Federal Court of Justice (BGH) Draws Distinct Boundaries around Shareholders\' Right to Disclosure Regarding a Change of a Corporate Statute

Suggested Citation: *Federal Court of Justice (BGH) Draws Distinct Boundaries around Shareholders\' Right to Disclosure Regarding a Change of a Corporate Statute*, 2 German Law Journal (2001), *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=55

[1] The Federal Court of Justice (BGH) issued a decision on December 18, 2000, in which it redrew the demarcation lines for *Anfechtungsklagen* (actions to rescind) brought by individual shareholders against the majority\'s move to change the corporation\'s statute. The change of statute is governed by the *Umwandlungsgesetz* (UmwandlungsG), enacted in 1994. Section 210 UmwandlungsG establishes that shareholders cannot bring actions to rescind or actions for avoidance against the corporation\'s decision to change its statute, based on the claim that they have received a deficient compensation offer for their shares (or perhaps no offer of compensation at all). Instead, the UmwandlungsG directs objecting shareholders to the courts for a determination of the adequate amount of compensation to be distributed to those shareholders that wish to sell their shares because of the change to the in case of the corporation\'s statute. (Section 212 UmwandungsG) This mechanism, in the Court\'s view, clearly expresses the legislature\'s intention to provide for a speedy, unfettered route for changes of statute, mergers, splitting or the transfer of the firm\'s assets. These four forms of corporate change (Umwandlung) are mentioned in Section 1 Para. 1 numbers 1 through 4 of the UmwandlungsG. While the law provides for a number of shareholders\' rights with respect to such changes (providing for the right to choose to sell or retain the shares, for example) the bottom-line is that the law gives priority to the decision taken by the majority.

[2] The BGH points to this characteristic of the UmwandlungsG, when it held that Sections 210 and 212 of the UmwandlungsG are designed to establish an adequate harmony between the interests of: (1) the shareholders who support the corporate change and wish to retain their shares, and (2) those shareholders leaving the corporation in objection to the change. The Court stated that it is in the interest of the corporation (sic!) (*"Unternehmensinteresse\"*) to follow through with a decision to change (split, merge or transfer) once the decision has been taken. While several provisions of the law aim at facilitating this procedure, Section 212 UmwandlungsG establishes a safeguard for the shareholder in those cases where a shareholder\'s right to be compensated has been infringed. The shareholder will receive from the Court a decisive amount as to his claim for compensation that is binding for the corporation. That means that, while the shareholder is not able to overturn or hold up the execution of the majority\'s decision for a corporate change, the minority shareholder adequate compensation for his or her shares.

[3] The Court further held that the architecture of the UmwandlungsG precludes a separate action for avoidance under Section 131 of the Law governing publicly held corporations (*Aktiengesetz* - AktG). A minority shareholder cannot claim a violation of the right to disclosure regarding a cash compensation scheme, if a decision under the UmwandlungsG has been taken. If, under Section 210 UmwandlungsG, a shareholder cannot reverse the majority\'s decision, this reversal clearly cannot be had in the case that information rights of the shareholder related to the compensation were violated. The Court acknowledges, however, the serious infringement of the shareholders\' information rights that occurs if no compensation offer is being made. In that case, the shareholder most likely received no information whatsoever because the offer about which he was supposed to be informed was never made. The Court listed all the duties related to the shareholder\'s right to information that the corporation must fulfill with its compensation offer in the case of a corporate change, but the Court found that the legislature (through the Umwandlungsgesetz) decided to deny the shareholder\'s right to bring an action against the majority decision even when there was no compensation offer. Without responding to the objections such a drastic interpretation has received in the literature, the Court held that the text of the law simply leaves no room for an alternative view.

[4] The absence or deficiency of information about changes to the corporation, resulting from the absence of a compensation offer or a deficient compensation offer, leads to a high level of insecurity on the part of those shareholders considering the sale of their shares in case of corporate change. Addressing this insecurity, the BGH held that the situation is not so much different if the procedures had been dutifully carried out. The Court noted that it is normal in the case of a corporate change that a final decision as to the amount of compensation often cannot not be made earlier than a couple of years after the majority\'s decision for change, because that is how long the complicated process in the court normally takes to determine the adequate amount of compensation. The shareholder is thus left with the option of voting for a corporate change without clear knowledge of the value he or she will be given if he or she chooses to object and sell-out. The Court concluded that the judicial process for determining sell-out value is an adequate safeguard for the quitting shareholder. The Court understands this mechanism to finally justify the priority that is given to the change procedure over the rights of the individual shareholder. The Court thus also explicitly overruled its earlier decisions in comparable cases in which it had held that the shareholder needed to be provided with sufficient information in order to be able to take a well informed decision towards the planned corporate change. In handing down a \"black-letter law\"-decision, the Court underlined the legislative aim of the Umwandlungsgesetz and the quasi self-enforcing corporate change procedure that gains its

https://doi.org/10.1017/S2071832200003345 Published online by Cambridge University Press

full momentum while showing little respect for shareholder rights that the Court so often has placed at the center of its judgments.

For more information:
Decision of the Bundesgerichtshof, December 18, 2000, - II ZR 1/99; published in: ZIP Zeitschrift für Insolvenzpraxis 2001, PP. 199-202.

https://doi.org/10.1017/S2071832200003345 Published online by Cambridge University Press