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AN EXAMINATION OF AMERICAN AND GERMAN CORPORATE LAW NORMS

FRANCK CHANTAYAN

I. INTRODUCTION

Business enterprises have been merging for thousands of years.¹ Today's mergers are more complex and more regulated than before which can produce some unique problems.² Challenges range from combining different corporate cultures, production and service resource, to meeting regulatory restrictions.³ In 1998 there were $2.5 trillion worth of mergers internationally.⁴ The merger between Daimler-Benz AG and

¹ See 2500 B.C. The Code of Hammurabi §§ 100 to 107 (c.1780 B.C.) (translated by L.W. King) (denoting the existence of business enterprises such as merchants, brokers, and agents). Other sections of Hammurabi’s Code deal with other business enterprises such as taverns, ship building, and construction. Id. See also, HARRY G. HENN AND JOHN R. ALEXANDER, LAWS OF CORPORATIONS §5, at 14 (3d ed., West 1983) [hereinafter HENN, LAWS OF CORPORATIONS] (stating there are references to corporations as far back as the Code of Hammurabi c.2083 B.C.).

² See Jeffrey E. Garten, Megamerger are a Clear and Present Danger, BUS. WK., Jan. 25, 1999, at 28 (discussing mergers between Citibank and Travelers, WorldCom and MCI, British Petroleum and Amoco, and Daimler and Chrysler); see also Howard Banks, Wishful Thinking?, FORBES, Nov. 27, 2000, at 52 (stating European Community may demand divestiture of certain assets before approval is given for the General Electric - Honeywell merger); John R. Wilke, FTC Demands New Changes in AOL Merger, WALL ST. J., Nov. 8, 2000, at A3 (stating $122 billion merger of America Online and Time Warner has been under scrutiny by the FTC and major concessions are expected before its approval).

³ See Jeffrey E. Garten, Daimler has to Steer the Chrysler Merger, BUS. WK., July 20, 1998, at 20 (indicating differences in strategy and culture must be overcome for merger to succeed); Karen Lowery Miller & Joann Muller, The Auto Baron, BUS. WK., Nov. 16, 1998, at 82 (suggesting Daimler and Chrysler have two “starkly different corporate cultures,” and Daimler’s methodical approach to decision making could crush Chrysler's greatest asset, its creativity); see also William Echikson, The Equalizer, BUS. WK., Oct. 9, 2000, at 62 (describing Mario Monti, chief of European Commission’s competition office in Brussels and his mission to protect Europe from uncompetitive mergers, even those between American companies).

⁴ See Mergers are No Menace, BUS. WK., Jan. 18, 1999, at 114 (indicating mergers hit worldwide peak in 1998); see also Laura M. Holson, Outlook 1999: Economy and Industry – Mergers; After $2.5 Trillion in Combinations in 1998, the Sky's the Limit in 1999, N. Y. TIMES, Jan. 4, 1999, at C11 (predicting 1999’s merger activity would break 1998’s record of $2.5 trillion worldwide); Paul M. Sherer, The Lesson from Chrysler, Citicorp and Mobil:
Chrysler Corporation into the world's fifth largest automobile manufacturer,5 Daimler-Chrysler, accounted for $36 billion of the 1998 total mergers.6

This article will examine the American and German corporate law norms, and consider how a melding of these different legal systems can affect a global corporation. The merger of two companies is difficult enough when they have the same legal structure and a similar cultural basis, such as in a domestic merger, but when the merger is between companies that have completely different legal systems and cultural approaches the challenges of merging two companies becomes exponential.7

There are vast differences between the American and German approaches to corporate governance, and ownership.8 Additionally, culture, politics and history can play a role in developing these corporate law norms.9 The conclusion will opine

No Companies Nowadays are Too Big to Merge, WALL ST. J., Jan. 4, 1999, at R8 (reporting $2.489 trillion worth of announced mergers and acquisition in 1998, up 54% from 1997).

5 See Miller & Muller, supra note 3, at 82 (describing Jurgen Schrempp's unique challenges merging two different corporate cultures as CEO of DaimlerChrysler, world's fifth largest automaker); see also Business Digest, N. Y. TIMES, Dec. 28, 1998, at C1 (noting Daimler-Chrysler, world's fifth largest automaker, had increased sales of 13% in 1998); Jagdish N. Seth & Rajendra Sisoda, Manager's Journal: Only the Big Three will Thrive, WALL ST. J., May 11, 1998, at A22 (commenting DaimlerChrysler's merger into fifth largest automaker is necessary according to "Rule of Three" where only three major players can survive in competitive markets).

6 See DaimlerChrysler Settles Outstanding German Lawsuits on Merger, BLOOMBERG, Dec. 11, 1998. See generally Edmund L. Andrews & Laura M. Holson, Shaping a Global Giant: The Overview; Daimler-Benz will Acquire Chrysler in $36 Billion Deal that Will Reshape Industry, N. Y. TIMES, May 7, 1998, at A1 (announcing $36 billion merger of American and German automakers); Joann Muller, The One-Year Itch at DaimlerChrysler, BUS. WK., Nov. 15, 1999, at 42 (reporting reorganization of DaimlerChrysler which was formed in $36 billion transatlantic merger).

7 See Garten, supra note 3, at 20 (stating challenges facing international mergers are often too great to overcome); see also Miller & Muller, supra note 3, at 82 (describing Jurgen Schrempp's unique challenges merging two different corporate cultures as CEO of DaimlerChrysler, world's fifth largest automaker). See generally Banks, supra note 2, at 52 (commenting on Europe's increased protectionism).

8 Compare DEL. CODE ANN. tit. 8, § 141(a) (1974) (Supp. 1998) (indicating there will be one board of directors that will control the affairs of the corporation) (emphasis added), with § 30(1) AktG (creating the supervisory board); § 30(4) AktG (providing the supervisory board will elected the board of management); § 82(1) AktG (indicating the management board directs the corporations affairs).

9 See Thomas J. Andre, Jr., Cultural Hegemony: The Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany, 73 TUL. L. REV. 69, 119 (1998) (indicating lack of hostile takeovers in Germany is result of business ethics and cultural norms which have culminated in no "statutory takeover code" being developed); see also David Charney, The German Corporate Governance System, 1998 COLUM. BUS. L. REV. 145, 145 (1998) (mentioning Germany developed different rules due to its dissimilar economics and politics); John C. Coffee, Jr., The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications, 93 NW. U. L. REV. 641, 655 (1999)
the likely challenges facing a global merger.

II. HISTORICAL BACKGROUND

Corporation law in the United States and Germany developed from the same early foundations, the law of merchants. The overseas trading companies and joint stock companies of the 16th and 17th century were the early models for the modern corporation. Common law courts of England in the 18th century began to adopt certain portions of the early law of merchants, which developed into modern corporation law.

In Civil law countries, by contrast, the law of merchants survived until the 19th and 20th centuries when European countries codified their laws. European countries developed the law of merchants into a commercial code. While the civil codes of the various European countries vary in many aspects, they have maintained common terminology and concepts.

It is from these early beginnings in the development of corporation law that the common law and civil law systems took divergent paths. A notable distinction between the two systems is that German corporation law did not develop the law-equity (asserting historical factors such as national borders have resulted in differences between U.S. and European corporate governments).


11 See HENN, supra note 10, §10, at 19 (stating "great overseas trading companies and joint stock companies" were prototypes of modern companies).

12 See id. §7, at 15 (indicating Chief Justice Holt began selective absorption process in early 18th century which was nearly completed by Lord Mansfield in latter part of 18th century).

13 See id. §7, at 15-16 (stating law of merchants survived and was administered by separate courts); see also R. SCHLESINGER, COMPARATIVE LAW: CASES-TEXT-MATERIALS 520, 529-30, 737-40, 786-93 (4th ed. 1980).

14 See HENN, supra note 10, §7, at 15-16.

15 See id. §7, at 15-16(indicating unifying influence of Roman law developed common features in civil codes); see also Philip W. Thayer, Comparative Law and the Law Merchant, 6 BROOK. L. REV. 139, 140 (1936) (stating "notion that the law merchant is common to all countries is of early vintage").

16 See HENN, supra note 10, §8, at 16-17 (stating early civil corporation law did not recognized distinction between law and equity as did early common corporation law).
distinction that evolved in Anglo-American corporation law. Accordingly, German corporation law did not develop the same approach to fiduciary duties that developed in the Anglo-America corporate system. Under this early civil law system there was great freedom to contract for fiduciary duties and responsibilities. Whereas, much of the common law system developed from sovereign grants. Eventually, abuses in the freedom to contract for duties developed in the civil law system and substantial reforms of the laws governing corporations and corporate financing were instituted.

The German system has developed several forms of business enterprises, similar to the American system. There are two forms of corporations in Germany, the Gesellschaft mit beschränkter Haftung, called GmbH for short, and the Aktiengesellschaft, or AG. The GmbH is more closely related to the American version of the closed corporation. By contrast, the

17 See id. §8, at 16-17 (indicating law-equity distinction unique to Anglo-American system).
18 See id. (stating civil law does not have “remedies for the enforcement of fiduciary duties which have been developed by English and American chancery or equity courts”).
19 See id. (indicating corporations developed through freedom of contract and not sovereign grant); see also John C. Coffee, Jr., Privatization and Corporate Governance: The Lessons from Securities Market Failure, 25 IOWA J. CORP. L. 1, 29 (1999) (stating certain steps have been taken in civil law jurisdictions, particularly Germany, in recognizing fiduciary duty). See generally Ramon E. Reyes, Jr., Nauru v Australia: The International Fiduciary Duty and the Settlement of Nauru’s Claims for Rehabilitation of Its Phosphate Lands, 16 N.Y.L. SCH. J. INT’L & COMP. L. 1, 44 (1996) (noting fiduciary duty is recognized under civil law system).
20 See HENN, supra note 10, §8, at 17 (stating corporate reform movement was spurred by abuses in freedom of contract); see also DROSTE KILLIUS TRIEBEL, BUSINESS LAW GUIDE TO GERMANY 119 (3d ed. 1991) (indicating Germany’s corporation law of 1937 was “significantly revised” in 1965); Lenhardt, supra note 10, at 553-54 (stating German corporation law was revised in 1937 and again in 1965).
21 See HORN ET AL., GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 239-41 (Tony Weir trans., Clarendon Press 1982) (outlining and explaining various forms of German business enterprises); TRIEBEL, supra note 20, at 96-127 (describing various business structures available in Germany); Friedrich Kubler, Corporate Governance: Comment: On Mark Roe, German Codetermination and German Securities Markets, 5 COLUM. J. EUR. L. 213, 214 (1999) [hereinafter Kubler, Corporate Governance] (noting American and German law both present variety of different legal structures).
22 See Kubler, supra note 21, at 214 (noting German law basically allows for two legal structures, AG and GmbH); Lenhardt, supra note 10, at 551 (indicating that there are two forms of incorporation); see also Kubler, The Fourth Abraham L. Pomerantz: Tensions Between Institutional Owners and Corporate Managers: An International Perspective: Institutional Owners and Corporate Managers: A German Dilemma, 57 BROOK. L. REV., 97, 98 (1991) [hereinafter Kubler, Pomerantz] (noting AG is stock corporation and GmbH is private company).
23 See Lenhardt, supra note 10, at 551-53 (stating “GmbH[s] [were] designed to be privately held” and finding majority of German business enterprises are in such form because they allow owners to maintain control of business while having limited liability);
Aktiengesellschaft, which means stock corporation,\textsuperscript{24} is the equivalent to the American publicly traded corporation.\textsuperscript{25} Of the nearly 2500 AGs registered in 1989, only 530 were sold on a public exchange.\textsuperscript{26} The majority of publicly held corporations are owned by a group of banks.\textsuperscript{27} Diverse corporate ownership of public corporations in Germany is still a rare occurrence. The majority of shares purchased in the companies by private individuals are purchased through one of the large banks, similar to any other product the bank would make available to depositors.\textsuperscript{28} It is only recently that the German stock exchange has been revamped in order to draw greater investment from private investors.\textsuperscript{29}

Sandra K. Miller, Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches, 36 AM. BUS. L.J. 73, 99 (1998) (stating German GmbHs and US. close corporations are very similar business enterprises); see also Dr. DIETER BEINERT, CORPORATE ACQUISITIONS AND Mergers in Germany 10 (Graham & Trotman 1991) (stating “GmbH has become the most popular corporate form”).

\textsuperscript{24} See TRIEBEL, supra note 20, at 118-19 (describing German stock corporation); see also Lenhardt, supra note 10, at 551 (stating Aktiengesellschaft means stock corporation). See generally Andre, supra note 9, at 83 (1998) (finding AG was created partly to protect interests of creditors and employees).

\textsuperscript{25} See Lenhardt, supra note 10, at 551 (stating Aktiengesellschaft was developed to be publicly traded corporation); Miller, supra note 23, at 96 (1998) (asserting AG is similar to publicly-held corporation in U.S.); see also TRIEBEL, supra note 20, at 119 (noting corporate law governing AGs consists of 410 provisions compared to 85 provisions for law governing GmbHs).

\textsuperscript{26} See BEINERT, supra note 23, at 14 (finding publicly held corporations trading in open exchange still remains around 20% of register corporations); see also Lenhardt, supra note 10, at 555 n. 26 (asserting only small portion of AGs were listed on stock exchange prior to enactment of Small Stock Incorporation Act); Gustavo Visentini, Compatibility and Competition Between European and American Corporate Governance: Which Model of Capitalism?, 23 BROOK. J. INT’L L. 833, 836 n. 12 (1998) (understanding in 1996, Germany only accounted for small portion of companies trading on New York Stock Exchange and recognizing that those German companies traded at low volume).

\textsuperscript{27} See Thomas J. Andre, Jr., Some Reflections on German Corporate Governance: A Glimpse at German Supervisory Board, 70 TUL. L. REV. 1819, 1834 (1996) [hereinafter Andre, Reflections] (stating German banks having control over German companies is widely practiced wonder of German corporate governance system); Charny, supra note 9, at 147 (asserting “large bank dominated corporate enterprise is only one such structure,” but it is given greatest consideration); Kubler, Pomerantz, supra note 22, at 99 (1991) (claiming institutional investment in Germany is mostly dominated by banks).


There are several notable distinctions between German and American corporation law. For example, the German rules are national rules while in America each state has developed its own set of corporate governance rules. The German rules are mostly mandatory rules that may be modified to a limited extent if provided for in the company’s charter. By contrast, American corporate governance rules are mostly permissive.

III. CORPORATE GOVERNANCE

One of the greatest distinctions between the American and German corporate governance scheme is the board of directors.

Germany are presently being reformed); Mary E. Kissane, Note, Global Gadflies: Application and Implementation of U.S. — Style Corporate Governance Abroad, 17 N.Y.L. SCH. J. INT’L & COMP. L. 621, 651-52 (1997) (noting federal legislation has been implemented to reduce banks’ shareholdings and realizing that large role of banks has discouraged global investment). See generally Lee E. Michaels and Marc I. Steinberg, Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity, 20 MICH. J. INT’L L. 207, 221-22 (1999) (noting there are eight German Stock Exchanges and that each of these exchanges has three different market segments).

30 See TRIEBEL, supra note 20, at 118-19 (reasoning German corporate governance system, which is provided for in Aktiengesetz (AktG), stock corporation law is different from American corporate governance system, which is decided by laws of state under that company is incorporated); see also Andre, Reflections, supra note 27, at 1824 (understanding U.S. senior executives serve demands of board, unless contracted otherwise, while German executives cannot legally delegate functions to supervisory board); Sandra K. Miller, Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches, 36 AM. BUS. L.J. 73, 95 (1998) (stating private companies in Germany, unlike those in U.S., must make public disclosures of financial information on annual basis).

31 See TRIEBEL, supra note 20, at 120 (indicating that rules are mandatory and less flexible); Kubler, Pomerantz, supra note 22, at 98 (1991) (stating “German corporate law is very rigid”); see also Andre, Reflections, supra note 27, at 1823-24 (indicating strict rules by stating that Aktiengesetz “requires” companies to have separate boards and “imposes” certain other duties on board).

32 See HENN, supra note 10, §12, at 31-32 (indicating Delaware General Corporation Law is permissive corporate statute and recognizing Delaware remains favorite state of incorporation because its rules offer companies greater flexibility than other jurisdictions); see also Melvin Aron Eisenberg, Contractual Freedom in Corporate Law: Articles & Comment; The Structure of Corporation Law, 89 COLUM. L. REV. 1461, 1461 (1989) (stating ules of corporations are established by unilateral action of officials, market forces, contracts, or laws); Martin Lipton and Steve A. Rosenblum, A New System of Corporate Governance: The Quinquennial Election of Directors, 58 U. CHI. L. REV. 187, 187 (1991) (suggesting that corporate governance systems should reflect shareholders’ wishes).

Under the American system there is a single board of directors that is responsible for managing the business affairs of the corporation. By contrast, German corporate law provides for a two-tier board of directors structure. The first board is the supervisory board (Aufsichtsrat), which has the responsibility of appointing the members of the second tier, the board of management (Vorstand). The supervisory board is statutorily responsible for overseeing the board of management, examining the corporation's books, reviewing its assets, giving approval for certain management decisions, and calling a shareholder's meeting when it is in the corporation's best interest. The board of management is responsible for conducting the affairs of the corporation.

30(1) AktG (forming supervisory board to oversee management board), and § 82(1) AktG (indicating management board directs corporations affairs).

34 See DEL. CODE ANN. tit. 8, § 141(a) (1974) (stating “business and affairs of every corporation organized under this chapter shall be managed by or under direction of board of directors, except as may otherwise be provided in this chapter or in its certificate of incorporation”); Mark J. Loewenstein, The SEC and the Future of Corporate Governance, 45 ALA. L. REV. 783, 787 (1994) (stating practically all states call for board of directors to manage business and affairs of corporation). See generally, Symposium, The ALI's Corporate Governance Proposals: Law and Economics: Keynote Address: The Dynamics of Corporate Governance, 9 DEL. J. CORP. L. 515, 518 (1985) (stating desired qualities of Board are responsibility, diligence, and success).

35 See § 30(1) and (4) AktG (indicating founding members of corporation are to select Supervisory Board, which in turn selects Board of Management); see also BEINERT, supra note 23, at 11 (stating “AG has mandatory two-tier system, board of management (Vorstand) and supervisory board (Aufsichtsrat)”; HORN ET AL., supra note 21, at 260 (mentioning method by which one board has duty of appointing second board).

36 See § 95 AktG (indicating number of members to supervisory board is based on capital amount of corporation, with three board members as minimum number, unless “articles of association” provides for greater number, and noting corporations with more than 20,000,000 Duetsche Mark (DM) have maximum number of twenty-one board members); Charles B. Craver, Mandatory Worker Participation Is Required in a Declining Union Environment to Provide Employees with Meaningful Industrial Democracy, 66 GEO. WASH. L. REV. 135, 148 (1997) (stating supervisory board, Aufsichtsrat, oversees management, appoints those members and may remove them as well); see also DaimlerChrysler Supervisory Board Constituted, PRNEWswire, Dec. 16, 1998, available at http://www.prnewswire.com (recognizing that under German Co-Determination Law, Supervisory Board usually has ten shareholders and ten employee representatives and asserting that “Supervisory Board elects Chairman and appoints Management Board [while] employee representatives are appointed by...Court”).

37 See § 30(4) AktG (stating “supervisory board appoints the... board of management); see also BEINERT, supra note 23, at 11 (indicating supervisory board appoints and removes the members of the management board); Peter Norman, Europe: Moves to Promote Idea of Shareholder Value, FIN. TIMES (LONDON), July 16, 1996, at 2 (noting recent government effort to revise law concerning public limited companies).

38 See § 111 AktG (outlining supervisory board rights and obligations); see also HORN ET AL., supra note 21, at 260 (stating management board member will not violate his duty to the corporation by seeking prior approval by supervisory board); Jeffrey N. Gordon, Corporate Governance: Pathway to Corporate Governance? Two Steps on the Road to Shareholder Capitalism in Germany, 5 COLUM. J. EUR. L. 219, 222 (1999) (describing role of supervisory board).
corporation and representing the corporation in all matters, including court proceedings.\textsuperscript{39} In this respect the German board of management is similar in function to the American board of directors.\textsuperscript{40}

**A. Corporate Governance Under the German and American Systems.**

Under Germany's two-tiered board, the management board has the sole responsibility of controlling the corporation.\textsuperscript{41} Their authority in governing the corporation may not be limited by the supervisory board.\textsuperscript{42} While the supervisory board oversees the management board, it has no authority to bind the corporation in any matter.\textsuperscript{43} The supervisory board in reality is more closely related to the Anglo-American outside or non-managing director.\textsuperscript{44} Their role in directing the affairs of the corporation is


\textsuperscript{41} See § 82(1) AktG (indicating management's authority to govern the corporation cannot be limited); see also Miller, supra note 23, at 97 (noting management board's responsibility over corporation's daily affairs). See generally Charles B. Craver, *Mandatory Worker Participation is Required in a Declining Union Environment to Provide Employees with Meaningful Industrial Democracy*, 66 GEO. WASH. L. REV. 135, 147-48 (discussing system of co-determination in Germany).

\textsuperscript{42} See BEINERT, supra note 23, at 12 (stating even for “extraordinary” matters the board of management does not require the supervisory boards approval, unless it is a matter that is noted as requiring prior approval in the article of incorporation); TRIEBEL, supra note 20, at 120 (stating management board authority must not be limited); see also Viet D. Dinh, Symposium: Team Production in Business Organizations: Codetermination and Corporate Governance in a Multinational Business Enterprise, 24 IOWA J. CORP. L. 975, 981-82 (noting limited influence of the supervisory board).


\textsuperscript{44} See HORN ET AL., supra note 21, at 261 (discussing controversy regarding the supervisory board's role ever since it began as a mandatory part of an AG in 1870); See also § 84(3) AktG (indicating supervisory board may remove a member of the board of management for cause). See generally Andre, *Reflections*, supra note 27, at 1824 (comparing supervisory board monitoring role with outside directors on a unitary board in
limited to reviewing and advising the management board. The corporation's shareholders and labor representatives are responsible for electing members of the supervisory board.\footnote{See \$ 101 AktG (indicating shareholder representatives on the supervisory board are nominated by the shareholders and labor to elect labor representatives to supervisory board). The number of labor representatives on the supervisory board is governed by the Act Concerning Co-Determination of Employees of May 4, 1976 (Mitbestimmungsgegesetz); see also HORN ET AL., supra note 21, at 281 (stating shareholders and labor each nominate members to the supervisory board); Andre, Reflections, supra note 27, at 1826 (mentioning supervisory board consists of shareholder and labor representatives).}

A two-tiered board system has the appearance of protecting the board of management by giving their decisions support from a disinterested group.\footnote{See \$ 111(1) AktG (indicating supervisory board oversees management board); \$ 111(2) AktG (stating if board of management has overstepped the authority granted to it by statute or the article of incorporation, the supervisory board can bring legal action against the management; \$ 112 AktG (stating supervisory board represent the corporation against management in court proceedings); see also \$ 93(2) AktG (mentioning management has burden of proof to meet challenges).} The purpose of having a dual board system of corporate governance is to protect shareholders from harmful management decisions.\footnote{See \$93(2) AktG (stating members of board of management who violate their duties are jointly and severally liable to the association for the resulting damage); see also TRIEBEL, supra note 20, at 120 (mentioning management is liable for mismanagement and breach of duty). See generally Roberta Romano, A Cautionary Note on Drawing Lessons from Comparative Corporate Law, 102 YALE L.J. 2021, 2030 (1993) (noting differences between German and American corporate governance regarding protecting shareholder interests).} The belief is that by having a group that oversees the board of management's actions the shareholders' interest will be safeguarded.\footnote{See \$93(2) AktG (stating members of board of management who violate their duties are jointly and severally liable to the association for the resulting damage); see also TRIEBEL, supra note 20, at 120 (mentioning management is liable for mismanagement and breach of duty). See generally Roberta Romano, A Cautionary Note on Drawing Lessons from Comparative Corporate Law, 102 YALE L.J. 2021, 2030 (1993) (noting differences between German and American corporate governance regarding protecting shareholder interests).} The difficulty with this principle arises from the fact the board of management is given great latitude in its authority.\footnote{See \$93(2) AktG (stating members of board of management who violate their duties are jointly and severally liable to the association for the resulting damage); see also TRIEBEL, supra note 20, at 120 (mentioning management is liable for mismanagement and breach of duty). See generally Roberta Romano, A Cautionary Note on Drawing Lessons from Comparative Corporate Law, 102 YALE L.J. 2021, 2030 (1993) (noting differences between German and American corporate governance regarding protecting shareholder interests).} The level of control the board of management enjoys,\footnote{See \$ 82(1) AktG (indicating management's authority cannot be limited); see also Mark J. Roe, Corporate Governance: German Codetermination and German Securities Market, 5 COLUM. J. EUR. L. 199, 202 (1999) (noting supervisory boards meet infrequently which limits their ability to monitor management boards). But see Robert E. Benfield, Curing American Managerial Myopia: Can the German System of Corporate Governance Help?, 17 LOY. L.A. INT'L & COMP. L.J. 615, 630 (1995) (arguing German corporate managers are subject to invention from shareholders).} coupled with the fact that it is extremely difficult to remove a member of management from the American companies).
board, can allow the board of management to make business decisions relatively free from the fear of repercussions. The American corporate governance system is characterized by a single board of directors that manage the affairs of the corporation. As with the German management board, the American board of directors may delegate, but not relinquish, their responsibility to manage the business and affairs of the corporation. In effect, the German management board can act coercively without having their decisions challenged. Interestingly, prior to the 1965 revision of the German stock corporation act, management had the enumerated duties of managing the corporation in such a manner as to maintain the welfare of the corporation, employees, the people and the state. The rationale the German legislature gave for eliminating these duties in the 1965 revision was that management had an implicit duty to abide with the requirements; therefore, there was no need to enumerate them. The elimination of enumerated obligations to act in the best welfare of the corporation and constituents, coupled with the freedom management enjoys, creates an environment in which management could act

51 See §84(3) AktG (stating management board can only be removed only for cause); see also TRIEBEL, supra note 20, at 120 (indicating management can only be removed for cause which is not arbitrary). See generally Bernard Singhof, Shareholder Participation in Corporate Decision-Making Under German Law: A Comparative Analysis, 24 BROOK. J. INT'L L. 493, 561-65 (1998) (examining four weak points of supervisory boards in largely held public corporations).

52 See BEINERT, supra note 23, at 11 (mentioning German hostile takeovers are less attractive than elsewhere); see also §81(1) AktG (stating no limitations on management's decisions). But see §81(2) AktG (indicating management is limited in its authority as provided by statute or the article of incorporation).


54 See DEL. CODE ANN. tit. 8, § 141(c)(2) (2000) (indicating directors may delegate management authority); see also Rosenblatt v. Getty Oil Company, 493 A.2d 929, 943 (Del. 1985) (stating directors cannot be expect to run daily business affairs of corporations); CHARLES R. O'KELLY, JR. & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 190 (1998) (stating directors may not “abdicate [their] statutory power and [their] fiduciary duty to manage or direct the management of the business and affairs of [the] corporation”).


56 See id. at 196 (1979) (indicating 1965 revision of Stock Corporation Act eliminated many duties required of management in1937 Act).
opportunistically with little concern of backlash. The board of directors will usually select a group of officers to run the day-to-day affairs of the corporation. Officers manage the daily business of the corporation according to mandates from the board of directors. In turn, these officers will periodically advise the board of directors on the state of the corporation. The responsibility for the welfare of the corporation ultimately rests with the board of directors.

The German management board is obligated to supply information to the supervisory board. In reality, information about the corporation or management’s actions is less then forthcoming, and given that the supervisory board is only required to meet twice annually, it is difficult for them to effectively oversee the management board’s actions.

A more common problem for the supervisory board is that it is not completely disinterested. There has been much criticism regarding the make up of supervisory boards because Germany’s

57 See DEL. CODE ANN. § 142(a) (1998) (indicating officers are to be selected with enumerated duties); HENN, supra note 10, §212, at 573 (mentioning directors may delegate management authority); E. Norman Veasey, The Defining Tension in Corporate Governance in America, 52 BUS. LAW 393, 395 (1997) (stating under Delaware system, board of directors delegate management responsibilities to others).

58 See O=KELLEY & THOMAS, supra note 54, at 156 (stating power and authority of officers is subject to dictates and oversight of the management board). But see In re Caremark Int’l, Inc., 698 A.2d 959, 968 (Del.Ch. 1996) (attributing detrimental outcomes to ordinary business decisions made by officers of corporations).

59 HENN, supra note 10, at 578 (stating directors managing corporation have a right to information); Veasey, supra note 57, at 395 (stating board of directors rely on reports supplied to them regarding the status of corporate affairs).

60 See Veasey, supra note 57, at 397-98 (indicating directors owe a fiduciary duty to the corporation).

61 See § 90 AktG (stating management board is obligated to keep supervisory board informed about corporate affairs); see also HORN ET AL., supra note 21, at 260 (mentioning management board must regularly inform supervisory board regarding business activities); Charny, supra note 9, at 150 (stating supervisory board relies on managerial board for information).

62 See Andre, supra note 27, at 1820 (stating management does not fully disclose corporate information); Charny, supra note 8, at 158 (suggesting having workers on supervisory board may contribute to managers’ reluctance to disclose information and thereby exacerbate problems present in dual board structure); Kissane, supra note 29, at 652, 184 (mentioning German managers object to disclosing too much information on grounds that while helpful to shareholders it could be detrimental to corporation).

63 See Andre, Reflections, supra note 27, at 1822. See generally Lipton, supra note 56, at 220-21 (claiming sanguine effect of German banks acting as capable monitors through their concentration of control derived by function as portfolio managers when voting shares held for others and shares owned by bank as well as by function as members of supervisory boards). But see Bernard Singhof and Oliver Seiler, Shareholder Participation in Corporate Decisionmaking under German Law: A Comparative Analysis, 24 BROOK. J. INT’L L, 493, 494-95 (1998) (remarking on recent scholarship critical of strong bank influence on German corporations because of resulting inflexibility).
largest banks and a small group of individuals usually dominate these boards.64 This creates an “interlocking supervisory board relationship” between the major banks and a small group of companies.65 In light of the fact that these banks are also providing the corporations with financing capital66 and that members of the various corporations sit on each other’s supervisory boards, these board members are effectively not disinterested.67 While it is true that the other components of the supervisory board are labor representatives,68 this has little effect on the balance of power.69 One reason is that it is rare for the labor representatives to vote as a group in order to counter the shareholder representatives’ decisions.70 More importantly, even if there were a strict division between labor and shareholder votes, the vote of the chairman of the supervisory board, who is elected by the shareholders, would count twice thereby breaking any tie.71

One safeguard the German corporate governance system has

64 See Andre, Reflections, supra note 27, at 1822. But see HORN ET AL., supra note 21, at 262 (noting due to implicit control by few on supervisory boards, there is restriction, pursuant to ’100AktG, that no more than 10 board positions may be held by one person at one time).

65 See Andre, Reflections, supra note 27, at 1822. See generally Lipton, supra note 56, at 220-21 (claiming sanguine effect of German banks acting as capable monitors through their concentration of control derived by function as portfolio managers when voting shares held for others and shares owned by bank as well as by function as members of supervisory boards). But see Singhof & Seiler, supra note 63, at 494-95 (remarking on recent scholarship critical of strong bank influence on German corporations because of resulting inflexibility).

66 See Charny, supra note 9, at 157 (stating bank provide financing capital as well as investment decisions); Visentini, supra note 26, at 839 (indicating banks providing financing as debt and as equity through affiliates they own or influence such as mutual funds and brokerage firms); see also Andre, supra note 9, at 118 (discussing recent backlash to German corporate financing practices, partly because of poor auditing standards).

67 See Andre, Reflections, supra note 27, at 1822 (indicating companies have members on eachother’s supervisory boards creating an interlocking relationship).

68 See § 101 AktG (indicating labor nominates its representative to supervisory board); HORN ET AL., supra note 21, at 261 (indicating labor elects supervisory board representatives); Charny, supra note 8, at 158-59 (noting 1/3 to 2 of supervisory board are workers representatives).

69 See Andre, supra note 27, at 1827 (stating labor representatives role on supervisory board is less then their numbers suggest); Charny, supra note 8, at 159 (stating consultative process of supervisory board whereby labor peace is exacted despite the adverse interest of labor with that of shareholders and managers is mysterious).

70 See § 7 MitbG (dividing labor representative into categories); § 15 MitbG (noting groups often have different objectives and may not be unified in voting); Andre, supra note 27, at 1826 (indicating labor members do not always vote uniformly).

71 See Andre, supra note 27, at 1826-27. 71; Charny, supra note 8, at 159,159 n.33 (noting despite labor’s numerical representation, the shareholder appointed chairman overshadows with decisive vote).
developed is that if a management decision is challenged, the
board of management has the burden of proving they acted as an
appropriate manager would. This is in contrast to the American
system of giving management decisions the benefit of the
business judgment rule. Under the American system of
corporate governance, the board of directors is highly scrutinized.
Shareholders, both institutional and individual investors,
observe the board of directors and are prepared to challenge
director decisions the shareholders believe are not in the best
interest of the corporation or the shareholders. One distinct
difference between the German and American system of
corporate governance is who is able to bring a lawsuit on behalf
of the corporation or against its directors. Under the German
system only the management board can bring a lawsuit on behalf
of the corporation, and only the supervisory board may bring a
lawsuit against the management board for their actions. In
contrast, under the American system of corporate governance
shareholders may bring a derivative action on behalf of the
corporation, and an individual action or a class action for

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72 See § 93 II AktG (stating management board has burden of proving it act with due
care); see also HORN ET AL., supra note 21, at 260 (indicating management must prove it
acted appropriately); Lawrence A. Cunningham, Commonalities and Prescriptions in the
Vertical Dimensions of Global Corporate Governance, 84 CORNELL L. REV. 1133, 1157
(1999) (stating no business judgment rule exists in Germany and that directors have
burden of proof they acted properly).

73 See Shlensky v. Wrigley, 237 N.E.2d 776, 779-80 (1968) (stating absent fraud or
breach of good faith courts will not interfere with board of director's decisions); see also
HENN, supra note 10, at 661 (indicating courts will not interfere with decisions within
board's authority absent fraud or bad faith); Cunningham, supra note 72, at 1157 (stating
United States courts defer to managerial decisions under business judgment rule).

74 See HENN, supra note 10, at 546 (stating shareholders can bring lawsuits on behalf
of the corporation or themselves for alleged wrongs); see also Veasey, supra note 57, at
396-97 (denoting shareholders bring lawsuits for injuries to themselves or the
corporation); Singhof & Seiler, supra note 63, at 495 (1998) (indicating United States has
been called "the most lawsuit-crazy country in the world") (quoting David S. Jackson,
Litigation Valley, TIME, Nov. 4, 1996, at 72); Jonathan R. Macey & Geoffrey P. Miller,
Corporate Governance and Commercial Banking: A Comparative Examination of
Germany, Japan, and the United States, 48 STAN. L. REV. 74, 88 (1995) (stating role of
monitoring American corporate governance rests with shareholders).

75 See § 78(1) AktG (indicating management board represents the corporation in
matters before the courts); see also HORN ET AL., supra note 21, at 259 (stating board of
management represents the company in court and elsewhere).

76 See § 112 AktG (indicating supervisory board represent company against
management board). See generally Andre, Reflections, supra note 27, at 1823 (discussing
duties of German supervisory board).

77 See O'KELLY & THOMPSON, supra note 54, at 318 (stating shareholders bring
derivative suits on behalf of corporation).
alleged wrongs.  

The net effect of placing the burden of proof on the German management board is that they will be less likely to act opportunistically. While a German management board can only be removed for cause, German shareholders have an easier proof standard to satisfy than American shareholders. This lower proof standard placed on German shareholders balances out with the higher standards they must meet for board removal. By contrast, American shareholders can remove a board “with or without cause”. Generally, when an American board is threatened with removal its actions will have the presumption of the business judgment rule and the shareholders will have the burden of overcoming that presumption.

When making any business decision, management in Germany does consider their obligations towards the corporation and the other constituents. The German board of management considers the interest of the corporation, the shareholders, the employees, and the community. Furthermore, as a cultural precept the interests of these groups will be given equal weight when the management board considers the impact its decisions will have on the corporation. While the American system will consider constituent interests when making decisions, an American board’s foremost obligation lays with corporation, and

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78 See HENN, supra note 10, at 1044-45 (stating individual and class actions are in contrast to derivative actions); see also Veasey, supra note 57, at 396 (stating injured shareholders may bring suit on their own behalf or on behalf of similarly situated class).

79 See § 93 II AktG (indicating management board must prove it acted appropriately); see also HORN ET AL., supra note 21, at 260 (stating burden of proving due care rests on management board).

80 Compare DEL. CODE ANN. tit. 8, § 141(k) (1974) (indicating that board and its members may be removed at will with certain exceptions), with Andre, Reflections, supra note 27, at 1824-25 (mentioning that members of German management board may only be removed for “important cause”).

81 See HENN, supra note 10, at 1088 (stating burden is usually on plaintiff to prove cause of action elements).

82 See ERCKLENTZ, supra note 55, at 197 (stating management “takes into account three separate and distinct interests”); see also Charney, supra note 9, at 149 (mentioning German corporate governance considers employee and capital investor concerns).

83 See ERCKLENTZ, supra note 55, at 197 (stating management takes into account three separate and distinct interests); see also Charney, supra note 9, at 149 (mentioning German corporate governance considers employee and capital investor concerns).

84 See ERCKLENTZ, supra note 55, at 196-97 (indicating management board must consider the interest of these groups equally in determining the impact of its actions). See generally Andre, supra note 9, at 105 (stating German model of corporate governance emphasizes long term welfare of company and constituents).
its shareholders. Therefore, while the structural approach of
corporate governance may be different, "both Germany and the
United States fit a basic pattern: managerialism plus limits
imposed to protect other key groups." In reality management boards under the German system
consider the interest of key shareholders, usually banks and
other institutional investors. To many management boards, the
interests of small, individual investors are inconsequential. One
German banker went so far as to say, "Shareholders are dumb
when they buy stock and impertinent because they also want a
dividend." This is not to say that individual investors are
always ignored, only that their voice is a faint one that is rarely
heard.

B. Corporate Ownership Under the German and American
Systems.

Shareholders of German public stock companies are usually
institutional investors, mostly banks, and sometimes-large block
investors. Corporate ownership by dispersed individual
shareholders, common with American companies, is rare in
Germany, and generally this group of owners grant proxies to

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85 See HENN, supra note 10, at 627 (stating directors owe fiduciary duty to the
corporation, and perhaps the shareholders as well); see also Andre, supra note 9, at 105
(placing more emphasizes on corporate constituents).
86 See Charney, supra note 9, at 149.
87 See Andre, supra note 9, at 105 (indicating German corporate governance model
advances stakeholder interest); see also Charney, supra note 9, at 149 (mentioning
shareholder representatives on the board are mainly bank representatives); Visentini,
supra note 26, at 843 (stating "institutions, mainly banks, . . . assume large stakes of
stock in . . . companies").
88 See Andre, supra note 9, at 121 (stating German corporate governance is less open
and less shareholder friendly); Kissane, supra note 29, at 651 (indicating individual
shareholders are precluded from voicing their dissent); see also Leaning to Love Equity,
ECONOMIST, July 3, 1993, at 75 (indicating shareholders are last in order of importance).
89 See Andre, supra note 9, at 105 (characterizing sentiment towards shareholders
under German corporate governance system).
90 See Singhof & Seiler, supra note 63, at 535 (1998) (stating individual shareholders
are reluctant to bring lawsuits); Kissane, Global Gaddies, supra note 29, at 652
(indicating minority shareholder lawsuits in Germany are rare).
91 See Daniel Standen, Insider Trading Reforms Sweep Across Germany: Bracing for
the Cold Winds of Change, 36 HARV. INT'L L. J. 177 (1995) (concluding investor make-up of
German market is largely institutional); Visentini, supra note 26, at 837 (stating German
banks, in addition to giving depositors variety of investment services normally found at
brokerage houses in the United States, also own large blocks of corporate shares and offer
corporate financing); see also Andre, Reflections, supra note 27, at 1819 (indicating banks
and other individuals comprise shareholder membership of supervisory board).
92 See Kissane, supra note 29, at 652 (indicating only 7% of corporations are in
the banks through which the shares where purchased. The rationale for granting proxies to the banks is that large institutional investors will be better informed regarding corporate matters, and it would be too cumbersome to have each individual shareholder vote his or her own shares. American shareholders’ real power in effecting corporate governance is in their ability to elect and remove the board of directors with or without cause. One problem facing a large group of dispersed shareholders is they may be “rationally apathetic.” Shareholder apathy occurs when there is no

individual investor hands); Visentini, supra note 26, at 837 (stating households own small percentage of shares); see also Standen, supra note 91 (stating unlike in United States, majority of companies in Germany are organized as private, limited liability companies).

See Macey & Miller, supra note 74, at 83 (indicating banks vote by proxy the shares of individuals that are deposited with banks); see also Kissane, supra note 29, at 651 (stating “German banks administer the shareholdings of most individual German investors, usually obtaining proxy-voting authority.”); Standen, supra note 91 (noting German banks not only lend companies money that is needed, but often are also companies’ largest shareholders).

See Singhof & Seiler, supra note 63, at 535 (1998) (indicating banks do not share corporate information available to them with individual investors); HORN ET AL., supra note 21, at 263 (stating banks recommend how proxies should be voted); see also Jill E. Fisch, Class Action Reform: Lessons from Securities Litigation, 39 ARIZ. L. REV. 533, 540-541 (1997) (arguing institutional investors are much better situated to conduct monitoring, both because they have greater resources, and because as likely repeat players, they are experienced in all issues which inevitably arise).

See Jill E. Fisch, From Legitimacy to Logic: Restructuring Proxy Regulation, 46 VAND. L. REV. 1129, 1138 (1994) (discussing negative effects of geographic dispersal on shareholders’ abilities to attend annual meetings and their ability to become informed about corporate affairs in order to exercise their voting rights intelligently); George Ponds Kobler, Shareholder Voting Over the Internet: A Proposal for Increasing Participation in Corporate Governance, 49 ALA. L. REV. 673, 675 (1998) (stating as corporate ownership became widely dispersed across geographic areas, it became increasingly inconvenient for shareholders to attend meetings, effectively disenfranchising absent shareholders); see also HORN ET AL., supra note 21, at 263 (suggesting banks voting individual investors’ shares by proxy is only viable alternative to dispensing with this group’s vote).

See DEL. CODE ANN. tit. 8, § 211(b) (1974) (Supp. 1998) (indicating directors are elected at annual shareholder meetings); see also HENN, supra note 10, at 511 (stating some or all directors are elected at annual shareholder meeting); Fisch, supra note 95, at 1134 (noting all primary state corporation laws governing shareholder rights require that corporations’ board of directors be elected by shareholders).


majority shareholder and the shareholders are geographically dispersed.99 Shareholders have been able to overcome rational apathy by creating voting trusts and other voting agreements.100 This allows shareholders to combine their voting rights into a block through which they can affect some control over the board of directors and corporate governance.

Another source of shareholder power over corporate governance lies within the efficient capital market hypothesis. The efficient capital market hypothesis states that a security reflects all available information in the stock price.101 Therefore, under this theory the directors and officer’s ability to effectively manage the affairs of the corporation will be reflected in the stock price.102 If a corporation is inefficiently governed it will be reflected in a lower share value. Shareholders can liquidate their investment in a corporation if they are dissatisfied with the way it is being managed.103 This is of concern to directors because shareholder passivity and failure to exercise their voting rights).  

99 See Black, supra note 98, at 522 (explaining since individual shareholders own only small fractions of particular company’s stock they cannot be expected to care about voting and never will); Pinto, supra note 98, at 325-26 (analyzing majority view of shareholders as passive with preference for exit by selling rather than using their voice to challenge management).

100 See DEL. CODE ANN. tit. 8, § 218(a), (c) (1974) (Supp. 1998) (allowing shareholders to create voting trusts and other voting agreements); see also Carol Goforth, Proxy Reform as a Means of Increasing Shareholders Participation in Corporate Governance: Too Little, But Not Too Late, 42 AM. U.L. REV. 379, 448 (1994) (recommending various changes to existing law to allow shareholders a greater role in corporate governance); Kobler, supra note 95, at 699-700 (1998) (proposing use of Internet technology to increase shareholder activism).


103 See O’KELLEY & THOMPSON, supra note 54, at 174-76 (stating shareholders are unable to make management decisions; implied that they can sell stock if not satisfied with corporate policies); see also Carol Goforth, Proxy Reform as a Means of Increasing Shareholder Participation in Corporate Governance: Too Little, But Not Too Late, 43 AM. U. L. REV. 379, 448-53 (1994) (recommending various changes to existing law to allow shareholders a greater role in corporate governance); D. Gordon Smith, Corporate Governance and Managerial Incompetence: Lessons From KMART, 74 N.C. L. REV. 1037, 1088-96 (1996) (discussing corporate governance system).
their ability to satisfy shareholder expectations of corporate governance directly affects their ability to raise corporate capital.\textsuperscript{104} The reality of American corporate governance is there are mechanisms in place which shareholders can use to influence the business and affairs of the corporations they own, but management is of the company is freely left to the directors' and officers' discretion.\textsuperscript{105} Several commentators actually state that shareholders are powerless to effect corporate governance.\textsuperscript{106}

IV. CONVERGENCE OF AMERICAN AND GERMAN CORPORATE GOVERNANCE

There is actually a move in Germany and the United States to transform corporate governance. While each country is approaching the transformation independently, they are both moving towards uniformity given each country's unique system of governance.

A. Conscious Change in Corporate Governance

For example, Germany is trying to move away from the large bank-ownership dominated system to include a greater number of smaller, individual investors in corporate governance.\textsuperscript{107} There

\begin{itemize}
  \item \textsuperscript{106} See Macey & Miller, \textit{supra} note 74, at 81 (indicating shareholders are powerless to affect corporate governance); see also Bernard S. Black, \textit{Shareholder Passivity Reexamined}, 89 Mich. L. REV. 520, passim (1990) (discussing passivity of shareholders and arguing it may be partly a function of legal rules); Henry N. Butler & Larry E. Ribstein, \textit{Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians}, 65 WASH. L. REV. 1, 25 (1990) (stating continued importance of shareholder voting rights).
  \item \textsuperscript{107} See Andre, \textit{supra} note 9, at 112 (indicating Germany wants to attract greater
\end{itemize}
is a belief among German policymakers that the bank-dominated system has hindered Germany's economic growth,108 therefore, there is a move to develop a more diverse stock market.109 One method Germany is using to increase individual investor holdings is to lower the minimum share price in order to make investments more affordable to smaller investors.110 While this lower minimum investment level has produced some increase of smaller investors, it has not produced the overwhelming push for an individual investor capital market that was expected.111 In fact, there has been a decrease in individual share ownership over the years.112 Culture plays a major factor in why the German public is reluctant to invest in Germany's stock market.113 The German populace is more risk adverse than their number of smaller investors); Kissane, supra note 29, at 652 (stating federal legislation introduced in Germany aims to reduce bank holdings); Macey & Miller, supra note 74, at 108 (indicating bank dominance in Germany is eroding); Singhof & Seiler, supra note 74, at 540 (stating Germany wants to build its capital market to improve “quantity, quality and diversity” of its market).


109 See Gordon, supra note 108, at 220 (stating “desire to develop stock market channels for equity finance”); see also Andre, supra note 107, at 112 (indicating Germany's desire to attract smaller investors); Singhof & Seiler, supra note 63, at 540 (indicating Germany's desire to promote its stock market; stating Germany wants to build its capital market to improve its "quantity, quality and diversity").

110 See Andre, supra note 9, at 112 (stating legislation enacted to reduce nominal share value to 5 DM); Singhof & Seiler, supra note 63, at 541 (indicating minimum par value has been reduced from 50 DM to 5 DM); See generally James H. Freis, Jr., An Outsider's Look into the Regulation of Insider Trading in Germany: A Guide to Securities, Banking and Market Reform in Finanzplatz Deutschland, 19 B.C. INT'L & COMP. L. REV. 1, 61 (1996) (considering high fees charged for securities trades could limit benefits of such change).

111 See Andre, supra note 9, at 112 n. 218 (indicating lower nominal value has help one firm increase individual shareholder holdings but other factors limit benefit of lower nominal values); Kissane, supra note 29, at 652 (stating only 7% of shares are owned by individual investors). See generally Singhof & Seiler, supra note 63, at 540-41 (noting Financial Market Promotion Act and Small Stock Corporation Act designed to promote diversity in shareholding and reduction in share prices).

112 See Singhof & Seiler, supra note 74, at 542 n. 188 (stating individual shareholder stock ownership decreased). See generally Andre, supra note 9, at 99 (noting number of publicly traded companies is small); Kissane, supra note 29, at 652 (stating only 7% of shares are owned by individual investors).

113 See Christina Escher-Weigart, Corporate Governance: The Development of Corporate Governance in Germany, 5 COLUM. J. EUR. L. 243, 245 (1999) (stating loss in
counterparts in the United States. Germans traditionally save a larger portion of their income to put towards the purchase of a home, leaving little earnings to risk in capital markets. The German market is still dominated by bank ownership, and therefore, control of the supervisory board remains under bank representative control.

Another reason for the low percentage of individual investor stock ownership is the public's distrust of the stock market in Germany. Germans do not trust corporations or corporate governance in Germany to look after their interest.

An additional problem affecting a vibrant capital market in Germany is codetermination. Some believe that the management and shareholders may dilute the supervisory board

two world wars led to "economic instability" keeping Germans away from capital markets; see also Gerald L. Neuman and Mark J. Roe, Convergence and Diversity in Private and Public Law, 5 COLUM. J. EUR. L. 181, 184 (1999); Singhof & Seiler, supra note 63, at 542 (noting German's deep-rooted cultural conviction that shares are to risky).

See Andre, supra note 9, at 119-18 (indicating German individuals invest in conservative investments); Singhof & Seiler, supra note 63, at 542 (noting German's deep-rooted cultural conviction that shares are to risky). See generally Escher-Weigart, supra note 113, at 245-46 (stating loss in two world wars led to "economic instability" keeping Germans away from capital markets).

See Escher-Weigart, supra note 113, at 245-46 (stating Germans save to purchase homes leaving little for "private investment); see also Neuman & Roe, supra note 113, at 184 (citing to Ms. Escher-Weigart's article); see also Andre, supra note 9, at 97 (citing Chancellor Kohl statement that Germans are more happy to invest in cars, houses and holidays, but not shares).

See Kissane, supra note 29, at 652 (denoting banks own approximately 93% of shares); Singhof & Seiler, supra note 63, at 542 n. 188 (noting 83% of share are owned by large investors); Visentini, supra note 26, at 837 n. 11 (indicating German banks and institutional investors control 83% of share ownership).

See Kissane, supra note 29, at 652 (indicating only 7% of shares are owned by individual investors because they distrust German capital markets). See generally Escher-Weigart, supra note 113, at 245-46 (noting that a small investor has almost no chance of influencing business politics of corporations); Daniel James Standen, Insider Tradings Reforms Sweep Across Germany: Bracing for the Cold Winds of Change 36 HARV. INT'L L.J. 177. (1995) (noting public disenchantment with stock markets promoted acceptance of insider trading practice).

See Escher-Weigart, supra note 113, at 246 (indicating monitoring cost and public's lack of corporate influence as deterrent to investment); Gordon, supra note 108, at 222 (stating institutional investor corporate opportunism inhibits diverse capital markets). See generally Standen, supra note 117 (noting a widely held belief that the functioning of the stock market is slanted in favor of large, sophisticated traders, and to the acceptance of this structure).

See Mark J. Roe, German Codetermination and German Securities Markets, 5 COLUM. J. EUR. L. 199, 201 (1999) (stating "codetermined structure fits poorly with diffuse ownership); see also Helmut Kohl, Path Dependence and German Corporate Law: Some Skeptical Remarks from the Sidelines, 5 COLUM. J. EUR. L. 189, 194 (1999) (indicating management and shareholder may keep supervisory board weak to limits labors representation's control). See generally Neuman & Roe, supra note 113, at 183 (discussing Friedrich Kubler's belief that codetermination is only one reason why German securities markets are weak).
authority in order to limit the labor representative's control.\textsuperscript{120} The effect of maintaining a weak supervisory board is to allow the management board to operate with little monitoring. Without proper monitoring the management board is more apt to act opportunistically, and thereby undermining individual investor confidence. While codetermination is part of the German culture,\textsuperscript{121} its importance in recent years has diminished.\textsuperscript{122} For example, German companies are willing to forgo burdensome, and costly labor contracts in order to become more competitive in the global market place.\textsuperscript{123} It is moves such as this that will make German corporation more profitable and therefore, more attractive as investments. Therefore, while there is a trend to move towards an American style capital market with boarder diversity of shareholder ownership the German system is still characterized by a narrow shareholder base. The German government, as well as some German corporations, have devised a plan to jump-start their equity markets. In July of 1998 the London and Frankfurt Stock Exchanges announced their plan to integrate their markets, allowing each countries securities to trade on both exchanges.\textsuperscript{124} Also, some corporations have taken it

\textsuperscript{120} See Roe, supra note 119, at 202 (indicating information flow is restricted in order to constrict supervisory boards monitoring); see also Kohl, supra note 119, at 194 (stating supervisory board is kept weak to limit labors representation's effect). See generally Neuman & Roe, supra note 113, at 183 (discussing Friedrich Kubler's belief that German private firms have diluted form of codetermination).

\textsuperscript{121} See Kohl, supra note 119, at 195 (stating codetermination is solidly embedded in the German mind, even among citizens who are not fond of unions); see also §§ 1, 7 MitbG (stating number of labor representatives on the supervisory board is governed by the Act Concerning Co-Determination of Employees of May 4, 1976 (Mitbestimmungsgeesetze)); see also HORN ET AL., supra note 21, at 277 (stating Codetermination Act in 1976 established labor's parity with shareholders on supervisory board).

\textsuperscript{122} See Cecilie Rohwedder, Once the Big Muscle of German Industry, Unions See it All Sag: Membership and Clout Slip as Country Rues the Cost of Labor Inflexibility, WALL ST.J., Nov. 29, 1999, at A1 (indicating German labor organizations power is diminishing).\textsuperscript{123} See Rohwedder, supra note 122, at A1 (describing situation where a German computer chip maker refused a union labor contract because it would not allow the company to compete in the global market, and instead devised its own incentive package based on merit and performance for its employees); see also Andre, Reflections, supra note 27, at 1827 (stating codetermination has in fact had little impact on substantive decisions reached by boards of directors); Henry Hansman, When Does Worker Ownership Work? Esops, Law Firms, Codetermination. And Economic Democracy, 99 YALE L.J. 1749, 1803 (1990) (asserting primary effect of codetermination has arguably been to provide labor union members with informational rather than participatory seats on boards of directors).

upon themselves to list their securities on foreign exchanges into
to draw greater equity investments and a broader shareholder
base.125

By contrast, the American system of corporate ownership, and
governance, over the last 30 years has moved from individual
shareholder to institutional investor’s control.126 But while
institutional investors have the resources to stay well informed
regarding corporate matters,127 they have remained reluctant to
take an active role in corporate governance.128 There are several
reasons why institutional investors are not as active in corporate
governance as would be expected. For example, institutional
investors have a wide range of investments in their portfolios
making active participation in the management of each
investment impractical.129 Similar to the German system,
institutional investors in America invest in companies that are their clients. Additionally, institutional investors are generally more concerned with managing their own corporate affairs to interfere in the corporate matters of their investments. There has even been federal legislation geared towards institutional investors' taking a more active role in corporate governance. Despite federal legislation, institutional investors remain reluctant to actively participate in corporate governance matters, but as courts look to which investor is the "most adequate plaintiff" in securities litigation matters institutional investors, with the largest stake in the companies, will have to take the lead. Therefore, the hope is that institutional investors, as shareholders, will be more likely to monitor the companies in which they invest, before matters lead to litigation.

130 See Fisch, Class Action Reform: Lessons from Securities Litigation, 39 ARIZ. L.REV.533, 542 (1997) (stating active participation by institutions in litigation may cause sacrifice of many of the benefits resulting from close relationship between corporation and institution, such as superior access and influence); Robert G. Vannecko, Regulations 14A and 13D and the Role of Institutional Investors in Corporate Governance, 87 NW. U.L.REV. 376, 403 (1992) (describing conflict of interest faced by money managers between serving beneficiaries of pension plan as required by ERISA on the one hand, and supporting corporate management on the other).

131 See generally William Dale Crist, The Domestic and International Corporate Governance Role of the California Public Employees' Retirement System, Address at Universita Cattolica Del Sacro Cuore, Milan, Italy (Oct. 1994) (unpublished paper, available at Brooklyn Journal of International Law) (stating U.S. pension funds institutional investors are beginning to become more involved in management of corporations. But see 29 C.F.R. 2509.94-2 (1996) (stating it may be appropriate for institutional investor to engage in active role in corporate governance if investor concludes that such role is likely to enhance value of investment).

132 See, e.g., Private Securities Litigation Reform Act of 1995, 15 U.S.C.A. §§ 77z-1, 78u-4 (2000) (providing for investors with largest financial interest, usually institutional investors, to become lead plaintiff); 29 C.F.R. § 2509.94-2 (1996) (stating it may be appropriate for institutional investors to engage in monitoring or influencing management of corporations... if it is likely to enhance value investment). But see Investing in Lawsuits, CRAIN COMM., Oct. 16, 2000, at 10 (stating trend of pension funds in initiating or joining corporate securities litigation against companies in their investment portfolios).

133 See In re Cendant, 182 F.R.D. 476, 479 (D. N.J. 1998) (naming CalPERS most adequate plaintiff); Gluck v. Cellstar Corp., 976 F. Supp. 542, 545 (N.D. Tex. 1997) (indicating institutional investor was most adequate plaintiff); see also Stuart M. Grant, Appointment of Lead Plaintiff under the Private Securities Litigation Reform Act, 1070 PLI/CORP 547, 553 (stating when there is competition for lead plaintiff position courts select institutional investors over non-institutional investors). See generally Del. Judge Uses Reform Act Model, Chooses Institutional Investor for Lead Role, DEL. CORP. LITIG. REP., Nov. 13, 2000, at 3 (reporting Delaware Judge chose institutional investor as lead plaintiff in shareholder challenge against corporation). But see Investing in Lawsuits, CRAIN COMM., Oct. 16, 2000, at 10 (stating trend of pension funds in initiating or joining corporate securities litigation against companies in their investment portfolios).
B. Global Mergers Affecting Corporate Governance.

There is one additional factor leading to a convergence of corporate governance, which are transnational mergers. When corporations from different countries merge, they must not only merge different cultural norms but many times their approaches to legal norms. Cross-border mergers, such as the Daimler-Chrysler merger, create a situation that requires a convergence of governance norms. As more cross-board mergers occur, corporate governance norms will become more uniform. A by-product of harmonized governance norms in a global economy will be that foreign equity investment will become less risky. One change that Daimler-Chrysler announced was a shift to “U.S. style compensation patterns for senior management.” This change will have the possible effect of leading to greater focus on corporate profitability, which in turn will make Daimler-Chrysler a more attractive investment. Since Daimler-Chrysler is setting the template for cross-board mergers in Germany we can


135 See Gordon, supra note 108, at 228 (indicating Daimler-Chrysler merger may lead to new governance norms). See generally John H. Farrar, supra note 134, at 927 (PP) (suggesting importance of development of voluntary international corporate governance norms similar to international accounting standards); Roberta S. Karmel, The IOSCO Venice Conference, N.Y.L.J., Oct. 19, 1989, at 3 (stating purpose of global securities harmonization is to protect investors from fraud and to promote access to capital).


137 See also Gordon, supra note 108, at 238 (1999) (indicating Daimler-Chrysler set stage for international investment into Germany’s capital market). See generally Farrar, supra note 134, at 927 (suggesting importance of development of voluntary international corporate governance norms similar to international accounting standards); Roberta S. Karmel, supra note 135, at 3 (stating purpose of global securities harmonization is to protect investors from fraud and to promote access to capital).

138 See Gordon, supra note 108, at 236; see also Gregory L. White and Brian Coleman, DaimlerChrysler Pay Scale to Lean Toward U.S., WALL ST. J., Aug. 7, 1998, at A3 (stating Daimler-Chrysler pay scale for executives will be similar to American pay scales). See generally Richard Tomlinson, Europe’s New Business Elite: Wake up, America. Today’s European CEO is a global animal who lives to do deals and make shareholders rich. One of them could be your next boss, FORTUNE Apr. 3, 2000, at 177 (discussing trend of European CEO’s receiving large salaries akin to the American counterparts).
expect such a move from other German corporations.139

V. CONCLUSION

The American and German systems of corporate governance developed from the same fundamental law, the law of merchants. Over the years each system developed over different paths to the current models because of differences in cultures, politics, and history. Nevertheless, each system arrived at functionally the same result, management is responsible for conducting the business and affairs of the corporation and the owners monitor their activities. Under the American approach shareholders elect and monitor the board of directors who manage the corporation’s affairs. Under the German system the shareholders and employees of a company elect a supervisory board that is responsible for selecting and monitoring the management board who is responsible for corporate matters. While corporate ownership in Germany tends to be in the hands of a relatively small group of institutional investor, and in American ownership is characterized by geographically dispersed investors, the two seem to be trying to converge on a balance of large and small investors.

Shareholders under the American system of corporate governance, and in particular individual investors, have a greater opportunity to affect corporate governance than their counterparts in Germany. Germany’s goal in enacting legislation to promote individual investors was to minimize the control and dominance of banks in corporate governance, and to broaden the diversity of those monitoring management. Germany will have to fundamentally change its system to overcome shareholder distrust of the stock market, as well as other cultural norms, to attract a more diverse group of investors. Conversely, for institutional investors in America to become more active in corporate management they will need to take a lesson from their German counterparts. American institutional investors will need to select skilled individuals to act as their representatives on the

139 See Gordon, supra note 108, at 238 (1999) (stating “governance precedent set [by] DaimlerChrysler... may be hard to resist in other German firms”); see also Tomlinson, supra note 138, at 177 (discussing recent trend of European CEO’s receiving large salaries akin to their American counterparts).
board of directors of the companies in which they invest, similar to the German bank representatives on the supervisory boards. One major challenge facing large American investors is having enough control on the board of directors to affect any real change.

In sum, even though Germany and America took different paths in corporate governance both reached similar results. Management under both systems is charged with directing corporate affairs. As a greater amount of global mergers occur, corporate governance in Germany, the United States and other countries will develop to be more uniform. Already Germany is moving toward a more American style of corporate ownership, and management. For example, Jurgen Schrempp, the German co-chairman of Daimler-Chrysler's management board has been called a "maverick" because of his unique, American style approach to corporate governance, company performance and shareholder satisfaction. With each new deal small steps are taken to make cross-boarder corporate governance appear seamless. In the end there may be less distinctions then there are similarities.

140 See Karen Lowery Miller, The Auto Baron, BUS. WK., Nov. 16, 1998, at 82 (stating Schrempp is not afraid to shakeup the status quo); see also Christine Tierney, Can Schrempp Stop the Careening at Chrysler?, BUS. WK., Dec. 4, 2000, at 40 (describing Schrempp's merger with Chrysler as a "bold deal"); World's Most Respected Companies 5, FIN. TIMES, Dec. 15, 2000, at 5 (describing Schrempp as showing "daring behavior in the motor industry").