

Minority rights in German public companies

by Frank Wooldridge

ARTICLE 11 AKTG

There is a considerable body of German academic writing on the minority rights in German public companies. The writer found the short account of this matter in Schneider and Heidenhain, *The German Stock Corporations Act* (2nd edn, Kluwer Law International, 2000, pp 13–14) very helpful. The rules governing the present matter are somewhat detailed and complex. One of the most significant of the legal rules governing minority rights is contained in Article 122(1) *AktG*. The first sentence provides that a shareholders' meeting shall be called if shareholders whose holding is equal to or exceeds one twentieth of the share capital request such a meeting in writing, stating the purpose and reason thereof. Such a request must be addressed to the management board.

The second sentence of Article 122(1) *AktG* provides that the articles may stipulate that the right to demand a shareholders' meeting shall require only the holding of a lower proportion of the share capital. The third and final sentence thereof states that Article 142(2), sentence 2 *AktG* shall apply by way of analogy. The latter text stipulates that each person making such a request must provide evidence that he has been the owner of the shares for at least three months before the general meeting, and has continued to hold them until a decision has been made concerning his request.

PLACING OF ITEMS ON THE AGENDA OF THE MEETING

Article 122(2) *AktG* provides that the holders of one twentieth part of the share capital or the *pro rata* amount (*anteiligen Betrag*) of €500,000 thereof may require the inclusion of a specific item on the agenda. Each new item must be accompanied by reasons, or by an introductory passage in the resolution. The demand must reach the company at least 24 days before the meeting. If the company is listed on a stock exchange, this period is increased to 30 days. The date when it reaches the company is not counted.

ENFORCEMENT OF SHAREHOLDERS' RIGHTS

According to paragraph 122(3) *AktG* if any such demand is not complied with, the court may authorise the shareholders who have made it to call a shareholders meeting or to publish the relevant items. At the same time, the court may appoint the chairman of the meeting. The

notice of the meeting or the publication must refer to the authorisation. An immediate appeal may be made against the decision of the court.

POWERS OF A 10 PER CENT MINORITY TO BLOCK THE WAIVER OR SETTLEMENT OF CERTAIN CLAIMS AGAINST MEMBERS OF THE BOARD

Such a minority is empowered to block the waiver or settlement of certain claims against the management or supervisory board or others, against controlling enterprises. The law relating to these matters is a little complex. Article 50 *AktG* provides that the company may not waive or compromise claims for damages against the founders and any other persons who are liable besides them, and against members of the management or supervisory board in connection with the formation of the company before the expiration of three years from the date of the entry of its registration in the commercial register. It also provides that they may only do so if the shareholders' meeting consents thereto and not if minority whose total shareholding is equal to or exceeds one tenth of the share capital records an objection in the minutes. According to the second sentence of Article 50 *AktG*, this time limitation is inapplicable if the person liable for damages is unable to make payments when due, and enters into a composition with his creditors to avoid insolvency proceedings, or if the liability is governed by an insolvency plan.

According to Article 53 *AktG* the rules governing damage claims of the company contained in Articles 46 and 47 and 49–51 *AktG* apply by way of analogy to post-formation acquisitions (*Nachgründung*). As far as such acquisitions are concerned, the members of the management and the supervisory board are substituted for the incorporators, who are made jointly and severally liable under Article 46 *AktG* for the accuracy and the completeness of the statements made by them for the purposes of formation relating to a number of matters. Such substitution also occurs under Article 47 *AktG* which governs the liability of persons other than the founders, and Articles 49–51 *AktG*, which respectively concern the liability of the formation auditors, the waiver and compromise of such liability, and the limitation period for damage claims.

Article 93(4) *AktG* permits a company to waive or compromise a claim for damages after the expiration of

three years from the time when it has arisen, provided that the shareholders meeting consents thereto, and no minority whose aggregate shareholding is equal to or exceeds one tenth of the share capital records an objection in the minute. However, the final sentence of Article 93(4) *AktG* provides the latter period to be inapplicable if the person liable for payments is unable to make them when due, and enters into a compromise with his creditors to avoid insolvency proceedings, or if the liability for damages is subject to an insolvency plan.

THE SETTLEMENT OF CLAIMS AGAINST CONTROLLING ENTERPRISES

The power of a 10 per cent minority to block the waiver or settlement of claims which a company has against controlling enterprises is apparent from a number of provisions of the *Aktiengesetz*, which include paragraphs 309(3), 310(4), 317(4), and 318(4).

OTHER POWERS OF A 10 PER CENT MINORITY

According to Article 147 *AktG*, claims of the company for damages against members of the management or supervisory board in connection with the formation or management of the company, or with the exercise of undue influence on it against members of the management or supervisory board, shall be asserted if the shareholders' meeting so resolves by a simple majority or a minority where the aggregate shareholding equals or exceeds one tenth of the share capital, or the amount of €1 million, so requests. Such a request by a minority is only acted upon if evidence is provided that shareholders who constitute the minority have held their shares for no less than three months before the date of the meeting. An affidavit made before a notary shall constitute sufficient evidence.

According to Article 142(2) *AktG*, if the shareholders' meeting rejects a motion to appoint special auditors (*Sonderprüfer*) to audit any matter relating to the formation of the company or the management of its business which has occurred within the past five years, the court may, on a motion by shareholders whose aggregate shareholdings amount to one hundredth of the share capital or the pro rata amount of €100,000, appoint an additional special auditor, when grounds for such appointment exist relating to the person of the existing special auditor, in particular where he does not appear to have the necessary knowledge for the purposes of the audit, or where there are doubts about his reliability.

By Article 120(1), sentence 1 *AktG*, the shareholders' meeting shall annually, during the first eight months of the financial year, resolve on the ratification of the acts of the members of the management or supervisory boards. The second sentence of Article 120(1) *AktG* provides that a separate vote must be taken on the ratification of the acts of an individual member of the management or supervisory board, if so required by the shareholders' meeting or requested by a minority whose aggregate

shareholding amounts to or exceeds one tenth of the share capital or pro rata amount of €1 million.

According to Article 103(3) sentence 2 *AktG*, upon a motion by the supervisory board, the court shall remove a member thereof when there is a serious reason (*wichtigen Grundes*) relating to such person. The supervisory board shall resolve on such a motion by a simple majority. If such a person has been appointed to the supervisory board by the articles, shareholders whose aggregate holding amounts to one tenth of the share capital or the *pro rata* amount of one million euros may make such a motion. An immediate appeal lies against such a motion.

According to Article 265(3) *AktG*, the court shall appoint or remove liquidators for cause (*bei Vorliegen eines wichtigen Grundes*) upon the motion of the supervisory board or that of a minority of shareholders whose shares in the aggregation amount to one twentieth of the share capital or the *pro rata* amount of 500,000 euros. The shareholders must provide evidence that they have held the shares for no less than three months. An affidavit made before a court or notary suffices as evidence.


VOTING ON A NOMINATION MADE BY SHAREHOLDERS

Article 137 *AktG* provides that if a shareholder has made a nomination for the election of members of the supervisory board and he moves at the shareholders' meeting for the election of the person nominated by him, such motion shall be resolved upon prior to acting on the proposal of the supervisory board provided that a minority of shareholders whose aggregate holding equals or exceeds one tenth of the share capital represented at the meeting so requests.

INTEGRATED COMPANIES

According to Article 320, sentence 1 *AktG*, the shareholders' meeting of an AG may resolve to integrate the company into another AG with a domestic domicile if the prospective principal company holds shares in it amounting to 95 per cent of its share capital. It follows from Article 320a, sentence 1 *AktG* that once such integration is registered in the Commercial Register, the title to all shares which were not held by the principal company are transferred to it. The former shareholders of the integrated company are treated by Article 320b *AktG* as entitled to be granted own shares (*eigene Aktien*) of the principal company.

CONCLUDING REMARKS

The German rules governing minority protection appear rather complex and detailed; they contain nothing comparable to section 994 of the UK Companies Act 2006. However they would appear to have a useful effect, and they may well influence legislation in other states. 

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