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Rights of Minority Shareholders

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I. Introduction

The most common types of companies in Germany are the limited liability company (*Gesellschaft mit beschränkter Haftung - GmbH*), the stock corporation (*Aktiengesellschaft - AG*), the limited partnership (*Kommanditgesellschaft - KG*), the general partnership (*offene Handelsgesellschaft - oHG*) and the private partnership (*Gesellschaft bürgerlichen Rechts - GbR*).[1]

The protection of minority shareholders is provided by statutory provisions, case law and the general principles of German law. In addition, parties are free to provide for additional protection in the respective articles of association. However, there are great differences between the individual types of companies. The German limited liability companies act (*GmbH-Gesetz – GmbHG*) only provides fragmentary protection and leaves many issues up to the articles of association, i.e. the case law is important for the GmbH and its (minority) shareholders. The stock corporation is governed by the stock companies act (*Aktiengesetz - AktG*), which in turn only allows few deviations from the statutory provisions, but case law is very important as well. Further, the German Corporate Governance Codex provides for certain transparency obligations which should be followed by listed companies (see below under V.). Unlike in other jurisdictions, the Sarbanes Oxley Act does not constitute a particular protection of minority shareholders in Germany.

The partnerships are governed by numerous statutory acts: The basic provisions are set forth in Sec. 704 et seq. German Civil Code (*Bürgerliches Gesetzbuch - BGB*), which apply for all types of partnership. The general partnership is also governed by Sec. 105 et seq. German Commercial Code (*Handelsgesetzbuch - HGB*), which also provides for the basic rules of the limited partnership (which is further stipulated in Sec. 161 et seq. HGB).

Each shareholder has the right on equal treatment (see II. below). Further, a shareholder may convene for a shareholders' meeting and amendment of the agenda, provided he has reached certain thresholds (see III.). In addition, all shareholders have the right to receive information (see IV.). There are only limited rights to appoint the management (see VI.), but shareholders have certain approval and veto rights (see VII.). Furthermore, the general principles require a certain restraint of competition of other shareholders (see VIII.), and the very strict capital maintenance rules of a GmbH and an AG (see IX.) protect the minority shareholders as well. Under certain conditions, minority shareholders have a right to a minimum dividend (see X.) and/or may terminate the company against compensation, especially in stock corporations and groups of companies. Shareholders may also request a special audit to reveal mismanagement (see XI.). Finally, minority shareholders are protected by their right to terminate the company against compensation or to dismiss other shareholders in case of a breach (see XII.) and may challenge shareholders' resolutions (see XIII.) and insolvency plans under certain assumptions (see XIV.).

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1 Other companies are rather rare and accordingly not subject to this report, in particular since they do not provide for specific additional protection of minority shareholders. These companies are the partnership (*Partnerschaftsgesellschaft*), used e.g. for law firms or physicians, the EWIV (European Economic Interest Grouping) and the cooperative.

II. The Right on Equal Treatment

Minority shareholders are protected by their general right on equal treatment (*Gleichbehandlungsgrundsatz*). As one of the fundamental rights, this right applies to all types of companies. Even though the shareholders may, of course, agree on different rights for each shareholder in the articles or through a shareholders' resolution, the right on equal treatment requires that a shareholder may not be treated differently in case of equal rights or obligations. This means that the company may request all shareholders to pay additional contributions (if required), in order for the profit to be distributed in equal shares.

Similar to the right on equal treatment, any individual right granted by the articles (e.g. multiple votes, the right of delegation, etc.) may only be withdrawn by an amendment of the articles and only with the consent of the respective shareholder (Sec. 35 BGB).

In a GmbH and an AG, the right on equal treatment requires that all shareholders may participate in capital increases (*Bezugsrecht*).

However, each shareholder may waive his rights granted under the principle of equal treatment.

III. The Right to Convene for a Shareholders' Meeting and to Vote

If a shareholder's interests require that there should be a shareholders' meeting in order to discuss important issues, a certain minority of shareholders may convene for a shareholders' meeting. Since this instrument provides for a possibility for the minority shareholders' to discuss critical topics (and, in an AG, also to request information), this right is also one of the essential minority rights in Germany.

All shareholders may exercise their voting rights, and it is not permitted to irrevocably waive such right or to transfer the same to other parties. However, it is permitted (unless otherwise agreed in the articles) that shareholders may grant a power of attorney. Such representation of votes cannot be prohibited in an AG, so that minority shareholders may act with one vote by shareholder groups and gain influence at the shareholders' meeting.

1. Limited Liability Company (GmbH)

The mandatory provision of Sec. 50 GmbHG provides shareholders with a shareholding of at least 10% of the issued share capital with the right to demand for a shareholders' meeting, and further provides for the possibility to amend the agenda. The shareholders shall request such meeting from the management, indicating the agenda and the reasons why they consider such a meeting necessary.

If there is a valid reason for such shareholders' meeting and the management does not comply with the petition, the minority shareholders may call the meeting themselves (Sec. 50 para. 3 GmbHG). This right may be exercised whenever the management expressly refuses or avoids calling for a meeting, or does not react to the request in a "timely manner". As there is no general rule to determine the "timely manner", the time limit has to be determined on a case-by-case basis. The more urgent a meeting, the less time is appropriate. Generally, the management has to call for an extraordinary meeting if the ordinary meeting will be so late that any resolutions might put the request for an extraordinary meeting at risk (e.g. it could be too late to withdraw from negotiations, etc.).

2. Stock Corporation (AG)

For an AG, Sec. 122 para. 1 AktG provides minority shareholders with at least 5% of the capital stock with the right to convene for a shareholders' meeting. Further, minority shareholders who have 5% of the capital stock or at least shares in the nominal value of 500,000 EUR may request amendments of the agenda within 24 days before the meeting takes place (30 days for a listed company). If the management refuses calling for a shareholders' meeting, minority shareholders are entitled to seek a court order authorizing them to call a shareholders' meeting, which is more complicated than in the GmbH, accordingly. Minority shareholders may not call for a meeting themselves.

3. Partnership

In a GbR, the management is responsible to call for a meeting. In addition, each shareholder may do so unless otherwise agreed upon in the articles. In any case, each shareholder may request the management to convene for a meeting for good cause. If the management does not comply with such request, the shareholder may call for the meeting himself.

The same applies to the oHG and for the general partners of the KG. A limited partner may only request the management to convene for a meeting resp. a limited partner may call for the meeting by himself for good cause.

IV. Right to Information

Every shareholder has the right to information, which varies in the different types of companies. Even though majority shareholders also have the same rights to information, those rights grant the minority shareholder an effective protection.

1. Limited Liability Company (GmbH)

According to Sec. 51a GmbHG, each shareholder of a GmbH may request any information about the business matters of the company from the managing director(s) including the review of books and documents of the company. Such request for information may extend to contracts, information about profits and losses, financial liabilities (also between the company and its shareholders or managing director), and the existence and terms of guarantees and other securities.

These rights can be exercised at any time. The company's articles may, however, request a written form and other formalities, but no further restrictions are permitted. In particular, the articles may not require a shareholders' resolution to exercise the right to information.

The management may only withhold information in case the requested information is reasonably deemed to serve a purpose outside the scope of the company and this misusage may bear a substantial risk for the company that would cause disadvantages (Sec. 51a para. 2 GmbHG). To protect the shareholders, the management bears the burden of proof in case they do not wish to follow the request.[2] Furthermore, the refusal of the management has to be approved by a shareholders' resolution. Such resolution may be adopted with a

2 Henssler/Strohn, GmbHG, § 51a recitals 26.

simple majority. However, in analogy to Sec. 47 para 4 GmbHG, the requesting shareholder has no voting rights unless permitted in the articles.[3]

2. Stock Corporation (AG)

The shareholders of an AG have no such extensive right to information since the AG is managed by the independent managing board. However, Sec. 131 AktG provides every shareholder with the right to request all information necessary to exercise its rights at the annual shareholders' meeting. Contrary to the GmbH, such right may only be exercised in the shareholders' meeting. This right is mandatory and may not be restricted by the companies' articles or a shareholders' resolution. Wrong or incomplete information could serve as a basis for challenging a resolution, which protects the requesting shareholders (and leads to several extensive requests to information in the shareholders' meetings in particular of listed companies).

However, the executive board may withhold information due to the reasons exclusively listed in Sec. 131 para. 3 nr. 1 through 7 AktG. Accordingly, information may be withheld e.g. if it is reasonably suitable to cause substantial disadvantages for the company. Further, information may be withheld if it would reveal the tax valuation or hidden assets of the company, or if revealing the information would constitute a criminal offense. Moreover, the company does not have to give information about their accounting method and evaluation as long as the annual statement of accounts sufficiently demonstrates the financial standing and profitability of the company,[4] or if the requested information is accessible on the company's web page at least seven days prior to the shareholders' meeting. In addition, each shareholder may speak at the shareholders' meeting, but the chairman may restrict their time (without allowing differences between the speakers, which is based on the right on equal treatment), Sec. 131 para. 2 AktG.

3. Partnership

a. Private Partnership (*GbR*) and General Partnership (*oHG*)

According to Sec. 716 para. 1 BGB, shareholders have an extensive right to review all documents of the company. In case any information is not sufficiently provided by documents, the shareholders may request oral information from the management. Any further information rights may only be exercised by the shareholders' meeting. The articles may (and often do) restrict this right, but it is mandatory that each shareholder may request information if he suspects unrighteous management.

The same applies for shareholders of an oHG (Sec. 118 HGB).

This still quite broad right to information also extends to personal matters such as names or addresses of the shareholders,[5] which is especially relevant for connecting shareholders of public investment funds. Moreover, this right includes the right to draw copies of the company's documents.

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3 Henssler/Strohn, GmbHG, § 51a recitals 29.

4 Banks and financial service institutions have further rights to withhold financial information in case the German Banking Act (KWG) allows withholding such information.

5 BGH, 21 September 2009, II ZR 264/08.

b. Limited Partnership (*KG*)

The general partner of the KG (*Komplementär*) has the same right as each shareholder of the oHG (cf. above). According to Sec. 166 HGB, the limited partner of the KG (*Kommanditist*) has the right to review the annual accounts and to check its compliance with the books of the KG. According to the literature, this right may be restricted in public KGs only to review the accounts.

Additional rights to information are only granted for good cause. As for the GbR, such good cause is given e.g. if the limited partner suspects unrighteous management. This right may always be exercised, i.e. there is no restriction to exercising it in shareholders' meetings only.

V. Corporate Governance

Official corporate governance provisions only exist for the listed AG. In all other companies, the corporate governance is subject to the company's internal regulations.

Listed companies should explain to which extent they are compliant with the so-called German Corporate Governance Code.[6] This code is set up by a private commission, but Sec. 161 AktG requires that each listed company explains its compliance. This process shall ensure that the corporate governance is provided by down-to-earth regulations without the requirement of complicated governance sessions, which in turn is heavily criticized since private institutions almost act like the legislator. The code contains several (non-binding) recommendations regarding the shareholders' meeting, the cooperation of the management and supervisory board, transparency and reporting. It provides especially for a management board of more than one person, long-term incentives for the management, limitation of representation in the supervisory board, diversity, two years gap between the membership of the executive and the supervisory board, etc. Most recommendations allow that the shareholders' meeting resolves otherwise.

In case the supervisory board and the executive board do not explain the compliance with the code correctly, the resolution to release them from liability (*Entlastung*) may be challenged.

VI. Appointment and Revocation of the Management

1. Limited Liability Company (GmbH)

There are no special rights for minority shareholders to be represented in the management. However, each shareholder may request to revoke a managing director through a shareholders' resolution at any time. In case the company has no managing director (e.g. after a director has been revoked since the minority shareholders could enforce a corresponding resolution), the shareholders may request the court to appoint a managing director if they are not able to appoint someone themselves (Sec. 29 BGB).

6 http://www.dcgk.de/en/.

Each shareholder/shareholder group shall be entitled to delegate someone to the management, the principle of equal treatment applies (cf. above), but there is no general obligation that each shareholder group must be represented in the management.

2. Stock Corporation (AG)

In the AG, the supervisory board appoints the management board. However, there are no special rights for minority shareholders to be represented in the supervisory board. The only protection for the minority is that they may request the general meeting to revoke a member of the supervisory board for good cause. Each shareholder/shareholder group may be entitled by the articles of association to delegate someone to the supervisory board. In such a case, the principle of equal treatment applies (cf. above), but there is no general obligation that each shareholder group must be represented on the board as well. In any case, the right of delegates is limited to one third of all board mandates to ensure that the company is not controlled by persons without corresponding shareholdings (Sec. 101 para. 2 s. 4 AktG).

As outlined above for the GmbH, shareholders of an AG may request that the court appoints one or more members of the supervisory board in case it has not sufficient members (Sec. 104 AktG). Further, the shareholders of listed companies may (but do not need to) approve the remuneration of the management board. However, such approval has no legal effect and may not be challenged. Only German Corporate Governance Code (see below under VI) requires that a company published the remuneration of the management (Sec.4.2.4 et seq.).

3. Partnerships

a. Private Partnership (GbR)

In a GbR, all partners collectively have the right to manage and represent the company (Sec. 709, 714 et seq. BGB). However, the articles may (and usually do) provide differently. Even though the excluded shareholders may always object to any measures of the management pursuant to Sec. 711 BGB, the articles may limit or exclude these rights as well (cf. below). Further, the right to manage and represent the company may be revoked by the shareholders for good cause.

b. General Partnership (oHG)

The same applies to the oHG, however, only a court may revoke a managing director of an oHG.

c. Limited Partnership (KG)

While general partners of the KG have the same rights as each partner of the oHG, limited partners have no right to manage the company unless otherwise agreed. The only protection of the limited partners is to request for a revocation for good cause. The veto rights of limited partners are described below.

VII. Approval and Veto Right

Even though minority shareholders cannot make decisions by themselves, they are protected by certain case law which requires the prior consent of the shareholders' meeting for specific transactions. However, this only protects minority shareholders when a

shareholders' resolution is required. Since the quorum for specific measures is at least 75 % of the votes cast, the minority shareholders might not prevent such decision anyway.

1. Limited Liability Company (GmbH)

The probably most important non-codified right of every shareholder is the requirement of a shareholders' resolution for certain management decisions. This is imposed by case law in terms of the so-called decisions "*Holzmüller*" und "*Gelatine*" by the German Federal Supreme Court (*BGH*).[7] Even though these decisions were made for a stock corporation, they apply for a GmbH accordingly. Pursuant to these decisions, a shareholders' resolution is required in case significant assets are to be transferred, which is deemed to be a change of the scope of the company. The exact threshold for such approval is not clear, but it will probably apply in case of a divestment of assets which exceeds 70 to 80 % of the assets of the respective company.

Such a resolution requires the consent of at least 75 % of the votes cast, as required for an amendment of the articles.

2. Stock Corporation (AG)

The same applies to the AG. For a divestment of 100 %, the requirement of a shareholders' resolution is stipulated by Sec. 179a AktG.

3. Partnership

Usually, the management of the partnership intends to be free from influence of the shareholders, in particular in the common legal form of the KG. To this end, the articles usually stipulated that a shareholders' resolution shall only be required for the items listed in the articles, and that any other issues either do not require a shareholders' resolution or the statutory majority is reduced to e.g. 50 % of the votes cast. Until 2007, it was required to explicitly list the issues in which no shareholders' resolution was required (*Bestimmtheitsgrundsatz*), however, it was rather impossible to provide for each and every possible issue. In 2007 and 2014, the BGH decided that this explicit list was no longer required.[8]

However, the approval of each shareholder is required in case the "essential rights" (*Kernbereich*) of the shareholders are affected, e.g. a shareholder cannot waive his rights to terminate the company for good cause in advance, agree to future, non-identified limitations of his dividend right, and authorize any kind of amendment of the articles. In a second step, a court will analyze whether the resolution corresponds to the principle of good faith.[9]

Unless otherwise agreed, limited partners may object to any transaction outside the scope of business and may request all information to determine their decision (Sec. 164 HGB).

VIII. Restraints on Competition

7 BGH, 25 February 1982, II ZR 174/80 (Holzmüller), 26 April 2004, II ZR 155/02 (Gelatine).

8 BGH, 15 January 2007, II ZR 245/05; BGH, 21 October 2014, II ZR 84/13.

9 BGH, 21 October 2014, II ZR 84/13.

Another general protection of minority shareholders is the restraint on competition. Unless otherwise agreed upon in the articles or by shareholders' resolution, shareholders with influence on the management of a GmbH or an AG may not compete with the company. Further, according to German and European antitrust laws, minority shareholders may not be restricted in competing with the company in case they have no extraordinary influence on the company. However, competition by the major shareholder is allowed if the competition already existed beforehand and this fact was known to the other shareholders. There is no codified basis for this restraint, but case law refers to the provisions for partnerships (cf. below) and the principle of good faith.

In any type of partnership, no shareholder / general partner may compete with the company unless otherwise agreed upon (Sec. 112 HGB). Limited partners are generally free to do so, but have to observe the principle of good faith.

IX. Capital Maintenance

In the GmbH and the AG, minority shareholders are further protected by the very strict German capital maintenance rules. These do not apply for a partnership as a partnership has no share capital, and all partners are liable for the liabilities of the partnership.

In the GmbH, any transaction with shareholders is prohibited in case this would affect the share capital (Sec. 30, 31 GmbHG). Thus, e.g. shareholder loans are only permitted in case the claim for repayment is fully valuable, and the management is personally liable for its assumption whether or not the loan is repayable.

The restrictions in the AG are even stronger. Transactions with shareholders are only allowed if they are at arms' length – otherwise, it would constitute a repayment of share capital and trigger a claim for compensation against the management.

X. Right to a Minimum Dividend

In general, shareholders do not have a statutory right to dividends. German law only awards a minimum dividend to minority shareholders of a GmbH in case the company is part of a profit and loss pooling agreement with the majority shareholder. In an AG, shareholders are additionally entitled to claim a dividend of 4 % of the share capital.

1. Limited Liability Company (GmbH)

The GmbHG provides no basis for a minimum distribution in favor of the shareholders. As mentioned above, minority shareholders have the right to a minimum dividend in case the company has entered into a profit and loss pooling agreement (or a domination agreement) with another party (which is, for tax reasons, usually the majority shareholder). According to Sec. 304 AktG, the profit and loss pooling agreement of a company with minority shareholders has to contain a minimum dividend / compensatory payment to the other shareholders. This provision applies to the GmbH accordingly. Such dividend must amount to at least 0.01 EUR, otherwise, the profit and loss pooling agreement is void (Sec. 304 AktG). Each shareholder may challenge the amount of minimum dividend.

In case the minority shareholder accedes to the company after it was owned by only one shareholder, the profit and loss pooling agreement is terminated by law in order to force the company resp. its shareholders to enter into a new agreement (Sec. 307 AktG).

The articles of association may, however, provide for a fixed dividend right as long as they are paid out of an annual net profit and the nominal capital is therefore protected (Sec. 30 GmbHG).

2. Stock Corporation (AG)

In a stock corporation, the right to receive a minimum dividend is stipulated by Sec. 254 AktG. The shareholder can challenge the decision on profit distribution if the company carries its profits forward and does not pay the required minimum dividend of 4 % of the nominal capital to the shareholders (to the extent covered by the profits). The company is only authorized not to pay such minimum divided if this is required for economic reasons.

Further, the right of minority shareholders on a minimum dividend in case of a profit and loss pooling agreement is the same as described above for the GmbH.

3. Partnership

a. Private Partnership (GbR)

There are no provisions on minimum dividends for non-incorporated private partnerships.

b. Partnership (OHG) and Limited Partnership (KG)

In practice, there is no right to a minimum dividend in a partnership since the legal provisions on the profit distribution are usually waived in the articles. According to the (dispositive) legal regime, each partner has the right to obtain a dividend of 4 % of his capital share (Sec. 121 HGB). The rest of the annual profit – as well as an annual loss - is distributed per capita. Since the legal regime usually does not correspond with the parties' intent, the legal provisions on the profit distribution are waived. The same applies to the limited partnership (Sec. 168 HGB).

XI. Special Audit (*Sonderprüfung*)

Another protection of minority shareholders is provided by the right of the shareholders' meeting to request a special audit of the management. This right is stipulated in Sec. 141 et seq. AktG and applies not only to the AG, but also to the GmbH and to a KG, in particular to so-called public KGs (such as investment vehicles). In an AG, each shareholder with a shareholding of more than 1 % of shares or shares in the amount of 100,000 EUR or more may request such special audit in case the shareholders' meeting voted against the special audit, provided that he can demonstrate his suspicion of damages to the company (Sec. 142 para. 2 AktG).

The special auditor may examine the business of the company and, in particular, of the management. To this end, he may inquire with the employees and review documents. After finalization of his audit, he shall report to the shareholders' meeting. In an AG, such report has to be forwarded to the commercial register and will be published. Even though the results of the report are not binding on a court, it is a very strong argument to assert claims for damages.

In a group of companies, shareholders of the AG subsidiary may also request a special audit either if the auditor or the management / supervisory board has expressed that the dominating company has inflicted losses of the subsidiary, or if the shareholder demonstrates his suspicion of damages caused by the dominating company. In the latter

event, the shareholders are only allowed to apply for a special audit in case they own at least 1 % of shares of the company or shares in the aggregate amount of 100,000 EUR.

XII. Right to Termination and Dismissal

In case of breach of duties by a shareholder, the other shareholders may terminate either their shareholding or (if agreed in the articles) dismiss the breaching shareholder. An ordinary right for a shareholder to terminate the company is limited to only some types of companies.

1. Limited Liability Company (GmbH)

The shareholders of a GmbH do not have any right to ordinarily terminate their shareholding unless otherwise agreed upon in the articles. Each shareholder may terminate his shareholding or dismiss another shareholder only for good cause (the latter only if permitted in the articles).

According to German case law, it is not possible to substantially reduce the terminating / breaching shareholders' right for compensation in advance.[10] Even though no general limits have been approved by the BGH, a compensation of less than 66 to 70% of the fair market value bears a risk of being void. The compensation may be paid in equal installments for up to five years after terminating the shareholding. According to a recent decision of the BGH, the remaining shareholders are liable to pay the compensation in case the company is not able to do so in case a shareholder has been dismissed by a shareholders' resolution.[11]

Further, the minority shareholders may request from the dominating shareholder to purchase their shares at market value in case the dominating shareholders have entered into a profit and loss pooling agreement (Sec. 305 AktG) in terms of Sec. 298 et seq. AktG, which applies for the GmbH accordingly. The same applies in case of a merger: The assuming entity has to offer the shareholders of the transferring entity to acquire their shares in case it has a different legal form (e.g. a GmbH merging onto an AG), or if a listed company is merged onto a non-listed company, or if shares of the assuming entity have different restraints on disposal (Sec. 29 German Reorganization Act – *UmwG*).

According to case law, a shareholder may also claim dissolution of the company from a court (*Auflösungsklage*) in case of profound quarrels between the shareholders as *ultima ratio*.[12]

2. Stock Corporation (AG)

The same applies for the AG.

Until 2013, it was additionally required that the company (or – more relevant – any of its shareholder) offers the (other) shareholders the option to purchase their shares in case a company decided for a delisting from the stock exchange. According to a recent decision of the BGH a delisting does not trigger such duty any more (which substantially increased

10 MüKoGmbHG, § 34 recitals 226 et seq.

11 BGH, 24 January 2012, II ZR 109/11.

12 OLG Naumburg, 5 April 2012, 2 U 106/11.

the number of delistings).[13] Notwithstanding the fact that some of the German stock exchange regulations still provide for such a duty, the current government plans to reintroduce the protection of minority shareholders by law. By the time this article was written, it is not clear whether and when such new law will come into effect.

In case the majority shareholder reaches more than 90 % of the votes, he can squeeze out the minority shareholders against the fair market value of their shares by merging an AG onto another AG (Sec. 62 para. 5 UmwG). Without merging the company, a share of 95 % is required for a squeeze out (Sec. 327a et seq. AktG). The only protection of the minority shareholders is their claim to be compensated at fair market value.

3. Partnership

Contrary to the GmbH and AG, each shareholder may terminate his shareholding in a partnership (being a GbR, oHG, or KG). The articles may provide for a different regime, but it is not allow to completely exclude such a right for more than 30 years.[14] The only legal restriction is that a shareholder may not terminate the company when this is unreasonable for the company and the other shareholders (Sec. 723 BGB). As usual, a termination for good cause is permitted as well as the right to claim dissolution of the oHG or KG (*Auflösungsklage*).

According to Sec. 747 BGB resp. Sec. 140 HGB, all partners of the partnership may dismiss another shareholder from the company for good cause. Additionally, shareholder compensation may be limited to no less than 70% of the fair market value.[15]

XIII. Right to Challenge Shareholders' Resolutions

As mentioned above, shareholders may challenge a shareholders' resolution if the resolution is not compliant with applicable laws, the articles and the general principles outlined above. This right is often used by minority shareholders of listed companies who strive to delay complex processes in order to benefit from a settlement. Even though no extra payment may be made to the shareholders for capital maintenance rules, they are usually represented by close friends who may claim the legal fees for representing claimants before a court, and the company agrees to bear the costs. Since the implementation of structural changes could be significantly delayed by the shareholders challenging the resolution, the legislator resolved for an approval process to allow the company to implement any measure before finally resolving about the challenged resolution (*Freigabeverfahren*, Sec. 246a AktG). The court shall approve the implementation if the challenging shareholder owns shares of more than 1,000 EUR, there is obviously no reason for the claims or a process is significantly more detrimental to the company than to the shareholders.

For a GmbH, the approval process may not be initiated accordingly.

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13 BGH, 8 October 2013, II ZB 26/12.

14 A recent decision of the BGH dated 18 September 2009, II ZR 137/04 did not permit a restriction to terminate a law firm for 30 years, so that it can be expected that the maximum term permitted for a partnership will rather be shorter than 30 years, e.g. 14 years have been approved by courts.

15 BGH, 29 April 2014, II ZR 216/13: No reduction in case of breaches, at least if no fault is required.

XIV. Insolvency

In case of insolvency, shareholder claims are subordinated to other claims. However, in case an insolvency plan has been adopted for a GmbH or an AG, shareholders may challenge the plan in case they can substantiate that their position will be worse than without the plan (*Sec. 251 German Insolvency Code - InsO*). The plan may, however, provide for a compensation mechanism for such a case, which would prohibit challenging the plan due to the suspected worse position.

XV. Conclusion

Finally, minority shareholders have a quite high level of protection in particular in the listed AG. In other types of companies, the majority shareholders have broad rights to enforce their will and are basically only limited by the principle of good faith and the restraint on competition. However, the increased compliance regulations imposed in the last years were neither to the benefit of the majority shareholder, nor of the minority shareholders.

Regarding the right to challenge shareholders' resolutions, listed companies still suffer from the expensive processes of challenging resolutions or compensations set forth in profit and loss pooling agreements.

In total, minority shareholders have a rather balanced position in all companies and may negotiate beneficiary rights where possible. Even the situation in listed companies is reasonable, given that a certain level of protection is essential in those large companies.