authority in matters of management of the regular and ordinary business, but not regarding fundamental changes.⁵³ In an American

⁴²See BALLANTINE, *supra* note 4, 389; cf. FLETCHER, *supra* note 13 § 2258.

⁴³BALLANTINE, *supra* note 4, at 388-89.

⁴⁴*Id.* at 389.

⁴⁵See MARTINDALE-HUBBELL, note 6 *supra*; Winkhaus & Stratman, *supra* note 2 at 1289-90 & 1292.

⁴⁶Haskell, *supra* note 2, at 302.

⁴⁷Cf. BALLANTINE, *supra* note 4, at 396. Consider N.Y. STOCK CORP. L. § 9 (McKinney Supp. 1968) which allows close corporations to require greater than majority or plurality vote of directors and stockholders.

⁴⁸See BALLANTINE, *supra* note 4, at 390, 391-93

⁴⁹Cf. MARTINDALE-HUBBELL, note 6 *supra*; but cf. Haskell, *supra* note 2, at 297. Cf. Section 18(e) of the U.P.A. which declares "all partners have equal rights in the management and conduct of the partnership business."

⁵⁰DeVries & Juenger, *supra* note 2, at 871; cf. Haskell, *supra* note 2, at 302 and Winkhaus & Stratman, *supra* note 2, at 1283.

⁵¹BALLANTINE, *supra* note 4, at 433 and 434; see FLETCHER, *supra* note 13 §§ 356 and 357.

⁵²BALLANTINE, *supra* note 4, at 437; cf. FLETCHER, *supra* note 13 § 357. Cf. U.P.A. § 9(1) which says that "every partner is an agent of the partnership for the purpose of its business" and U.P.A. § 18(e) which states that "all partners have equal rights in the management and conduct of the partnership business."

⁵³BALLANTINE, *supra* note 4, at 119.

corporation, of course, officers are appointed and controlled by the board of directors.⁵⁴

In a GmbH, the authority of the manager or managers (*Geschäftsführer* and *prokura*) is set forth in the articles of association, or partnership agreement (*Gesellschaftsvertrag*).⁵⁵ The *Geschäftsführer* may be removed at any time by shareholders' resolution, with or without cause.⁵⁶ The quota-holders "may delegate functions normally within [their] competence . . . to management or special committees."⁵⁷

Corporate Capital

An American corporation is owned by the shareholders who obtain shares as parties to a subscription for new shares or by purchase of shares already issued and then reacquired by the corporation (known as treasury shares) or by transfer of outstanding shares from a person who is already a shareholder.⁵⁸

The GmbH requires minimum capital (*Stammkapital*) of 20,000 Deutsche marks, divided into business interests or shares, or quotas, of even or uneven amounts, the minimum interest being 500 Deutsche marks.⁵⁹ Higher shares must be in multiples of DM 100.⁶⁰ One share certificate is allowed to each stockholder.⁶¹ One-fourth of the capital must be paid in at the time of registration and be at the disposal of the managers.⁶² There may be later contributions, assessments, or loans (called *Nachschusse*) regarded as either of these categories.⁶³

Subscription for Shares

As stated above, shareholders of an American corporation obtain their shares by subscription; by purchase of treasury shares or by transfer, through a stock exchange, of outstanding shares.⁶⁴

⁵⁴*Id.* at 137.

⁵⁵*Cf.* DeVries & Juenger, *supra* note 2, at 874, and Winkhaus & Stratman, *supra* note 2, at 1281 and 1283. *See also id.* at 1277.

⁵⁶*Id.* at 1283. However, claim for compensation under an employment agreement may remain. *Id.* Note the duty of managers to use the "care of a diligent businessman." DeVries & Juenger, *supra* note 2, at 880.

⁵⁷*Id.* at 874.

⁵⁸BALLANTINE, *supra* note 4, at 442.

⁵⁹MARTINDALE-HUBBELL, note 6 *supra*; Winkhaus & Stratman, *supra* note 2, at 1280; Eder, *supra* note 2, at 204; DeVries & Juenger, *supra* note 2, at 870; Haskell, *supra* note 2, at 301.

⁶⁰Winkhaus & Stratman, *supra* note 2, at 1280.

⁶¹*Id.* A share certificate may be, but usually is not, issued; if issued it is evidence of an interest, but not an instrument, sufficient to transfer ownership. *Id.*; MARTINDALE-HUBBELL, note 6 *supra*; Eder, *supra* note 2, at 205; *cf.* Haskell, *supra* note 2, at 297.

⁶²MARTINDALE-HUBBELL, note 6 *supra*; DeVries & Juenger, *supra* note 2, at 870; Winkhaus & Stratman, *supra* note 2, at 1293. If the subscription is in kind, rather than in cash, the full amount must be paid in at registration.

⁶³*Id.* at 1294; *cf.* DeVries & Juenger, *supra* note 2, at 871.

⁶⁴*See* note 57 *supra*.

German law, governing the operation of a GmbH, prohibits stock exchange transactions.⁶⁵

The Issue of Shares

For corporations in the United States, certificates of stock evidence the ownership of shares. The certificate is "documentary evidence of the holder's ownership of shares and a convenient instrument for the transfer of title."⁶⁶

By contrast, in a GmbH no certificates are ordinarily issued as evidence of ownership by the members, or partners.⁶⁷ Ownership of shares is usually evidenced by a notarial protocol, the instrument by which ownership is transferred.⁶⁸

Debt Financing and Preferences

A common law practice of American corporations is to issue bonds and debentures, that is to incur long-term and funded debts (repayable with interest) to assist in financing the corporation.⁶⁹ The power to do this is not dependent upon express authorization in the articles of incorporation.⁷⁰

Such a practice is not known to the GmbH. It may be noted that public subscription for debentures is prohibited to a Belgian partnership with limited liability⁷¹ and to a Canadian private company,⁷² both business organizations somewhat similar to a GmbH. Debentures may be issued, however, by a Swiss incorporated company with limited liability.⁷³

Dividend Distributions

In the honest discretion of the directors, who determine it to be financially advisable, an American business corporation may declare dividends on shares, out of surplus or out of accumulated profits.⁷⁴

Distribution of dividends, as such, on shares is not known to the GmbH. However, shareholders have the right to participate in the profits of the company upon dissolution.⁷⁵

⁶⁵MARTINDALE-HUBBELL, note 6 *supra*; Eder, *supra* note 2, at 197 & 205; SCHLESINGER, *supra* note 2, at 430; *cf.* Haskell, *supra* note 2, at 297.

⁶⁶BALLANTINE, *supra* note 4, at 466.

⁶⁷MARTINDALE-HUBBELL, note 6 *supra*; Winkhaus & Stratman, *supra* note 2, at 1280.

⁶⁸*Id.*; see MARTINDALE-HUBBELL, note 6 *supra*; *cf.* Haskell, *supra* note 2, at 297 and SCHLESINGER, *supra* note 2, at 430. *Cf.* also U.P.A. § 7(4) which states that "the receipt by a person of the profits of a business is *prima facie* evidence that he is a partner in the business. . . ." and U.P.A. § 8(2) which declares "unless the contrary intention appears, property acquired with partnership funds is partnership property."

⁶⁹BALLANTINE, *supra* note 4, at 494.

⁷⁰*Ibid.*

⁷¹See Hughes, *Limited Liability Companies in Belgium*, 1 COMP. L. SERIES 133 (1938).

⁷²LOOKING AT CANADA, *supra* note 35, at 16.

⁷³See Wyler, *supra* note 28, at 88.

⁷⁴BALLANTINE, *supra* note 4, at 550. *Cf.* U.P.A. § 18(a) which provides that "each partner shall . . . share equally in the profits and surplus remaining after all liabilities, including those to partners are satisfied. . . ."

⁷⁵Winkhaus & Stratman, *supra* note 2, at 1286. It may be noted that in a Swiss company limited by shares dividends are payable out of a reserve fund of profits. Wyler, *supra* note 28, at 89.

Status of Treasury Shares

A corporation in the United States has the right to retire its own reacquired shares and restore them to the status of authorized, unissued—yet fully paid—shares or to reacquire such shares, but treat them as still issued, fully paid and subject to re-sale, as so-called “treasury shares.”⁷⁶ Reacquisition may occur by purchase or donation to the corporation.⁷⁷

A GmbH may acquire its own paid-up shares or quotas by purchase or gift and may transfer these shares to third parties.⁷⁸

Dissolution and Winding Up

“The legal existence of an [American] corporation is terminated only when a corporation is dissolved by legal authority or expires by limitation of its terms of existence or by forfeiture.”⁷⁹ There is no statutory certain term for a corporation.

In contrast, one may note that the Belgian partnership with limited liability is limited in duration to thirty years, unless loss, dissolution or liquidation should occasion its termination earlier.⁸⁰ A GmbH may be dissolved by expiration of the duration specified in its charter, by resolution to that effect by three-fourths of its quota-holders, by petition in bankruptcy, by judicial finding or impossibility of achieving the corporate objective or by judicial finding of “important reasons” for dissolution.⁸¹ However, the legal requirement for dissolution will require at least one year to complete.⁸²

Rights of Minority Shareholders

The prevailing view in the United States is that the discretionary power of the controlling or specified majority is untrammelled, in effecting charter amendments, other than the duty of exercising good faith; and the burden is upon the dissenter who attacks an amendment to prove fraud, bad faith or gross unfairness.⁸³ There are circumstances in which a court of equity, in the absence of other adequate remedy, will afford relief to shareholders against fraud and gross mismanagement by the appointment of a receiver and the winding up of a solvent, going corporation.⁸⁴ The majority cannot use a sale of assets as a device to freeze out a minority or exercise their power in a way to buy the property for themselves and exclude the minority from a fair participation in the fruits of the sale.⁸⁵ The

⁷⁶See BALLANTINE, *supra* note 4, at 614; FLETCHER, *supra* note 13 § 5088.

⁷⁷See BALLANTINE, *supra* note 4, at 614.

⁷⁸DeVries & Juenger, *supra* note 2, at 878.

⁷⁹BALLANTINE, *supra* note 4, at 709; see FLETCHER, *supra* note 13 § 7967. Cf. U.P.A. § 31 which provides that a partnership could be dissolved by termination of the definite term or particular undertaking specified in the partnership agreement.

⁸⁰See Hughes, *supra* note 71, at 134.

⁸¹DeVries & Juenger, *supra* note 2, at 882; Haskell, *supra* note 2, at 300. The ownership interest may be inherited. *Id.* at 297.

⁸²Winkhaus & Stratman, *supra* note 2, at 1281.

⁸³BALLANTINE, *supra* note 4, at 656; cf. FLETCHER, *supra* note 13 §§ 5149, 5151, 5152 & 7063.

⁸⁴BALLANTINE, *supra* note 4, at 714; cf. FLETCHER, *supra* note 13 §§ 8080, 8082 & 8083.

⁸⁵BALLANTINE, *supra* note 4, at 673.

most appropriate remedy against the majority is in the form of pecuniary compensation.⁸⁶ Outside of these areas, the protection of minority shareholders against abuse by majority shareholders is very limited.

In a GmbH, minority quota holders, if they represent at least one-tenth of the stated capital of the GmbH, may request a meeting of quota holders, setting forth the purpose, reason and items for agenda and may hold a valid meeting if the majority does not comply with the request; they may sue for dissolution of the enterprise if it becomes impossible to achieve the corporate purpose or where other "important reasons" for dissolution exist; they may request a court to appoint liquidators in case of dissolution of the GmbH; they may petition for special audit of accounts in case of some evidence of abuse of trust or unfair dealings by the majority and they possess a limited right to inspect books and records of the company.⁸⁷

The Transfer of Shares

In an American corporation legal title to shares of stock may be assigned by one shareholder to another by delivery of a share certificate, either duly endorsed or with a separate document containing written assignment to sell, assign or transfer the shares or a power of attorney.⁸⁸ Registration of ownership by the corporation on its records acknowledges the shareholder as owner of record.⁸⁹

If shares are issued in a GmbH, their transfer does not alone transfer ownership of the shares.⁹⁰ The transferability of shares in a GmbH is usually restricted in the articles of association or by-laws, requiring consent of a shareholder's meeting or of managers.⁹¹ Shares are transferable by deed of assignment before a notary public or a court.⁹² Bearer shares are not permitted.⁹³

Liability of Shareholders to Creditors

In an American corporation, the capital—which is the amount subscribed and paid in, or agreed to be paid in, by the shareholders, upon the issue of the corporation's shares is the basis of the credit and financial responsibility of the corporation.⁹⁴ The usual remedy of creditors to reach and apply the indebtedness

⁸⁶*Id.* at 675.

⁸⁷DeVries & Juenger, *supra* note 2, at 877; Haskell, *supra* note 2, at 299-300; *cf.* Winkhaus & Stratman, *supra* note 2, at 1285. *See further id.* at 1287.

⁸⁸*See* BALLANTINE, *supra* note 4, at 737, 748 and 749; FLETCHER, *supra* note 13 §§ 5480 & 5484.

⁸⁹*Id.*; BALLANTINE, *supra* note 4, at 737, 748 and 749. *Cf.* U.P.A. § 27 which provides that conveyance by a partner, of his interest in the partnership, is allowable and does not, of itself, dissolve the partnership.

⁹⁰*Id.*; *cf.* Eder, *supra* note 2, at 206.

⁹¹*Id.*; *cf.* Eder, *supra* note 2, at 206.

⁹²*See* MARTINDALE-HUBBELL, note 6 *supra*.

⁹³Winkhaus & Stratman, *supra* note 2, at 1280.

⁹⁴BALLANTINE, *supra* note 4, at 782. *Cf.* U.P.A. § 17 which provides:

"A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property."

of shareholders upon partly paid shares is a creditor's bill in equity.⁹⁵

In a GmbH, the liability of the partners or shareholders to creditors is limited to any unpaid part of their shares or quotas.⁹⁶ They are ratably liable to creditors if another shareholder fails to pay his share in full.⁹⁷ The articles of association may provide for additional liability.⁹⁸

Conclusion

The GmbH has been referred to as "an 'incorporated partnership' . . . [with limited] corporate powers. . . ."⁹⁹ It has been distinguished from a close corporation as merely a "privately financed enterprise" with the latter described as "an enterprise in corporation form in which management and ownership are substantially identical" and in which "the participants consider themselves 'partners' and seek to conduct the corporate affairs to a greater or lesser extent in the manner of a partnership."¹⁰⁰ A "definite limitation to known risks"¹⁰¹ characterizes the GmbH and certainly distinguishes it from a partnership. Nor is the objective of the participants in a close corporation which is "to equate [its] scheme of . . . governance to that of a partnership"¹⁰² the guiding element of a GmbH. The GmbH appears *sui generis* in relation to the American institutions of the publicly financed corporation, the close corporation and the partnership, with some similarity to each of these enterprises.¹⁰³

Cf. also the Uniform Limited Partnership Act § 7 which states that "a limited partner is not liable to creditors unless, in addition to exercise of his rights and powers as a limited partner, he takes part in control of the business."

⁹⁵*Id.*; *Cf.* FLETCHER, *supra* note 13 § 6051 which states that when capital stock is not paid in, persons dealing with a corporation have a right to insist that it be paid in when its payment is necessary for satisfaction of their claims against the corporation.

⁹⁶*See* MARTINDALE-HUBBELL, note 6 *supra*; Winkhaus & Stratman, *supra* note 2, at 1275 & 1277.

⁹⁷*See* MARTINDALE-HUBBELL, note 6 *supra*.

⁹⁸*Id.*; Haskell, *supra* note 2, at 298; *cf.* Winkhaus & Stratman, *supra* note 2, at 1277.

⁹⁹Haskell, *supra* note 2, at 302; *see* SCHLESINGER, *supra* note 2, at 428.

¹⁰⁰Israels, *The Close Corporation and the Law*, 33 CORNELL L.Q. 488 (1948); *cf.* Winkhaus & Stratman, *supra* note 2, at 1276.

¹⁰¹Eder, *supra* note 2, at 220.

¹⁰²Israels, *supra* note 98, at 491; *cf.* Haskell, *supra* note 2, at 302.

¹⁰³Note that The International Association of Legal Science is compiling an INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW. At this date Volume XIII, on Business and Private Organizations, is in the stage of preparation. Chapter 2 of that Volume has been designated to treat "limited liability companies and (private) companies."

