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Michael Gruson

Global Shares of German Corporations and Their Dual Listings on the Frankfurt and New York Stock Exchanges

Nr. 87

Institut für Bankrecht

Arbeitspapiere

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Michael Gruson*

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I. Listing on the New York Stock Exchange – General Observations

Several German corporations are listed on the New York Stock Exchange (NYSE) and others have announced that they will follow[1] and join the ever-increasing number of foreign corporations that are listed on the NYSE.[2] This may seem surprising considering that

[1] As of March 2001, DaimlerChrysler AG ("DaimlerChrysler"), Fresenius Medical Care AG, SGL Carbon AG, Pfeiffer Vacuum Technology AG, Celanese AG, Deutsche Telekom AG, E.ON AG (formerly VEBA AG), Epcos AG, Infineon Technologies AG, SAP AG, BASF AG, Allianz AG and Siemens AG were listed on the NYSE. Several other German corporations, including Bayer AG, are preparing a listing on the NYSE.

[2] As of July 1999, 382 non-U.S. companies were listed on the NYSE. *See* The New York Stock Exchange, *Listed Companies*, at <http://www.nyse.com/listed/listed.html> (last visited Oct. 5, 2000). For a complete list, *see* The New York Stock Exchange, *Non-U.S. Listed Companies,* at <http://www.nyse.com/international/international.html> (last visited Oct. 5, 2000). As of August 31, 2000, 509 non-U.S. companies were listed on the NASDAQ. For a current list, *see* National Association of Securities Dealers Automated Quotations, *Nasdaq International Companies*, at <http://www.nasdaq.com/about/NonUSoutput_A0.stm (last visited Oct. 5, 2000)>. As of July 31, 2000, 59 non-U.S. companies were listed on the American Stock Exchange. *See* American Stock Exchange, *AMEX International Companies*, at <http://www.amex.com/about/NonUSAmex.stm> (last visited Oct. 5, 2000). Of the thirteen thousand companies now registered with the SEC as "reporting" companies, it is estimated that more than one thousand are foreign. *See* Uri Geiger, 'Harmonization of Securities Disclosure Rules in the Global Market – A Proposal', (1998) 66 *Fordham Law Review* 1785, at p. 1786 (citing data from the Office of International Corporate Finance of the SEC).

foreign issuers incur extensive initial and ongoing costs when they list their equity securities on the NYSE and register such securities with the Securities and Exchange Commission (SEC),[3] that they have to restate their financial statements in accordance with U.S. Generally Accepted Accounting Principles (U.S. GAAP) or discuss and quantify material differences between the accounting principles of their home country and U.S. GAAP[4] and that they become subject to continuing reporting requirements[5] and to certain restrictions concerning the way in which they

[3] Foreign issuers with a class of equity securities listed on a U.S. national securities exchange are required by § 12, Securities Exchange Act of 1934 (15 United States Code [U.S.C.] § 78*l* (1994 & Supp. IV 1998)) to register the class of securities with the SEC under the Securities Exchange Act of 1934. Foreign private issuers must use Form 20-F for such registration and also for the required annual reports to the SEC pursuant to § 13(a) or § 15(d), Securities Exchange Act of 1934 (15 U.S.C. § 78m(a) or § 78o(d) (1994)). Form F-20 requires a description of the issuer, comparable to the description in a securities sales prospectus. The compliance with the SEC requirements is far more time-consuming than compliance with the NYSE requirements. Daimler Benz AG was already listed on the NYSE and its common stock was already registered with the SEC prior to the merger with the Chrysler Corporation. *Foreign private issuer* is defined in SEC Rule 3b-4(c) under the Securities Exchange Act of 1934 (17 Code of Federal Regulations [C.F.R.] § 240.3b-4(c) (2000)) as any foreign issuer other than a foreign government except an issuer meeting the following conditions: (1) more than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and (2) any of the following: (i) the majority of the executive officers or directors are U.S. citizens or residents, (ii) more than 50 percent of the assets of the issuer are located in the United States, or (iii) the business of the issuer is administered principally in the United States. Rule 3b-4(b) (17 C.F.R. § 240.3b-4(b) (2000)) defines *foreign issuer* as any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.

[4] As to U.S. GAAP, *see* Thomas Joyce, Michael Gruson & Patricia O. Jungreis, 'Offers and Sales of Securities by a Non-US Company in the United States', in: Peter Farmery & Keith Walmsley (eds.), *United States Securities and Investment Regulation Handbook* (1992), ch. 1, 1, at p. 11. The potential difference between foreign accounting principles and U.S. GAAP is demonstrated by the fact that when Daimler Benz AG listed on the NYSE in 1993, it was required to restate its 1992 annual earnings to comply with U.S. GAAP standards. In Germany, the company had reported a profit of DM 615 million to its shareholders, but was required to restate this as a loss of DM 1,839 million pursuant to U.S. GAAP. Daimler-Benz, Form 20-F, Listing on the NYSE 1993, p. SF46. *See* Paul Pacter, 'International Accounting Standards: The World's Standards by 2002', (1998) 68 *The Certified Public Accountant Journal* 14, at p. 17. The new German Capital Raising Relief Act (*Kapitalaufnahmeerleichterungsgesetz*, Federal Law Gazette (*Bundesgesetzblatt*) [*herein* BGB1.] I 1998, p. 707) added a new § 292a to the German Commercial Code (*Handelsgesetzbuch,* Reichs Law Gazette (*Reichsgesetzblatt*) [*herein* RGBl.] 1897, p. 219), as amended. Section 292a permits German corporations to prepare consolidated financial statements exclusively in accordance with internationally accepted accounting standards (IAS) or U.S. GAAP. *See* Carsten P. Claussen, 'Corporate-Governance-Grundsätze in Deutschland – nützliche Orientierungshilfe oder regulatorisches Übermaß ?', (2000) *Die Aktiengesellschaft* 481, at p. 488; Stefan Göbel, 'Internationalisierung der externen Rechnungslegung von Unternehmen', (1999) *Der Betrieb* 293, at p. 293.

[5] *See* Douglas Jones & Michael C. Banks, 'Periodic Reporting Obligations of Foreign Issuers of Securities', in: Farmery & Walmsley, *supra* note 4, ch. 5, 198.

may conduct their business, *e.g.*, the prohibition on payments of foreign bribes[6] and that they become subject to restrictions in their dealing with the press even in their home country.[7]

A listing of a foreign issuer's shares on the NYSE in connection with a contemporaneous offering of such shares to the general public in the United States makes sense, because it increases the number of potential purchasers of the shares being offered. A foreign corporation might list its shares on the NYSE in the absence of a public offering in order to increase the corporation's international recognition and prestige.[8] A listing also simplifies a subsequent public offering of the listed securities in the world's most liquid capital market.[9]

In addition to this, a corporation may be interested in having SEC-registered and NYSE-listed shares as a "currency" to pay for acquisitions in the United States. This becomes more and more important in view of the increasing number of cross-border acquisitions. A

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[6] *See* § 30A, Securities Exchange Act of 1934 (15 U.S.C. § 78dd-1 (1994 & Supp. IV 1998)).

[7] *See* In the Matter of E.ON AG, SEC Release No. 34-43372 (Sept. 28, 2000), 73 SEC Docket 974, 2000 SEC LEXIS 2055 (SEC Order against E.ON AG for false statements regarding a merger negotiation). Note that the SEC's new Regulation FD (Fair Disclosure) on selective disclosure which took effect on October 23, 2000 might also apply. Regulation FD will be codified in 17 C.F.R. §§ 243.100–243.103. *See* SEC Release No. 33-7881 (Aug. 15, 2000), 73 SEC Docket 1, 65 Fed. Reg. 51715, 2000 LEXIS 1672, [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319. Regulation FD requires that when an issuer or person acting on its behalf selectively discloses material nonpublic information to market professionals or shareholders, the issuer must make public disclosure of the information simultaneously, in the case of intentional disclosure, or promptly after a senior official of the issuer learns that there has been a non-intentional disclosure, in the case of a non-intentional selective disclosure. Although *foreign private issuers* are exempted from Regulation FD (17 C.F.R. § 243.101(b)), the Regulation applies to a foreign corporation which does not qualify as foreign private issuer, *e.g.*, if because of a NYSE listing the majority of shareholders are U.S. residents. *See supra* note 3 for the definition of *foreign private issuer*. Moreover, in its release the SEC reminds foreign private issuers of their obligations under the rules of the NYSE to make timely reports of material information and warns that their disclosures remain subject to antifraud provisions. Also, the release notes the SEC's plan to undertake a "comprehensive review of the reporting requirements of foreign private issuers." SEC Release No. 33-7881, *sub* II B 5.

[8] *See* Wolfgang Meyer-Sparenberg, 'Deutsche Aktien auf dem US-amerikanischen Kapitalmarkt – eine Alternative zu ADR Programmen?', (1996) *Zeitschrift für Wirtschafts- und Bankrecht, Wertpapiermitteilungen* 1117, at p. 1117; Christiane Wilhelm, 'Die Registrierungs- und Publizitätspflichten bei der Emission und dem Handel von Wertpapieren auf dem US-amerikanischen Kapitalmarkt', (1998) *Die Wirtschaftsprüfung* 364, at p. 365. *See also* John C. Coffee, Jr., 'The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications', (1999) 93 *Northwestern University Law Review* 641, at p. 674.

[9] A foreign issuer that has been filing reports on Form 20-F, *supra* note 3, for at least three years (a *seasoned issuer*) is permitted, in connection with a public offering, to supply the information required to be disclosed about the issuer in its registration statement under the Securities Act of 1933 and the related prospectus by including either physically or by incorporating by reference, depending on certain factors, a copy of its latest Form 20-F. The rationale behind the permission to use simplified registration forms (Form F-2 or Form F-3) is that the information currently in the market about the issuer should be adequate to inform the investors. *See* Joyce, Gruson & Jungreis, *supra* note 4, at pp. 34, 40. *See generally* Stephan Hutter, 'Obligations of German Issuers in Connection with Public Securities Offerings and Stock Exchange Listings in the United States', in: Rüdiger von Rosen & Werner G. Seifert (eds.), *Zugang zum US-Kapitalmarkt für deutsche Aktiengesellschaften* (Schriften zum Kapitalmarkt, vol. 1, 1998), 115, at pp. 135–136 [*herein* Rosen & Seifert, Zugang].

listing in the United States may also serve a corporation as protection against hostile takeovers: the U.S. tender offer laws apply to any tender offer of shares registered with the SEC[10] — unless an exception applies because the number of U.S. holders of the shares subject to the tender offer does not exceed a certain percentage.[11]

The desire to broaden the shareholder base in the United States is frequently mentioned as a prime motivation for a NYSE listing. Today, this argument has lost some of its significance because international brokerage houses can easily execute transactions in foreign countries. However, United States institutional investors may be subject to internal limitations with regard to investments in foreign securities or with regard to investments in foreign securities that are not listed on a United States securities exchange.[12] In particular, professional pension funds, such as the Teachers' Fund or the Farmers' Association, are not allowed to invest in stocks that do not have a full listing in the United States.[13] Many of the U.S. institutional investors with restrictions on investments in foreign securities consider foreign shares that are traded in the form of American Depository Receipts (ADRs) as domestic securities.[14] Presumably, a full listing of foreign shares on the NYSE would reach even more U.S. institutional investors.[15] Furthermore, exchange-listed securities are exempted from the application of state securities or "blue sky" laws.[16]

A special need for listing on the NYSE exists for foreign corporations that already have a substantial number of shareholders in the United States, *e.g.*, DaimlerChrysler AG, or

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[10] *See* §§ 14(d)(1) & 12, Securities Exchange Act of 1934 (15 U.S.C. §§ 78n(d)(l) & 78*l* (1994 & Supp. IV 1998)).

[11] For a description of existing and proposed exemptions, *see* Harold S. Bloomenthal, *Securities Law Handbook* (2001), pp. 1075-1081.

[12] *See* Matthias Zachert, 'Zugangshindernisse und Zugangsmöglichkeiten zum US-amerikanischen Eigenkapitalsmarkt aus Sicht eines deutschen Unternehmens', (1994) *Die Aktiengesellschaft* 207, at p. 215.

[13] *See* Laura Covill, 'Playing the American Card', (May 1995) *Euromoney* 42, at p. 43.

[14] *Id*.

[15] *Id*. (quoting Werner Steinmüller, senior vice president in the corporate finance division of Deutsche Bank in Frankfurt).

[16] Section 18(a) & (b), Securities Act of 1933 (15 U.S.C. § 77r(a) & (b) (1994 & Supp. IV 1998)). The National Securities Markets Improvement Act of 1996, by amending § 18, Securities Act of 1933, significantly limited the role of state law in securities regulation by providing for preemption of state registration requirements for securities listed or authorized for listing on the NYSE, the American Stock Exchange or the NASDAQ Stock Market. *See* Charles J. Johnson, Jr. & Joseph McLaughlin, *Corporate Finance and the Securities Laws* (2d ed. 1997), p. 119. Although precluding substantive registration and reporting requirements by the states, the Act expressly preserves the states' right to require the filing of documents solely for notice purposes. *See* § 18(c)(2), Securities Act of 1933 (15 U.S.C. §77r(c)(2) (1994 & Supp. IV 1998)). *See* the general discussion of the blue sky laws, Thomas Lee Hazen, *Treatise on The Law of Securities Regulation* (3d ed. 1995), vol. 1, ch. 8, pp. 490–510 and 2000 pocket part, pp. 151–155.

have substantial assets and operations in the United States which make a shareholder following in the United States likely, *e.g.*, Fresenius Medical Care AG and Celanese AG.[17]

II. Global Shares — The Basic Concept

A special problem that German companies face when contemplating a listing on the NYSE is the fact that German stock corporations customarily issue bearer shares (*Inhaberaktien*) and not registered shares (*Namensaktien*).[18] The German trading, clearing and

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[17] Professor John C. Coffee, *supra* note 8, at pp. 673–674, has suggested that the "accelerating pace" of the migration of foreign issuers into the U.S. stock markets might be explained by a wish of management to commit itself to compliance with "the generally higher disclosure standards that prevail in the United States". The author's experience with foreign corporations does not support Professor Coffee's suggestion. It is the author's experience that foreign corporations do not welcome the higher U.S. disclosure standards, but accept them as a necessary price for the benefit of a presence in the U.S. capital market. The decision to list their securities in the United States is the result of a balancing of the perceived "disadvantages" of complying with U.S. law and of the advantages of a presence in the U.S. capital market. The weight put on either side of the scale depends on the level of the disclosure requirements and the depth of the capital market in the home country: U.S. disclosure requirements seem to be more acceptable if the gap to the home country disclosure requirement is not too wide; if the home country capital market cannot meet the issuer's capital needs, U.S. disclosure requirements look less formidable.

[18] Historically, since the middle of the 19th century, bearer shares were generally preferred in Germany. After World War II, the Western Allied Powers changed the law to require registered shares for the coal and steel industry. This requirement was later deleted and § 24(1) of the 1965 version of the German Corporation Act (*Aktiengesetz* [*herein* AktG], BGBl. I 1965, p. 1089) accordingly provided that shares shall be issued in bearer form unless otherwise provided in the charter of the corporation. For the history of the registered share in Germany, *see* Hanno Merkt, 'Die Geschichte der Namensaktie', in: Rüdiger von Rosen & Werner G. Seifert (eds.), *Die Namensaktie* (Schriften zum Kapitalmarkt, vol. 3, 2000), 63 [*herein* Rosen & Seifert, Namensaktie]. Since 1978, § 23(3), no. 5, AktG requires that a corporation's charter prescribe which of the two kinds of shares shall be issued, *see infra* text accompanying note 32. Furthermore, a corporation that issues registered shares has to maintain a share register and, until 1997, there existed no electronic booking system to operate a share register. Since the introduction of registered shares by DaimlerChrysler, registered shares are making a comeback in Germany. *See*, *infra* note 36, for examples of German corporations that have recently converted their shares from bearer to registered form. *See*, for a discussion of the development of the electronic booking system and the recent popularity of registered shares, Ralf P. Brammer, 'Die Einführung der Globalen Namensaktie bei DaimlerChrysler', in: Rosen & Seifert, Namensaktie, *supra,* 399, at pp. 399–400; Tobias Huep, 'Die Renaissance der Namensaktie', (2000) *Zeitschrift für Wirtschafts- und Bankrecht, Wertpapiermitteilungen* 1623; Ulrich Noack, 'Die Namensaktie – Dornröschen erwacht', (1999) *Der Betrieb* 1306 [*herein* Noack, Namensaktie]; Hans Diekmann, 'Namensaktien bei Publikumsgesellschaften', (1999) *Der Betriebsberater* 1985; Jürgen Blitz, 'Namensaktien – kein Clearingproblem', in: Rosen & Seifert, Namensaktie, *supra*, 373, at pp. 383–384; Ulrich Kastner, 'Das Integrierte Aktienbuch: Unternehmen kommunizieren erfolgreich mit ihren Anlegern', in: Rosen & Seifert, Namensaktie, *supra*, 335, at pp. 337–342; David C. Donald, 'Deutsche Namensaktien für den US-amerikanischen Kapitalmarkt', (Oct. 2, 2000) (unpublished thesis for the Magister degree at Johann Wolfgang Goethe-Universität, Frankfurt am Main) (*in the possession of the author*). *See also* Peter Chudaska, 'Die Führung des Aktienbuchs für Dritte', in: Rosen & Seifert, Namensaktie, *supra*, 355, at p. 356.

The Act Concerning Registered Shares (*Gesetz zur Namensaktie und zur Erleichterung der Stimmrechtsausübung – Namensaktiengesetz,* BGB1. I 2001, p. 123), which was enacted on Jan. 18, 2001 and amends the AktG, reflects the trend of German corporations towards registered shares. Bundestags Drucksache 14/4051 of Sept. 8, 2000, pp. 9 *et seq*., sets forth the official explanation of the bill (*Begründung*) [*herein* Official Explanation]. *See* Huep, *supra*, at p. 1623; Ulrich Noack, 'Neues Recht für die Namensaktie - Zum Referentenentwurf eines NaStraG', (1999) *Zeitschrift*

settlement rules and the rules concerning payment of dividends, distribution of shareholders meeting material and attendance at shareholders meetings are based on the use of bearer shares. However, in the U.S. market, registered shares are far more common than bearer shares, and trading, clearing and settlement rules are based on the use of registered shares.[19] The NYSE permits only the listing of registered shares.[20] The policy underlying the requirement for shares in registered form only is to prevent theft and to enable identification of shareholders in case of loss. Bearer shares are not favored because it is difficult for purposes of withholding tax to determine whether the owners of such shares are U.S. or foreign residents.[21] On the other hand, it is easier to withhold taxes on dividend payments on registered shares.

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für Wirtschaftsrecht (ZIP) 1993, at p. 1993 [*herein* Noack, Neues Recht]; Ulrich Seibert, 'Der Entwurf eines Gesetzes zur Namensaktie und zur Erleichterung der Stimmrechtsausübung (Namensaktiengesetz – NaStraG), Vom geltenden Recht über den Referentenentwurf zum Regierungsentwurf', in: Rosen & Seifert, Namensaktie, *supra*, 11. *See* the cabinet decision of May 10, 2000 which includes the bill for the Act Concerning Registered Shares, together with the official explanation of the bill (*Begründung*)*, reprinted in* Ulrich Seibert, 'Der Regierungsentwurf zum Namensaktiengesetz (NaStraG)', (2000) *Zeitschrift für Wirtschaftsrecht (ZIP)* 937, at pp. 938 *et seq*. [*herein* Seibert, Regierungsentwurf]. Note that the Federal Council (*Bundesrat*) of the German Parliament has discussed the proposed Act on July 14, 2000 and suggested several amendments. For the proposed amendments and the Government's reaction, *see* Official Explanation, *supra*, at pp. 22–23.

[19] *See* Noack, Namensaktie, *supra* note 18, at p. 1306; Klaus-Peter Röhler, *American Depositary Shares* (1997), p. 39. According to § 8-102(a)(13), Uniform Commercial Code [*herein* UCC], a share in registered form as applied to a certificated security means a form in which (i) the security certificate specifies a person entitled to the security, and (ii) a transfer of the security may be registered upon books maintained for that purpose by or on behalf of the issuer, or the security certificate so states. Many U.S. states mandate that a share certificate contain the name of the person or persons to whom the certificate is issued, thereby preventing corporations incorporated in those states from issuing bearer shares. *See, e.g.*, § 508(c), New York Business Corporation Law (McKinney 1986 & Supp. 2000). Delaware does not contain a similar express requirement. Certain provisions of the Delaware General Corporation Law, however, support the argument that certificates may only be issued in registered rather than bearer form. *See, e.g.*, § 158, Delaware General Corporation Law (Delaware Code Annotated, Title 8 (vol. 4, 1991 & Supp. 1998)). Additionally, quorum and voting provisions require a determination of record ownership. *See* §§ 213, 216 and 219, Delaware General Corporation Law (Delaware Code Annotated, Title 8 (vol. 4, 1991 & Supp. 1998)). If shares are held in a central depository evidenced by a global certificate, the difference between registered shares and bearer shares loses its significance.

According to § 8-102(a)(2), UCC, "bearer form", as applied to a certificated security, means a form in which the security is payable to the bearer of the security certificate according to its terms but not by reason of an indorsement.

The references in this article to Article 8, UCC are to the revised version of 1994 of Article 8, as adopted in 1997 by New York (McKinney 1990 & Supp. 2000).

[20] This requirement is not explicitly set forth in the New York Stock Exchange Listed Company Manual [*herein* NYSE Manual], but follows from Paragraph 501.01, NYSE Manual, which requires that each stock certificate on its face shall indicate ownership, and from Paragraph 601(A), NYSE Manual, which in its relevant part reads "[T]he company must . . . maintain registrar facilities for all stock of the company listed on the exchange". *See also* Meyer-Sparenberg, *supra* note 8, at p. 1118. The NYSE Manual is the NYSE's basic handbook for policies, practices and procedures for listed companies.

[21] If the shares are held in a central depository evidenced by a global certificate, withholding of tax on dividends paid on bearer shares is not more difficult than withholding of tax on dividends paid on registered shares.

Because bearer shares are not admitted for listing on the NYSE, German corporations have listed ADRs with the NYSE and registered them with the SEC.[22] ADRs are negotiable securities that are issued in registered certificated form by a depository bank and represent a non-U.S. corporation's ordinary or preferred shares that have been deposited with the depository bank. These receipts can be listed and traded on the NYSE. The shares that are represented by ADRs may be issued in bearer or registered form. Even though it is sometimes said that ADRs constitute U.S. securities, they are in fact — as their name indicates — nothing but a receipt for German or other foreign shares.[23]

Although bearer shares are prevalent in Germany, the German Corporation Act (*Aktiengesetz*) permits the issuance of registered shares as well as bearer shares.[24] Based on the authorization in the German Corporation Act to issue registered shares, DaimlerChrysler developed the concept of a Global Share.[25] This concept is rather simple: the corporation issues

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[22] As to ADRs, *see generally* Joyce, Gruson & Jungreis, *supra* note 4, at 94–101; Klaus-Peter Röhler, *American Depositary Shares* (1997); Rosen & Seifert, Zugang, *supra* note 9, at pp. 17–78; Hartwin Bungert & Nikolaos Paschos, 'American Depositary Receipts: Gestaltungspotentiale, kollissionsrechtliche und aktienrechtliche Aspekte', (1995) *Deutsche Zeitschrift für Wirtschaftsrecht* (*ZIP*) 221; Mark A. Saunders, 'American Depositary Receipts: An Introduction to U.S. Capital Markets for Foreign Companies', (1993) 17 *Fordham International Law Journal* 48.

[23] A non-U.S. corporation also has the option to issue so-called American Shares or New York Shares [*herein* NY Shares] for listing on the NYSE. A NY Share is a share representing equity ownership in a non-U.S. corporation that has allowed a part of its capital to be outstanding in the United States and part in the home market. A NY Share is issued by a U.S. transfer agent and registrar on behalf of the corporation and is created against the cancellation of a home market share by the home market registrar, whereas the ADR is created against the deposit of a home market share. Therefore, in the case of the NY Share, no local custodian has to be appointed. While the ADR allows the issuer to select the number of underlying shares representing one ADR (or vice versa), the NY Share, like the Global Share, is always equal to one ordinary share. NY Share programs are typically managed by the same banks that manage ADRs, since the mechanics of the instruments are similar. NY Shares are used primarily by Dutch companies, such as KLM, Phillips, Royal Dutch Petroleum, Unilever, and previously also Polygram. It is interesting to note that, in the case of both Royal Dutch Petroleum and Unilever, their respective UK incorporated sister companies, Shell Transport & Trading and Unilever plc, use ADRs. Until 1998, the NY Share model could not be used by German corporations for a listing on the NYSE because, according to the pre-1998 version of § 6, AktG, the par value of shares had to be expressed in *Deutsche Mark* (which was changed in 1998 to *Euro* pursuant to the Euro Introduction Act (*Euroeinführungsgesetz,* BGB1. I 1998, p. 1242)). Since the amendments to § 8, AktG by the No Par Value Stock Act (*Gesetz über die Zulassung von Stückaktien*, BGB1. I 1998, p. 590), corporations can choose whether they wish to constitute their shares as par value or no par value shares. Thus, this impediment against issuing NY Shares by German corporations no longer exists. An analysis whether there are other legal impediments against the issuance of NY Shares by a German corporation is beyond the scope of this article. So far no German corporation has issued NY Shares. *See* Brammer, *supra* note 18, at p. 405.

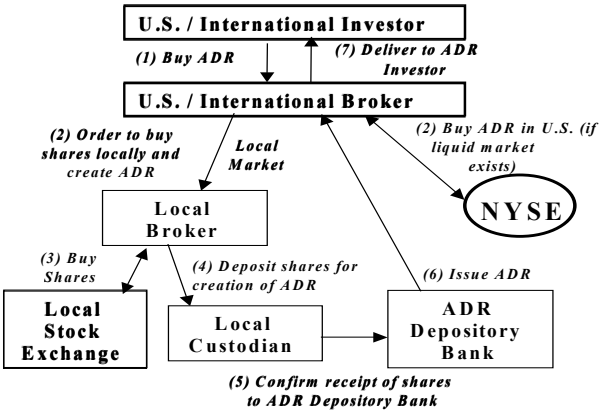
[24] *See supra* note 18.

[25] In November 1998, DaimlerChrysler became the first non-U.S. corporation and in October 1999, Celanese AG became the second non-U.S. corporation to list Global Shares on the NYSE. The author was involved in the development of the Global Share in both transactions. For an excellent description of the DaimlerChrysler merger by Georg F. Thoma, the principal architect of that merger, *see* Georg F. Thoma & Till Reuter, 'Shrinking the Atlantic', (May 1999) *European Counsel* p. 1. In May 2000, UBS, Switzerland's largest bank, developed a Global

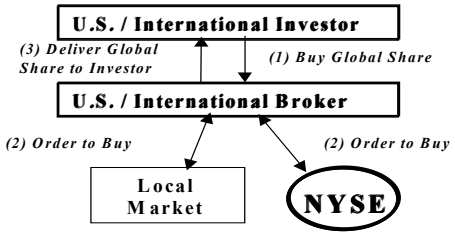
registered shares as the only class of common shares worldwide. A Global Share of a German corporation is nothing but an ordinary registered share, with no par value,[26] representing equity ownership in that German corporation, which is quoted and traded simultaneously and without intermediation by receipts in several markets in the respective currencies of such markets. The form of the share certificate, dividend payment procedures, prerequisites for voting at a shareholders meeting and the share register and other features have been devised so that they meet U.S., as well as German, legal requirements and as much as possible, conform with U.S. and German market practices.

The structure of an ADR program as opposed to the structure of a Global Share program is shown by the following charts:

ADR



GLOBAL SHARE



DaimlerChrysler developed the Global Share in order to give all of its shareholders the same type of share representing the same direct property and membership interest in the corporation and to permit the listing and trading of all shares on all-important international stock exchanges.[27] Furthermore, a Global Share program enables a corporation to create management stock option, employee share ownership and dividend reinvestment plans that are substantially consistent in various countries.

Unlike an ADR which provides "evidence of ownership" through a receipt issued by an ADR depository bank, the Global Share offers equal treatment for shareholders across

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Share program and now has its shares traded in Zurich, New York and Tokyo. *See* William Hall, 'UBS Listing is Snub for ADRs', (May 11, 2000) *Financial Times (London)*, p. 42.

[26] Section 8(1), AktG. Since 1998, a German corporation is permitted to issue no par value shares (*Stückaktien*). For the legislative history of § 8(1), AktG, *see supra* note 23. *See* Uwe Hüffer, *Aktiengesetz* (4th ed. 1999), § 8, annots. 1–4.

[27] *See generally* Brammer, *supra* note 18, at pp. 399-400. The DaimlerChrysler share is currently traded and listed on all German stock exchanges as well as on the Basel, Chicago, Geneva, London, Montreal, New York, Pacific, Paris, Philadelphia, Tokyo, Toronto, Vienna and Zurich stock exchanges.

borders. Furthermore, a single, fungible class of shares trades seamlessly in multiple markets with no time zone restrictions. An investor can purchase a corporation's shares in the home market prior to the opening of the NYSE in New York and sell the same shares that evening on the NYSE after the home market has closed without paying a cross-border fee.[28]

The advantages and disadvantages of issuing Global Shares in comparison to establishing an ADR program are still being discussed, and it is too early to say whether Global Shares will generally replace ADRs for German issuers.[29] At the end of the day, the decision to issue Global Shares rather than to establish an ADR program is a reflection of management philosophy. The substantially lower direct transaction costs for the investor[30] of the Global

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[28] In a Global Share program, this fee is eliminated because the ordinary shares can be held directly in the U.S. clearing systems and the Global Share program avoids the onerous conversion process of an ADR program; *see infra* part VI 4 and note 30.

[29] *See generally* 'Single global shares take shine off ADRs: With the globalisation of financial markets, there should be a growing need for one class of security for all in:' [sic], (May 31, 2000) *Financial Times (London)*, p. 37; Greg Ip, 'Global Investing—Now What?: Home Advantage', (Apr. 26, 1999) *Wall Street Journal*, Section R, p. 12, Column 1; 'Die Globale Aktie von Daimler-Chrysler wird zum Vorbild', (Jan. 6, 1999) *Frankfurter Allgemeine Zeitung*, p. 17; Noelle Knox, 'NYSE sees more foreign stocks in '99 from global mergers', (Jan. 12 and 13, 1999) *Associated Press*; Brian Garrity & Jeffrey Keegan, 'DaimlerChrysler's New Global Share Threatens ADRs', (Nov. 23, 1998) *Investment Dealers Digest*; Thomas S. Mulligan, 'Newly Created DaimlerChrysler has spawned the Global Share, An Alternative to the ADR', (Nov. 17, 1998) *Los Angeles Times*, Part C, p. 1. A critical view about this development has been expressed by Rainer Wunderlin, the Executive Director in the Frankfurt branch of The Bank of New York, 'Globale Aktie oder ADR?', (Dec. 17, 1998) *Börsenzeitung*, p. 19 and by Stefan Ruhkamp, 'Die Globale Aktie hat's schwer gegen ADR', (Nov. 2, 2000) *Börsenzeitung*, p. 4. For a discussion of flow-back of ADRs and Global Shares, *see* G. Andrew Karolyi, 'DaimlerChrysler AG, The First Truly Global Share', at <http://www.cob.ohio-state.edu/~fin/journal/dice/papers/1999/99-13.htm> (last visited Oct. 14, 2000).

[30] U.S. holders of Global Shares are not subject to the conversion fees associated with ADR programs. The ADR conversion fee is paid each time ADRs are issued upon deposit of shares or shares are delivered upon surrender of ADRs. The fee, typically up to U.S.$5 per 100 shares, increases the cost of a 10,000-share transaction by U.S.$500. In an ADR program the costs of 200 transactions of a total of one million shares at a rate of U.S.$0.04 per share amounts to up to U.S.$40,000, whereas an electronic transfer for the same amount of shares at a fixed cost of U.S.$5 per transaction in a Global Share Program between CBA and DTC involves costs of only U.S.$1,000. *See* Claus Döring, 'Die Globale Aktie', (Dec. 2, 1998) *Börsenzeitung*, p. 4; Brammer, *supra* note 18, at p. 416. In addition, holders of ADRs might be required to pay certain out-of-pocket expenses. The ADR banks have therefore been referred to as "toll stations" for non-U.S. companies who want to get access to the U.S. capital market. A conversion fee is incurred in connection with most purchases of ADRs because the Frankfurt Stock Exchange [*herein* FSE] is a more efficient market for German shares than the U.S. ADR market and purchases of ADRs are usually executed by purchasing shares on the FSE, depositing them with the German custodian bank and having the depository bank issue ADRs in New York. Sales of ADRs are executed in the reverse way. It appears however that the higher transaction costs associated with ADR programs are not (or not fully) borne by the trading investor. Representatives of The Bank of New York have stated to the author (Dec. 16, 1998) that the executing brokers, and not the trading investors, assume the conversion fee. Whether the investor or the broker incurs the conversion fee, this fee arguably discourages the development of a two-way market, and negatively impacts the size and liquidity of the ADR market.

In a Global Share program, the issuing corporation has to pay for the establishment and maintenance of the shareholder register which accounts for the bulk of the total costs of the introduction of Global Shares and also bears the cost for the services of the central depositories and clearing agencies, CBA (*infra* note 56) and Depository Trust

Share model and the fact that exactly the same share type is traded in all markets, in particular Frankfurt and New York, supports liquidity in both places and thereby should contribute to an efficient market. The illiquidity of the ADR market tends to affect the market price. The Global Share will contribute to the leveling out of differences in the trading prices on its home country exchange and the foreign exchanges and will result in a more transparent and accurate market price. However, the obligation to maintain a share register and the requirement to comply with different practices in the U.S. and German securities markets make the Global Share more expensive for the issuing corporation than an ADR program.

This article contains a discussion of selected legal issues arising in connection with the conversion of bearer shares of a German corporation into registered Global Shares for the purposes of listing them on the NYSE. These issues were first discussed in the DaimlerChrysler merger, and the structure of the Global Shares presented in this article is based on the DaimlerChrysler transaction.

III. Conversion of Bearer Shares into Registered Shares

1. Registered Shares

The German Corporation Act gives a corporation the option to issue its shares in bearer or in registered form.[31] The corporation's charter (*Satzung*) must set forth which type has been chosen.[32] The charter may also provide that, upon the request of a shareholder, such shareholder's bearer shares shall be exchanged for registered shares and vice versa.[33] The right to exchange shares may be modified and made dependent on certain requirements.[34] Besides the issuance of registered shares, the German Corporation Act also permits the issuance of restricted

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Company (DTC). On the other hand, the cost of establishing and maintaining a share register is incurred by every corporation that issues registered shares (*see infra* note 36, listing major German corporations that have recently converted their shares from bearer shares to registered shares) and the specific operational and legal issues involved in creating a Global Share program have been substantially resolved by DaimlerChrysler and Celanese. The costs for share transfers, which are borne by the shareholder, are relatively small (DM 0.25 per change in shareholder, irrespective of the size of the transaction). From the investor's point of view, the Global Share Program therefore involves lower transaction costs than an ADR Program. As a result, the Global Share concept is shareholder value-driven while the ADR concept is driven by the interest to minimize the corporation's direct costs, not the shareholders' total costs. *See* Wunderlin, *supra* note 29, at p. 19.

[31] Section 10(1), AktG. *For details, see* Hüffer, *supra* note 26, § 10, annot. 1; Alfons Kraft in: Wolfgang Zöllner (ed.), *Kölner Kommentar zum Aktiengesetz* (2d ed. 1988), vol. 1, § 10, annot. 12.

[32] Section 23(3), no. 5, AktG.

[33] Section 24, AktG. *For details, see* Hüffer, *supra* note 26, § 24, annots. 3–5.

[34] *See* Georg Wiesner in: Hans-Joachim Priester (ed.), *Münchner Handbuch des Gesellschaftsrechts* (2d ed. 1999), vol. 4, § 13, annot. 5.

registered shares (*vinkulierte Namensaktien*), the transfer of which is subject to the issuing corporation's consent.[35]

2. Subsequent Conversion by Amendment of the Charter

If the charter of a German corporation provides for bearer shares, an amendment to the charter is necessary to convert the bearer shares to registered shares. [36] The approval of the shareholders is required for such an amendment. Subject to some controversy, however, is the question of whether for an amendment of the charter converting the type of shares from bearer shares to registered shares a vote of a qualified majority of 75% of the capital stock represented at the shareholders meeting (*Hauptversammlung*) is sufficient[37] or whether the consent of all

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[35] Section 68(2), sentence 1, AktG. *See* Hüffer, *supra* note 26, § 68, annot. 10. In the case in which the effectiveness of the transfer depends on the consent of the corporation, generally the management board *(Vorstand)* has the authority to grant such consent. Section 68(2), sentence 2, AktG. However, the charter may provide that the supervisory board or the shareholders meeting of the corporation has the authority to grant such consent. Section 68(2), sentence 3, AktG. DaimlerChrysler AG and Celanese AG issued customary, *i.e.*, non-restricted, registered shares. An example for issuers of restricted registered shares — but so far not within the framework of a Global Share program — are German insurance corporations. Lufthansa AG has issued restricted registered shares as required by European Council Regulation on licensing of air carriers (EEC) No. 2407/92 of July 23, 1992 (O. J. Eur. Comm. No. L 240, p.1 (1992)) and pursuant to the Aviation Compliance Act (*Luftverkehrsnachweis-sicherungsgesetz*, BGB1. I 1997, p. 1322). *See* Diekmann, *supra* note 18, at p. 1985.

The issuance of restricted registered shares is intended to protect the corporation, *inter alia*, against foreign control and hostile takeovers. According to § 26(2) of the Conditions for Transactions on the Frankfurt Stock Exchange of May 2, 2000 (*Bedingungen für Geschäfte an der Frankfurter Wertpapierbörse*) [*herein* FSE Conditions], restricted registered shares are admissible for stock exchange listing under the condition that either the last and only the last transfer was carried out through an indorsement in blank (*Blankozession*) or the shares have a transfer application in blank (*Blankoumschreibungsantrag*) appended. A registered share indorsed in blank resembles a bearer share. *See infra* text accompanying note 137. For a detailed description of legal aspects of the collective deposit of restricted registered shares, *see* Siegfried Heißel & Christopher Kienle, 'Rechtliche und praktische Aspekte zur Einbeziehung vinkulierter Namensaktien in die Sammelverwahrung', (1993) *Zeitschrift für Wirtschafts- und Bankrecht, Wertpapiermitteilungen* 1909.

[36] *See generally* Roger Zätzsch, 'Die Voraussetzungen der Umstellung von Inhaber- auf Namensaktien', in: Rosen & Seifert, Namensaktie, *supra* note 18, 257. Several German corporations have converted shares from bearer to registered form in recent years, *e.g.*, Deutsche Bank AG, Dresdner Bank AG, Deutsche Telekom AG, Mannesmann AG, Siemens AG, Deutsche Lufthansa AG and Aventis AG. Furthermore, some corporations listed on the new trading segment of the FSE, called the *Neue Markt*, have converted from bearer shares to registered shares, *e.g.*, AC-Service AG and Infor Business Solutions AG. The *Neuer Markt* targets small- to medium-sized innovative growth companies. Other recently established corporations have provided for registered shares in the original charter, *e.g.*, Celanese AG.

[37] In favor of this view, *see* Decision of the Appellate Court of Hamburg (*Oberlandesgericht Hamburg*) of July 3, 1970, (1970) *Die Aktiengesellschaft* 230; Hüffer, *supra* note 26, § 24, annot. 6; Andreas Pentz in: Wolfgang Zöller (ed.), *Münchner Kommentar zum Aktiengesetz* (1999), § 24, annot. 13; Volker Röhricht in: Klaus J. Hopt & Herbert

affected shareholders is required.[38] A majority of legal authorities is in favor of the first-mentioned view. The latter view would virtually preclude a conversion of bearer shares of publicly held corporations to registered shares.

In order to evaluate these two views, one must consider that under the German Corporation Act registered shares and bearer shares are two different types (*Arten*) of shares but not different classes (*Gattungen*) of shares, as both are common stock granting exactly the same membership and property rights. Consequently, the German Corporation Act treats bearer and registered shares — irrespective of the fact that bearer shares are easier to transfer — as two equivalent alternatives by which the same membership and property rights are expressed. Therefore, in the view of most legal scholars, a resolution to amend a charter to provide for registered shares does not interfere with the core of shareholder rights.[39] Amendments to a charter affecting the core of shareholder rights may only be adopted with the consent of all affected shareholders, not by a majority vote.[40]

An amendment of a charter providing for registered shares does not *eo ipso* result in the creation of a new type of shares, but obligates the shareholders to participate in the conversion of bearer shares to registered shares.[41] If shareholders do not surrender their share certificates, the corporation may declare such certificates invalid and replace them without such

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Wiedemann (eds.), *Grosskommentar zum Aktiengesetz* (4th ed. 1997), § 24, annot. 11; Huep, *supra* note 18, at pp. 1623–1624.

Section 179(1) & (2), AktG requires for charter amendments a vote of a qualified majority of at least 75% of the capital stock represented at the shareholders meeting unless the charter provides for a different capital majority.

[38] In favor of this view, *see* Kraft, *supra* note 31, § 24, annot. 18 (arguing that a shareholder cannot be deprived of the individual right granted by the issuance of bearer shares without his consent). *See also* § 179(3), AktG which requires the consent of all disadvantaged shareholders if the relationship between different classes of shares is altered to the detriment of one of the classes.

[39] *See* the authorities cited *supra* note 37. As to classes of shares, *see* § 11, AktG.

[40] The form of certification as bearer shares does not confer any special privileges on shareholders in terms of § 35, German Civil Code (*Bürgerliches Gesetzbuch*, RGBl. 1896, p. 195), as amended. Section 35 states that special privileges of a member cannot be withdrawn by a meeting of the members without the consent of the affected member; *see* Röhricht, *supra* note 37, § 24, annot. 11.

[41] *See* Huep, *supra* note 18, at p. 1624; Hüffer, *supra* note 26, § 24, annot. 6; Kraft, *supra* note 31, § 24, annots. 17–18.

shareholders' consent.[42] Costs incurred by the conversion must be borne by the corporation, because the conversion is initiated by the corporation and is in its interest.[43]

[42] According to § 73(1), AktG, the corporation may, with the permission of the competent court, declare invalid the share certificates that have not been surrendered to it for correction or replacement despite the request for surrender, if the language of share certificates has become inaccurate by reason of a change in legal circumstances. In lieu of the invalidated share certificates, new share certificates shall be issued and delivered to the person entitled thereto or be deposited with the court if the corporation is entitled to make such deposit. *See* § 73(3), AktG.

[43] *See* Hüffer, *supra* note 26, § 24, annot. 7.

IV. Certification and Design of Share Certificates

1. Exclusion of Individual Share Certificates

(a) Exclusion in the Original Charter

When setting up a Global Share program, it is advisable to exclude individual certification of shares in the corporation's charter to the maximum extent possible and to provide for the issuance of one or more global certificates evidencing all shares of the corporation. This exclusion results in a simplification of the issuance of shares, saves printing costs for individual share certificates, simplifies dividend payments and controlling the attendance at shareholders meetings, and makes the settlement and clearing of share transactions much more efficient.[44] The German Corporation Act clearly permits a corporation's original charter to exclude individual share certificates or to restrict the shareholders' right to receive share certificates.[45] If the issuance of individual certificates is excluded, the corporation will issue one or more global certificates evidencing all shares, and the shareholders are co-owners of such certificates.[46]

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[44] *See infra* parts VI, VII and VIII.

[45] Section 10(5), AktG, as amended in 1998 by the Law in Furtherance of Control and Transparency of Business Ventures (*Gesetz zur Kontrolle und Transparenz im Unternehmensbereich*, BGB1. I 1998, p. 786), reads: "The right of a shareholder to receive a share certificate may be excluded or restricted in the charter". This change was motivated by the introduction of the Single European Currency, the Euro, because of the costs involved in printing new certificates denominated in Euro. *See* Ulrich Seibert, 'Der Ausschluss des Verbriefungsanspruches des Aktionärs in Gesetzgebung und Praxis', (1999) *Der Betrieb* 267 [*herein* Seibert, Ausschluss]. Most recently Bayer AG announced the exclusion of individual share certificates in favor of one single global certificate deposited with CBA. *See* 'Bayer stellt Globalurkunde aus', (Sept. 27, 2000) *Frankfurter Allgemeine Zeitung*, p. 31.

Exclusion of individual certification in this context means that a shareholder cannot request a certificate for the shares owned by him; it does not mean that the shares are uncertificated in the meaning of § 8-102(18) UCC, because all shares are certificated in global certificates. The German terminology differs: jurists call the exclusion of individual certification, "exclusion of certification" (*Ausschluss der Verbriefung*) and call the exclusion of the right of shareholders to obtain one certificate for each share, an "exclusion of individual certification" (*Ausschluss der Einzelverbriefung*). Section 10(5), AktG was already amended in 1994 by the Law Concerning Small Corporations and the Deregulation of the Securities Laws (*Gesetz für kleine Aktiengesellschaften und zur Deregulierung des Aktienrechts*, BGB1. I 1994, p. 1961) to exclude the right of shareholders to receive one certificate for each share. *See* Hüffer, *supra* note 26, § 10, annot. 1.

[46] *See* § 6, Depository Act (*Gesetz über die Verwahrung und Anschaffung von Wertpapieren* (*Depotgesetz*), BGB1. I 1995, p. 34), as amended. The issuance of global certificates (*Sammelurkunden*) is permitted by § 9a, Depository Act. For a discussion of co-ownership, *see infra* text accompanying note 152.

(b) Subsequent Exclusion by Amendment of the Charter

It has been questioned whether a subsequent exclusion or restriction of the right of shareholders to receive individual share certificates by an amendment to the charter is possible, because such an exclusion or restriction interferes with a right of shareholders originally provided for in the charter. The more convincing and also prevailing view is that the subsequent exclusion or restriction of the shareholders' right to receive share certificates is permitted. Professor Hüffer,[47] for example, points to the similarity of such an exclusion to a subsequent restriction of voting rights by providing for a maximum vote for each shareholder irrespective of the number of shares held by such shareholder.[48] Such a restriction has been approved by the German Federal Supreme Court in Civil Matters[49] even in cases where shareholders already owned shares in excess of the maximum vote. From this, Professor Hüffer correctly concludes that a subsequent exclusion or restriction of the right to receive share certificates — a less far-reaching action — is permissible as long as the principle of equal treatment of shareholders[50] is not violated.[51]

(c) NYSE Rule

There are no provisions of the U.S. securities laws or internal rules of the U.S. central depository, The Depository Trust Company (DTC), that prohibit an exclusion of the shareholders' right to have individual share certificates issued on request. However, the regulations of the NYSE provide that a listing of shares on the NYSE is subject to the condition that, upon request of a shareholder, individual share certificates must be issued.[52] It is presently

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[47] *See* Hüffer, *supra* note 26, § 10, annot. 12. *See also* Seibert, Ausschluss, *supra* note 45, at pp. 267–268.

[48] Permitted by § 134(1), sentence 2, AktG.

[49] Decision of the Bundesgerichtshof (German Supreme Court in Civil Matters) of Dec. 19, 1977, in: *Entscheidungen des Bundesgerichtshofs in Zivilsachen* (BGHZ), vol. 70, p. 117 ("Mannesmann").

[50] The rule of equal treatment of shareholders is set forth in § 53a, AktG, stating that "shareholders shall be treated equally under equivalent circumstances".

[51] *See* Hüffer, *supra* note 26, § 10, annot. 12.

[52] This requirement is not explicitly stated, but follows from a number of provisions in the NYSE Manual, *supra* note 20. For instance, Paragraph 501.01(B), NYSE Manual provides: "Except as provided below, the Exchange does not require that a listed company send stock certificates to a record holder with respect to a stock distribution unless the record holder requests a certificate". Shares that are not individually certificated are customarily held in the form of one or more global certificates by custodians for The Depository Trust Company [DTC]. Although U.S. law permits uncertificated shares (*see* § 158, Delaware General Corporation Law (Delaware Code Annotated, Title 8 (vol. 4, 1991 & Supp. 1998)), and, *e.g.*, § 8-102(18), § 8-108(b), (c) and (e) and § 8-202(a), UCC), this authority has never been utilized by publicly held corporations. The global certificate that is issued to evidence an aggregate

unlikely that listed companies will obtain an exemption from this NYSE rule. Therefore, it is necessary for listed companies to provide for the issuance of individual share certificates to U.S. shareholders upon their request.

(d) Solution

In light of the conflict between the desirability of excluding individual share certificates as permitted by German law and the NYSE requirement to issue individual share certificates upon request, a shareholder's right to receive individual share certificates should generally be excluded in the charter, with the exception that individual share certificates will be issued to the extent that this is required under the rules of a stock exchange on which the shares will be listed.[53] This solution cannot be considered to constitute an unequal treatment of shareholders[54] because it is based on objective criteria and it is up to the German shareholder to decide whether he wants to purchase his shares on the NYSE and have direct or indirect physical possession of individually certificated shares or hold his shares in the indirect holding system through a DTC participant,[55] in which case he can demand at any time individual share certificates, or whether he wants to hold his shares through the German stock exchange clearing agency, Clearstream Banking AG (CBA),[56] in which case he cannot demand individual share certificates.

All shares that are not represented by individual certificates are represented by one global certificate held by the U.S. central depository, DTC, and by one global certificate held by the German central depository, CBA.[57] Both global certificates are of a variable nature, so

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number of shares owned by various beneficial owners and held by the DTC must not be confused with the concept of Global Shares discussed in this article.

[53] DaimlerChrysler AG amended Section 4(2), sentence 1, of its charter to read as follows: "To the extent legally permissible and unless required under the rules of a stock exchange where the shares are listed, shareholders' rights to stock certificates and dividend coupons are disallowed" (*Ein Anspruch der Aktionäre auf Verbriefung ihrer Aktien und Gewinnanteile ist ausgeschlossen soweit dies gesetzlich zulässig und nicht eine Verbriefung nach den Regeln einer Börse erforderlich ist, an der die Aktie zugelassen ist).* The charters of Siemens AG, Deutsche Bank AG and Dresdner Bank AG contain similar provisions. *See* Seibert, Ausschluss, *supra* note 45, at pp. 267–268 (Siemens); Zätzsch, *supra* note 36, at p. 264 n.14 (Deutsche Bank und Dresdner Bank). *See* Appendix III to this article for a sample of an individual share certificate of DaimlerChrysler.

[54] *See supra* note 50.

[55] *See infra* part VI 2(c) for a discussion of the indirect holding system.

[56] Clearstream Banking AG [*herein* CBA] is a subsidiary of Clearstream International, a product of the merger of Cedel International and Deutsche Börse Clearing AG in 1999 (effective Jan. 2000). Until then, Clearstream Banking AG was known as Deutsche Börse Clearing AG [DBC]. Before 1997, it was named Deutscher Kassenverein AG. For further information on Clearstream International, *see* Clearstream International, at <http://www.clearstream.com> (last visited Oct. 8, 2000).

[57] *See* Appendix I to this article for a sample of a global share certificate of DaimlerChrysler. In fact, DTC holds several global certificates, the reason being that for insurance purposes no single certificate should have a value of

that a decrease in the number of shares represented by one global certificate can be equalized through an increase in the number of shares represented by the other global certificate. For this reason, each global certificate states that it represents "up to" the number of shares representing the entire issued and outstanding share capital of DaimlerChrysler. This way, a "cross-Atlantic" share transfer of a share represented by one global certificate to the other global certificate is possible. The use of two global certificates permits the use of both the U.S. and the German clearing systems.

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more than US$ 200 million. *See* Memorandum of Jan. 1, 1998 by The Depository Trust Company to Participants, Underwriters, Agents, Trustees, Counsel, and Others Affected, at p. 16 (Appendix A) (*available via* e-*mail at*: The Depository Trust Company, *Securities Eligible for DTC Services – DTC's Operational Arrangements Necessary for an Issue to Become Eligible* (http://www.dtc.org (last visited Nov. 8, 2000)). This amount has increased and today any single certificate may not exceed US$ 400 million. *See* The Depository Trust Company, *Book-Entry-Only Corporate Equity Securities, Letter of Representation* (*available via e-mail id*.). The fact that DTC holds several certificates does not change the legal analysis. In the case of DaimlerChrysler, global certificates are also held by The Bank of New York to facilitate the link between The Bank of New York and Deutsche Bank (s*ee infra* part VI 4 (b)) and by Deutsche Bank (*see infra* part VI 4 (c)) to facilitate the delivery of physical certificates in Germany.

A structure in which all Global Shares would be represented by one global certificate held by DTC would violate § 9a, Depository Act, *supra* note 46. Whereas § 5(4), Depository Act allows the establishment of a "cross-Atlantic" link between the German and a foreign central depository, § 9a, Depository Act requires that a global certificate be deposited with a depository bank within the meaning of § 1(3), Depository Act. In addition, § 48(2), sentence 2, no. 7(a), Stock Exchange Admission Regulation (*Verordnung über die Zulassung von Wertpapieren zur amtlichen Notierung an einer Wertpapierbörse* (*Börsenzulassungs-Verordnung)*, BGB1. I 1998, p. 2832), as amended, provides that, in the case the shares to be listed on the FSE are represented by global certificates, the issuer must submit to the stock exchange a declaration that the global certificate has been deposited with a German central depository bank for securities *(Wertpapiersammelbank)* within the meaning of § 1(3), Depository Act. Section 1(3), Depository Act defines *Wertpapiersammelbanken* (central depository bank for securities). CBA is the only *Wertpapiersammelbank*. *See infra* note 146.

Similarly, in a structure in which only one global certificate would have been issued in the name of CBA, CBA would have had to register with and submit to the jurisdiction of the SEC as a *clearing agency* pursuant to §§ 3(a)(23)(A) and 17A(b)(1), Securities Exchange Act of 1934 (15 U.S.C. §§ 78c(a)(23)(A), 78q–1(b)(1) (1994)). *See also* SEC Rule 17Ab2-1 under the Securities Exchange Act of 1934 (17 C.F.R. § 240.17Ab2-1 (2000)). According to § 3(a)(23)(A), Securities Exchange Act of 1934, the term *clearing agency* "also means any person, such as a securities depository, who (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates".

2. Design and Contents of Share Certificates

(a) Competing Requirements as to Printing and Contents

The design and layout of share certificates to be issued in a Global Share program of a German corporation must conform to the standards of German law. These standards apply although, because of the exclusion of individual share certificates to the largest extent possible, as mentioned above,[58] physical share certificates are virtually exclusively issued to U.S. shareholders. The share certificates should (1) be issued in bilingual form (German/English), (2) not lose their legal character as shares of a German corporation, (3) permit the issuance and cancellation of share certificates by the U.S. Registrar in accordance with applicable U.S. law and practice, (4) to the extent possible, comply with the printing standards of Deutsche Börse AG, the Frankfurt Stock Exchange [*herein* the FSE], and the NYSE, and (5) comply with German and U.S. law as to the contents of the share certificate.

The printing standards for share certificates admitted for listing on German stock exchanges are set forth in Section 8, Stock Exchange Admission Regulation[59] and in the Common Principles of the German Stock Exchanges for the Printing of Securities [*herein* Common Principles].[60] The Common Principles are a common administrative interpretation of Section 8, Stock Exchange Admission Regulation[61] by the German stock exchanges.[62] The Common Principles apply only to physical share certificates issued by a corporation to its shareholders, not to global certificates deposited with CBA.[63] The reason is that global certificates do not circulate and that there is no need for protection against falsification. The printing requirements of the NYSE are set forth in the NYSE Manual.[64] The Common Principles

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[58] S*ee supra* part IV 1(d).

[59] *See supra* note 57.

[60] *Gemeinsame Grundsätze der deutschen Wertpapierb rsen für den Druck von Wertpapieren – Druckrichtlinien* of Oct. 13, 1991, as amended.

[61] Section 8(1), sentence 1, Stock Exchange Admission Regulation, *supra* note 57, provides: "The printing design (*Druckausstattung*) of the securities represented by printed individual certificates shall provide sufficient protection against forgery and facilitate a safe and convenient handling of securities transactions".

[62] The Common Principles, *supra* note 60, are binding on corporations listed on one of the eight German stock exchanges because the exchanges declared them binding with respect to the printing of securities. *See* introductory sentence of the Common Principles.

[63] *See* § 8(1), sentence 1, Stock Exchange Admission Regulation, *supra* note 57 (the text of § 8(1), sentence 1 is set forth *supra* note 61).

[64] Paragraphs 501, 502.00, 502.01, 502.02, NYSE Manual, *supra* note 20.

and the NYSE Manual contain detailed requirements regarding the form, layout and printing of share certificates, which contradict each other in part and, therefore, cannot both be met by one certificate.[65]

In order to solve the problem of diverging printing requirements, an (almost) total conformity with NYSE printing provisions and the "largest possible conformity" with German printing provisions was attempted in the DaimlerChrysler transaction.[66] The "largest possible conformity" with German printing provisions was accepted by the FSE and CBA, because physical share certificates were only intended for U.S. shareholders and are accepted as "good for delivery" in Germany only after having been deposited with and canceled by CBA.[67]

U.S. and German requirements also differ with respect to the informational content of the share certificates.[68] The DaimlerChrysler Global Share contains all informational statements and notices required by U.S. and German law.

(b) Numbering of Share Certificates

In Germany, physical share certificates of listed companies are usually divided into certificates representing 1, 5, 10, 50, 100, 1,000 or 10,000 shares. Each share certificate carries a series of numbers identifying the shares it represents ("unit numbers").[69] Thus, each share has its specific unit number which it always retains, even upon transfer or exchange. For example, a physical share certificate that represents 50 shares will be assigned, for instance, the unit numbers 1,000,000 – 1,000,049. If the holder of this certificate transfers all shares, the transferee will be issued a share certificate bearing the same unit numbers. If the shareholder transfers 10 shares, the transferee will receive a new certificate bearing the unit number, *e.g.*, 1,000,000 – 1,000,009, and the transferor will receive a new certificate for the remaining shares

[65] Real or potential conflict between the rules of the two exchanges exists in the areas of paper size, positioning of the certificate number, "suitable" printing firms, paper type, printing methods and the numbering system.

[66] As to the requirements of German law to place unit numbers on share certificates, *see infra* part IV 2(b). It is important to mention that two changes of NYSE rules were required in connection with the form of the DaimlerChrysler shares. These two changes were approved by the SEC on Oct. 23, 1998. The first change permits vignettes (*i.e.*, pictures) that are not fully steel engraved as is required by Paragraph 502.01(A), NYSE Manual, *supra* note 20. The second change involved Paragraph 501.03(A), NYSE Manual and permits the form of indorsement to provide for a German registry. *See* SEC Release No. 34-40597 (International Series Release No. 1163) (Oct. 23, 1998), 68 SEC Docket 732, 63 Fed. Reg. 58435, 1998 SEC LEXIS 3210, *sub* II A (1).

[67] *See infra* part VI 4(c).

[68] *Compare* Paragraph 501.01, NYSE Manual, *supra* note 20, *with* §§ 6, 8, 10 and 13, AktG. German law does not require the use of the German language. *See* Hüffer, *supra* note 26, § 13, annot. 4. For the text of the certificate of the DaimlerChrysler share, *see* Appendices I and III to this article.

[69] According to the prevailing opinion, the distinctiveness of shares, *i.e.*, the necessity that each share can always be identified by the same number, is a necessary feature required by the AktG (*see* Hüffer, *supra* note 26, § 13, annot. 4), even though the AktG does not describe precisely how the numbering should be done.

bearing the unit numbers 1,000,010 – 1,000,049. In contrast to the German system, U.S. shareholders may receive a share certificate stating the actual number of shares represented by that certificate; therefore, the issuance of "uneven" amounts ("odd lots") is possible, but certificates representing "round lots" (evidencing 100 shares) are preferred.[70] The U.S. Registrar assigns a "certificate number" to each share certificate. In the event of a transfer of shares, the share certificate is withdrawn from circulation and a new share certificate representing an equal number of shares identified by a different certificate number will be issued to the new shareholder. In the case of a partial transfer, the share certificate is withdrawn from circulation and two new share certificates are issued; a new certificate representing the number of shares transferred will be issued to the new shareholder and a new certificate representing the number of shares not transferred will be issued to the original shareholder. Both certificates will be identified by new certificate numbers and the old certificate number is cancelled. The same principle applies in case of an exchange of a share certificate for several new certificates or vice versa.[71] The global certificate(s) deposited with CBA carry unit numbers according to the number of shares represented by the global certificate. Certificate numbers are also assigned to the global certificates held by DTC.

In order to coordinate the German system of unit numbers with the U.S. system of certificate numbers, it is necessary to allocate to each certificate number on the records of the Registrar the unit numbers of the shares evidenced by that certificate. If, upon transfer of all shares evidenced by one certificate, one or more new certificates are issued, the new certificate(s) receive new certificate numbers in accordance with U.S. practice, but the shares now evidenced by the new certificate(s) retain the same unit numbers as indicated on the records of the Registrar.[72] Such allocation of German unit numbers to certificate numbers can be

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[70] *See* Paragraph 501.01(B), NYSE Manual, *supra* note 20; Rule 55, New York Stock Exchange Guide [*herein* NYSE Guide] ¶ 2055, *reprinted in* CCH New York Stock Exchange Guide (loose leaf). The NYSE Guide is not a "guide" but contains binding rules issued by the board of directors of the NYSE. *See* Article VIII, Section 1, Constitution of the New York Stock Exchange, Inc., *reprinted in* CCH New York Stock Exchange Guide ¶ 1351. The rules of the exchanges must be approved by the SEC. *See* § 6(b), Securities Exchange Act of 1934 (15 U.S.C. § 78f(b) (1994)).

[71] In the case of an exchange of a share certificate for certificates representing different numbers of shares, the original share certificate is withdrawn from circulation and new share certificates representing in the aggregate an equal number of shares and identified by new certificate numbers are issued. The U.S. system makes it possible to ascertain from the register all prior transfers and exchanges of a share certificate.

[72] An example for clarification: A U.S. shareholder owns 50 shares. According to the German system, the unit numbers 1,000,000 – 1,000,049 have been assigned to such shares. If this shareholder requests the issuance of a physical share certificate, he receives one share certificate which carries, *e.g.*, the certificate number 326, according to the U.S. system of numbering and the same German unit numbers are still assigned to the share certificate. If the shareholder transfers all 50 shares, the transferee will receive a new share certificate with, *e.g.*, the certificate number 327; the same German unit numbers 1,000,010 – 1,000,049 are still assigned to this share certificate. If the shareholder transfers only 10 shares, the transferee will receive a new share certificate with the certificate number 327 and the German unit numbers, *e.g.*, 1,000,000 – 1,000,009 are assigned to this certificate; the seller receives a new share certificate with, *e.g.*, the certificate number 328 for his remaining number of shares and the German unit numbers 1,000,010 – 1,000,049 are assigned to this certificate.

ascertained at any time from the register or number book held by the U.S. Registrar and the Global Registrar.

3. Dividend Coupons and Preemptive Rights

(a) Customary Use of Coupons by German Corporations

In the case of German listed corporations, the dividend rights and subscription or preemptive rights are embodied in so-called dividend coupons.[73] The dividend coupons are issued in the form of a coupon sheet (*Bogen*) together with each share certificate.[74] The issuance of dividend coupons is not mandatory under the German Corporation Act;[75] however, they are universally used by German exchange-listed corporations, even in the case of registered shares. The advantage of dividend coupons in the case of bearer shares is that the shareholder does not need to present the share certificate in order to receive dividends and that a separate disposition of the dividend right is possible. Registered shares of German corporations are generally issued with coupons because this permits dividend payments in accordance with established market practices. Coupons are bearer securities, even if they are issued in connection with registered shares.[76] The coupon sheet contains a so-called "renewal coupon" (*Talon*). The Talon serves to renew the coupon sheet when all dividend coupons are used up.[77]

(b) Coupons and Global Shares

Contrary to the German custom, coupons for dividends and subscription or preemptive rights are not issued in the Global Share program in connection with the global

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[73] *See* § 793(1), German Civil Code, *supra* note 40. These coupons are considered to be a so-called "collateral paper" (*aktienrechtliches Nebenpapier*) and are in bearer form. *See* Dieter Leuering, 'Das Aktienbuch', (1999) *Zeitschrift für Wirtschaftsrecht (ZIP)* 1745, at p. 1749.

[74] The share certificate to which a coupon sheet relates is called *Mantel* (cloak).

[75] Dividend coupons are mentioned in, *e.g.*, § 72(2) and § 75, AktG.

[76] See *infra* text accompanying notes 254-256.

[77] According to § 75, AktG, the claim for renewal of the coupon sheet is embodied in the share and not in the renewal coupon and the shareholder can withhold consent to the issuance of new dividend coupons to the holder of the renewal coupon. Therefore, the renewal coupon is not a security, but rather a simple paper of legitimation. *See* Hüffer, *supra* note 26, § 58, annot. 30; § 75, annot. 1; Marcus Lutter in: Wolfgang Zöllner (ed.), *Kölner Kommentar zum Aktiengesetz* (2d ed. 1988), vol. 1, § 58 annots. 133–135; § 75, annot. 2. Because the renewal coupon does not represent an independent right, an independent transfer of the renewal coupons is not possible. *See* Lutter, *supra*, vol. 1, § 58 annot. 135.

certificates that are held by DTC and issued in the name of DTC's nominee, Cede & Co., or in connection with the physical share certificates, which can be issued to U.S. shareholders. Coupons are not customary in the United States and their introduction would necessitate substantial and continuing explanations to U.S. investors. DaimlerChrysler was of the view that the use of dividend coupons would have endangered the acceptability of the Global Shares in the United States.[78] Furthermore, a separately certificated coupon would be considered a separate security according to U.S. securities law[79] and, therefore, the registration provisions of the Securities Act of 1933 might apply every time dividends are distributed.[80] Finally, systems and procedures for the cashing of the coupons would have to be established and implemented in the United States.

On the other hand, one global coupon is attached to the global certificate that is deposited with CBA. This global coupon bears an indorsement stating: "this certificate is designated for exclusive custody by [Clearstream Banking AG]".[81] This means that for those shareholders whose shares are represented by the global certificate deposited with CBA, the dividend rights are embodied in the global coupon that is held in custody by CBA, whereas the dividend rights of the holders of the U.S. global and individual certificates are embodied in the share certificates. This, in turn, affects the method for the payment of dividends; whereas in the United States the share register determines the shareholder entitled to receive dividends, in Germany the co-owners of the global coupon, not the registered shareholders, are entitled to receive dividends and such co-owners cannot be ascertained from the share register but must be ascertained from the records of CBA and its participants.[82]

V. Share Register

1. The Share Register in Germany

(a) Contents of the Share Register

A German corporation that issues registered shares must maintain a share register.[83] The administration of the share register of a German corporation is incumbent upon

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[78] *See* Brammer, *supra* note 18, at p. 403.

[79] *See* § 2(a)(1), Securities Act of 1933 (15 U.S.C. § 77b(a)(1) (1994 & Supp. IV 1998)).

[80] *See* § 5, Securities Act of 1933 (15 U.S.C. § 77e (1994 & Supp. IV 1998)).

[81] For the text of the DaimlerChrysler Global Share Coupon, *see* Appendix II to this article.

[82] For details concerning the procedure of dividend distribution, *see infra* part VII.

[83] *See* Hüffer, *supra* note 26, § 67, annot. 3; Leuering, *supra* note 73, at p. 1745. The Act Concerning Registered Shares, *supra* note 18, changes the name of the register from "share book" (*Aktienbuch*) to share register (*Aktienregister*). *See*, *e.g.*, §§ 65, 67(1), AktG, as amended by the Act Concerning Registered Shares. For the

the management board (*Vorstand*), which is permitted to entrust a third party with this task.[84] One characteristic element of German registered shares is that the shareholders are known to the corporation because the corporation is obligated upon application to enter a transfer of shares in the share register,[85] stating the complete name, date of birth, place of residence and, until recently, the occupation[86] of the shareholders. The share register also contains the names, dates of birth and addresses of the shareholder whose shares are represented by interests in a global certificate deposited with CBA.[87] Thus, Germany avoided, in most cases, the distinction between legal ownership and beneficial ownership. This distinction, however, is not unknown in Germany, because under the German Corporation Act it is also permissible to register the depository bank at which a customer maintains a securities account (and not its customer) in the share register as nominee.[88] If nominee registration becomes prevalent in Germany, the German

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legislative history of this change, *see* Seibert, Regierungsentwurf, *supra* note 18, at p. 939; Official Explanation, *supra* note 18, at p. 10.

[84] *See* Huep, *supra* note 18, at p. 1626; Leuering, *supra* note 73, at p. 1746; Meyer-Sparenberg, supra note 8, at p. 1120; Diekmann, *supra* note 18, at p. 1986; Hüffer, *supra* note 26, § 67, annot. 3.

[85] Section 67(3), AktG (added by the Act Concerning Registered Shares, *supra* note 18; registration of transfer was previously covered by § 68(3), AktG; *see infra* note 94). *See* Hüffer, *supra* note 26, § 68, annot. 17.

[86] *See* § 67(1), AktG. Section 67(1), AktG, as modified by the Act Concerning Registered Shares, *supra* note 18, replaces the requirement to enter the occupation of the shareholder in the share register by the requirement to enter the shareholder's date of birth. *See* Huep, *supra* note 18, at p. 1626. Section 67(1), as modified, also requires the registration of the number of shares (or the unit numbers of the shares, *see supra* part IV 2 (b)) held by a shareholder. As to the difference between place of residence (*Wohnort*) mentioned in the previous § 67(1), AktG and address (*Adresse*) mentioned in § 67(1), AktG, as modified, *see* Huep, *supra* note 18, at p. 1626. For the legislative history of this change, *see* Seibert, Regierungsentwurf, *supra* note 18, at pp. 939–940; Official Explanation, *supra* note 18, at pp. 10–11.

[87] Registration of the shareholders whose shares are represented by a global certificate is made possible by the legal theory that the interest of a shareholder in the global certificate is that of a pro rata co-owner. *See infra* text accompanying note 152 for further discussion of that theory. The German share register contains an inaccuracy because of shares transferred for which the registration of transfer has not (yet) been applied for (*freier Meldebestand*) or for which the registration of transfer has been applied for but has not been completed (*zugewiesener Meldebestand*). Most shares, of course, are registered in the register in the name of the owner (*Hauptbestand*). *See infra* notes 107 & 108 and accompanying text.

[88] *See* Chudaska, *supra* note 18, at pp. 359, 369; Noack, Namensaktie, *supra* note 18, at p. 1306; Diekmann, *supra* note 18, at p. 1986. Sections 129(3) and 135(7), AktG authorize the registration in the share register of a third party who holds in its possession shares owned by others (*Fremdbesitzer*) as nominee (*Legitimationsaktionär*). Although the nominee has to be designated as such in the share register, the nominee, in accordance with § 67(2), AktG, is deemed to be the exclusive shareholder with respect to the corporation. *See* Diekmann, *supra,* at p. 1987; Noack, Namensaktie, *supra*, at pp. 1306–1307; Huep, *supra* note 18, at p. 1625. It also follows from § 128(1), AktG, as amended by the Act Concerning Registered Shares, *supra* note 18, that a bank may be registered as nominee for its customer. For the legislative history of the changes made in § 128 (1), AktG, *see* Seibert, Regierungsentwurf, *supra* note 18, at p. 942; Official Explanation, *supra* note 18, at pp. 13, 20 & 23. Under German law, the person whose shares are registered in the name of a nominee remains the "owner" of the shares. Therefore, the German nominee has no voting right; it can vote only on the basis of a proxy by the owner. Section 135(7), sentence 1, AktG. The Act Concerning Registered Shares, *supra* note 18, amends § 135(7), sentence 1, without changing its substance insofar as registered shares are concerned. For the legislative history of the changes made in § 135(7) AktG, *see*

share register will lose its information value and will become similar to the U.S. share register. The argument of many German proponents of registered shares, that the share register makes investor relations easier,[89] will no longer be valid.

(b) Registration of Transfers

Under German law, a transferee is not obligated to request registration of the transfer,[90] and such registration is not a prerequisite for a valid transfer of shares.[91] U.S. law does not differ.[92] Under German law, the transferee of shares is owner of the shares or, if the shares are represented by a global certificate, pro rata co-owner of the global certificate, even if he is not registered in the share register.[93] If the registration of the new shareholder is desired, the transferor or the transferee of a registered share must notify the corporation of the transfer and must furnish evidence of the transfer; the corporation then records the transfer in the

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Seibert, Regierungsentwurf, *supra* note 18, at p. 945; Official Explanation, *supra* note 18, at pp. 16, 21 & 23. In contrast, the U.S. nominee as registered holder is empowered by the corporation law to vote the shares registered in its name, but under the rules of the NYSE is obligated to solicit a proxy (in the meaning of a voting instruction) from the beneficial owner (the economic owner). *See infra* text accompanying notes 288-290.

The AktG is based on the assumption that banks (*Kreditinstitute*) or financial services institutions (*Finanzdienstleistungsinstitute*) (*see* § 125(5), AktG) may act as nominees. It must be noted that under §§ 1, 32 of the German Banking Act (*Gesetz über das Kreditwesen*, BGB1. I 1998 p. 2776), as amended, broker-dealers in Germany operate under a banking license. *See* Michael Gruson, 'Banking Regulations and Treatment of Foreign Banks in Germany', in: Michael Gruson & Ralph Reisner (eds.), *Regulation of Foreign Banks – United States and International* (3d ed. 2000), vol. 2, § 8.03, pp. 355–358.

[89] *See*, *e.g.*, Ulrich Kastner, 'Das Integrierte Aktienbuch: Unternehmen kommunizieren erfolgreich mit ihren Anlegern', in: Rosen & Seifert, Namensaktie, *supra* note 18, at pp. 348–349; Rüdiger von Rosen & Stefan Gebauer, 'Namensaktien und Investor Relations', in: Rosen & Seifert, Namensaktie, *supra,* 127, at pp. 134–139; Brammer, *supra* note 18, at pp. 401, 413–414; Donald, *supra* note 18, at pp. 22-26; Blitz, *supra* note 18, at p. 375. The Official Comment to the Act Concerning Registered Shares, *supra* note 18, at p. 13 (and Seibert, Regierungsentwurf, *supra* note 18, at p. 942), states: "It remains to be seen how [the registration in the name of banks as nominees] will develop".

[90] In spite of the language of the recently deleted § 68(3), sentence 1, AktG, which seemed to *require* the transferee to request registration of transfer, it was the general view of legal scholars that the transferee was not *obligated* to request registration. *See* Huep, *supra* note 18, at p. 1629; Leuering, *supra* note 73, at p. 1746. Section 68(3), AktG has been deleted by the Act Concerning Registered Shares, *see supra* note 18. This means that a transferee is no longer stated to be obligated to cause the transfer to be registered.

[91] *See* Hüffer, *supra* note 26, § 68, annot. 3; Huep, *supra* note 18, at p. 1629; Diekmann, *supra* note 18, at p. 1987; Leuering, *supra* note 73, at p. 1747. *S*ee *infra* part VI 1 for a discussion of transfers.

[92] Under U.S. law the transferee of shares is not required to request registration of transfer. *See, e.g.*, § 201, Delaware General Corporation Law (Delaware Code Annotated, Title 8 (vol. 4, 1991)), in connection with § 8-401, UCC. A registration of transfer is not a condition to a valid transfer. *See infra* text accompanying note 179.

[93] *See* Wiesner, *supra* note 34, § 14, annot. 40; Diekmann, *supra* note 18, at p. 1987; Hüffer, *supra* note 26, § 67, annot. 7.

register.[94] In relation to the corporation, only persons who have been registered as shareholders in the share register are deemed to be shareholders (irrebuttable presumption).[95] Consequently, only registered persons are entitled to exercise the membership rights of a shareholder.[96] Equally, under U.S. law, only the registered holder can exercise the rights of a shareholder.[97] German law and U.S. law do not differ with respect to this issue. They differ, however, on the scope of shareholder rights. The right to vote at a shareholders meeting depends on registration in Germany as well as in the United States. However, if dividend rights or subscription rights of a German share are evidenced by a coupon, the owner of the coupon or the pro rata co-owner of the global coupon incorporated in a global share certificate, not the registered shareholder, is entitled to receive dividends or subscription rights. Ownership or co-ownership of the coupons does not depend on registration in the share register.[98] In the United States, only the registered

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[94] *See* Leuering, *supra* note 73, at pp. 1746–1747; Lutter, *supra* note 77, vol. 1, § 68, annots. 53 *et seq*. The Act Concerning Registered Shares, *supra* note 18, covers the registration of transfer (previously covered by § 68(3), AktG which has been deleted; *see supra* note 90), in a new § 67(3), AktG, which provides: "If a registered share is transferred to another person, the reregistration (*Umschreibung*) in the share register will take place upon notification (*Mitteilung*) and proof (*Nachweis*)". Thus, the requirement of the prior § 68 (3), AktG that the share certificate be presented has been deleted. *See* Huep, *supra* note 18, at p. 1629. For the legislative history of this change, *see* Seibert, Regierungsentwurf, *supra* note 18, at p. 940; Official Explanation, *supra* note 18, at p. 11. For a discussion of the presentation requirement under prior law in the case of a global certificate, *see infra* notes 159 & 160. Seller and purchaser cause the registration of transfer to be arranged by their respective depository banks at which they maintain their securities accounts. *See* Diekmann, *supra* note 18, at p. 1987 n.26. The electronic transmission of the data concerning the transfer to CBA constitutes the notification triggering registration. Official Explanation, *supra* note 18, at p. 11; Seibert, Regierungsentwurf, *supra* note 18, at p. 940.

[95] Section 67(2), AktG. *See* Hüffer, *supra* note 26, § 67, annot. 9; Berhard Bungeroth & Wolfgang Hefermehl in: Ernst Geßler & Wolfgang Hefermehl, *Aktiengesetz* (1984), vol. 1, § 67, annot. 23; Lutter, *supra* note 77, vol. 1, § 67, annot. 19; Huep, *supra* note 18, at p. 1625; Diekmann, *supra* note 18, at p. 1987; Noack, Neues Recht, *supra* note 18, at p. 1995; Leuering, *supra* note 73, at p. 1748. A minority of authors takes the position that § 67(2), AktG expresses a legal fiction as to the effect of registration. *See* Adolf Baumbach & Alfred Hueck, *Kommentar zum Aktiengesetz* (13th ed. 1968), § 67, annot. 10; Sylvester Wilhelmi in: Freiherr R. v. Godin & Hans Wilhelmi, *Kommentar zum Aktiengesetz* (4th ed. 1971), § 67, annots. 6–7.

[96] Prevailing opinion: Hüffer, *supra* note 26, § 67, annot. 10; Diekmann, *supra* note 18, at p. 1987; Decision of the Appellate Court of Celle (*Oberlandesgericht Celle*) of Sept. 7, 1983, (1984) *Die Aktiengesellschaft* 266, at p. 268.

[97] Section 8-207(a), UCC states that, before due presentment for registration of transfer, the issuer is entitled to treat the registered owner of a security as the person exclusively entitled to exercise all the rights and powers of an owner.

[98] *See* the discussion of coupons, *infra* part VII 1. *See also* Diekmann, *supra* note 18, at p. 1987. If dividend or subscription rights pertaining to a German share are not evidenced by a coupon, they are rights of the registered holder. *Id*. Another right to which only the registered owner is entitled, is the right to receive liquidation proceeds. *Id. See* §§ 67(2), 271(1), AktG. The same is true under U.S. law. *See, e.g.*, § 8-207(a), Delaware Uniform Commercial Code (Delaware Code Annotated, Title 6 (vol. 3, 1999)), in conjunction with § 281(a), Delaware General Corporation Law (Delaware Code Annotated, Title 8 (vol. 4, 1991 & Supp. 1998)).

holder on the record date is entitled to receive dividends.[99] Defects concerning the transfer itself are not cured by the registration under German or U.S. law.[100]

In Germany, data regarding the shareholders necessary to establish and administer the share register are transmitted to CBA on behalf of the seller and the purchaser of shares by the banks at which the seller and the purchaser keep their securities accounts.[101] The Act Concerning Registered Shares[102] establishes an obligation of such banks to perform these functions by requiring the banks participating in a share transfer or keeping shares on deposit for customers to report to the corporation all data required for the accurate maintenance of the share register.[103] Thus, these banks will be the source of the data for the maintenance of the share register. The data includes the shareholder's name, his place of residence and his date of birth, as required by the German Corporation Act.[104] Further information, for example, may be the nationality of the shareholder[105] or whether the shares are held by the depository bank as own holdings or for a third party. The collection and delivery of those data are considered to be an administrative duty inherent in the functions of the depository bank maintaining securities accounts for its customers. The data will then be compiled into data files by CBA and transmitted to the registrar for inclusion into the share register of the corporation.[106] The

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[99] *See infra* note 250 and accompanying text.

[100] *See* Hüffer, *supra* note 26, § 67, annot. 7. If a person has wrongfully been registered as a shareholder in the share register, the corporation may cancel the registration only if it has previously notified the person concerned of the intended cancellation and has granted the person a reasonable period of time to object and the person has not objected. *See* § 67(5), AktG (renumbered by the Act Concerning Registered Shares, *supra* note 18; previously numbered § 67(3)). For U.S. law on wrongful registration of transfer, *see* § 8-404, UCC, and Ronald A. Anderson, *Uniform Commercial Code* (3d ed. 1996), vol. 8, §§ 8-404:1 – 8-404:10.

[101] See Diekmann, *supra* note 18, at p. 1987. These are the so-called *Verwahrer* (custodians) under § 1(2), Depository Act, *supra* note 46. The banks at which a seller or purchaser of shares keeps its security deposits are sometimes referred to herein as "depository banks".

[102] *See supra* note 18.

[103] Section 67(4), AktG, added by the Act Concerning Registered Shares, *supra* note 18. This obligation covers information on transfers of shares, inheritance, changes of address or name of the shareholder. The Act is based on the concept of a complete share register. *See* Seibert, Regierungsentwurf, *supra* note 18, at p. 940; Official Explanation, *supra* note 18, at p. 11. The transferee may wish not to be registered, in which case the share remains unregistered in the *freier Meldebestand*, *see supra* note 87 and *infra* note 107; or the transferee and the bank at which he holds his securities on deposit may agree that the bank will be registered as nominee for the transferee, in which case the bank will report to the corporation its name as nominee, *see supra* note 88. *See* Seibert, Regierungsentwurf, *supra* note 18, at p. 940; Official Explanation, *supra* note 18, at p. 11.

[104] *See supra* part V 1(a). The Act Concerning Registered Shares, *supra* note 18, deletes the information about the profession required by prior law but adds the date of birth of the shareholder. *See supra* note 86.

[105] This is, for instance, relevant for Deutsche Lufthansa AG, because in the case of that company the nationality of the shareholders is important for the transfer restriction on the shares. *See supra* note 35.

[106] No. 46(3), Terms and Conditions of Deutsche Börse Clearing AG (*Allgemeine Geschäftsbedingungen der Deutsche Börse Clearing AG*) of Jan. 1, 1999 [*herein* Terms and Conditions of CBA]. These Terms and Conditions

processing of the data is performed within Deutsche Börse AG by its data processing subsidiary, Deutsche Börse Systems AG ("DBS"). The registration is confirmed by the registrar to the purchaser's depository bank via CBA.

The data files for the share register are segregated by CBA into shares registered in the name of a registered holder (principal holdings, *Hauptbestand*), shares not registered in the name of a registered holder (unallocated positions, *freier Meldebestand*), and shares in process of being registered in the name of a transferee (allocated positions, *zugewiesener Meldebestand*).[107] The unallocated position consists of shares purchased and sold, where the transferee has not (yet) applied for a registration of transfer in the share register.[108]

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are still in force in spite of the merger between Cedel International and Deutsche Börse Clearing AG, *see supra* note 56. *See* Chudaska, *supra* note 18, at p. 359, for a description of the registration procedure.

[107] If a registered share is sold, the bank at which the seller maintains his security account causes the transfer in the CASCADE-RS system (the software system of CBA, *see infra* text accompanying note 145) of the share from the *Hauptbestand* (shares that are registered in the name of a registered holder) to the *freie Meldestand* (shares that are not registered in the name of a registered holder). If the bank at which the purchaser maintains his security account applies for registration of the transfer in the share register, the share will be allocated by the CASCADE-RS system to the purchaser, transferred to the *zugewiesener Meldebestand* (shares in process of being registered in the name of a transferee), and registration in the share register will be applied for electronically. Upon registration of the transfer, the registrar will electronically confirm the registration to CBA, which will then transfer in the CASCADE-RS system the share to the *Hauptbestand*. *See* Blitz, *supra* note 18, at pp. 377–378. It is important to note that the share may remain in the *freie Meldebestand* if the purchaser does not wish to become shareholder of record (*see supra* note 103) and does not wish his bank to register as nominee (*see supra* notes 88 & 103 and accompanying text). Not only the registered shareholders but also the unregistered transferee become pro rata co-owners of the global certificate and the global coupon attached to that certificate (*see infra* part VI 1) and, thus, even the unregistered shareholder is entitled to dividend payments (*see infra* part VII 2(a)), but he is not shareholder in relation to the corporation and cannot exercise his shareholder rights; essentially he cannot vote in the shareholders meeting. *See supra* text accompanying note 98, and *infra* part VIII. Because in Germany, as opposed to the United States, a nonregistered shareholder of a share having coupons attached is entitled to receive dividends, the incentive to register is smaller in Germany than it is in the United States and the number of unregistered shares in the *freie Meldebestand* is relatively high.

[108] *See* Noack, Neues Recht, *supra* note 18, at p. 1996. *See* No. 52(a) & (b), Terms and Conditions of CBA, *supra* note 106 (relating to restricted registered shares).

(c) Administration of the Share Register

In the case of Global Shares, the global share register that is required by German law for registered shares and a German subregister for the shares held by CBA are kept in Germany[109] by the corporation or an entrusted third party.[110] There are several options for the administration of the share register: The corporation itself could perform this function, provided the necessary computer systems have been installed. For instance, Allianz Versicherungs AG and Münchner Rückversicherungs AG maintain their own share register using software from CSC Ploenzke. Alternatively, another company may carry out the administration of the share register although the legal responsibility for such administration remains with the corporation.[111] The service of administering a share register for the registrar is offered by CBA/DBS (which currently acts on behalf of, *e.g.*, Lufthansa). ADEUS-Aktienregister-Service GmbH, a subsidiary of Dresdner Bank AG, is the registrar for Deutsche Telekom AG. In the case of DaimlerChrysler, a subsidiary of Deutsche Bank AG, registrar services GmbH, is the global registrar and German subregistrar; however, CBA provides certain computer services, for example, it processes the relevant daily data files for the shares traded and constitutes the link between the German and the U.S. subregistrars.

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[109] This is the case with the DaimlerChrysler Global Share register. There is a question whether the Global Share register could be kept in the United States. The AktG does not contain any provision which determines the form or specifies the location of the register (*see* Lutter, *supra* note 77, vol. 1, § 67, annot. 5). The relevant provisions for the maintenance of the share register are §§ 238 *et seq.*, German Commercial Code, *supra* note 4, as amended (*see* Hüffer, *supra* note 26, § 67, annot. 2). Sections 238 *et seq.* do not specify the place where the register has to be kept. Therefore, the view has been expressed that the register can be kept abroad (*see* Klaus Hopt & Adolf Baumbach, *Handelsgesetzbuch* (30th ed. 2000), § 239, annot. 4, and Winfried Morck in: Ingo Koller, Wulf-Henning Roth & Winfried Morck, *Handelsgesetzbuch Kommentar* (3d ed. 2000), § 239, annot. 4). However, there are also good arguments against this view, because the management board *(Vorstand)* of a corporation is obliged to keep the register in the manner required by law. This obligation certainly does not prevent the board from delegating the maintenance of the share register to another company, as DaimlerChrysler did to Deutsche Bank AG. However, the board cannot delegate its legal responsibility. The delegation can only be made under the condition that the board retains the right of comprehensive supervision and has access to the register at all times. *See* Diekmann, *supra* note 18, at p. 1985; Leuering, *supra* note 73, at p. 1746. The performance by the board of its obligations may be endangered if the register is kept in a foreign country. The register must be available for inspection by the shareholders at the seat of the corporation. *See* Diekmann, *supra* note 18, at p. 1985. The issue of the location of the register must be distinguished from the question of the place where the registration takes place. The registration itself can take place abroad, *e.g.*, in the case of the DaimlerChrysler Global Share, by The Bank of New York acting as the U.S. Registrar.

[110] In a Global Share program, the corporation issuing the shares must enter into agreements with the registrar (a registrar is a trust company or bank charged with the responsibility of keeping a record of the owners of a corporation's securities and preventing the issuance of more shares than authorized by the corporation) and transfer agent (a transfer agent keeps a record of the name of each registered shareowner, his address, the number of shares owned, and sees to it that certificates presented to its office for transfer are properly cancelled and new certificates issued in the name of the transferee) for the United States ("U.S. Registrar") and Germany ("German Registrar"). This could be done by a separate agreement with each registrar, or, as it was done in the DaimlerChrysler transaction, by a single agreement with the German Registrar (in the DaimlerChrysler transaction, Deutsche Bank AG is also acting as Global Registrar ("Global Registrar") and a sub-agreement between the German (and also Global) Registrar and the U.S. Registrar (The Bank of New York in the DaimlerChrysler transaction). From the

Certain categories may be used for the analysis and presentation of the information in the share register.[112] A standard analysis may include a categorization of shareholders in domestic/foreign persons, natural persons/legal entities and a categorization of shares held by a depository bank for its own account or for the account of a third party. The corporation is also able to develop, together with CBA, additional categories beyond this standard analysis, if additional criteria are necessary, for example, for the purpose of investor relations. As stated above, the German Corporation Act only requires information pertaining to the name, place of residence and date of birth of the shareholders to be included in the share register.[113]

(d) Shareholders' Rights to Inspect Share Register

In one respect, the German law concerning share registers is developing in a direction that differs from U.S. law. The German Corporation Act, until its amendments by the Act Concerning Registered Shares, provided, similarly to the corporation laws of Delaware and New York,[114] that each shareholder may inspect the share register without having to demonstrate a particular reason.[115] The Act Concerning Registered Shares gives precedence to secrecy considerations and deletes the shareholder's inspection right. The right of a shareholder is limited to the right to inquire about the data in the share register relating to him personally.[116] Of

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corporation's point of view, the one-agreement approach is highly advantageous because the German Registrar will be responsible for the functioning of the system as a whole, whereas in the two-agreement approach great care is required to provide for the proper working together of both agreements. For the NYSE requirements regarding transfer agents and registrars, *see* Paragraph 6, NYSE Manual, *supra* note 20, and Rule 496, NYSE Guide ¶ 2496, *supra* note 70.

[111] *See supra* note 84 and accompanying text.

[112] *See* Günter Bredbeck, Klaus Schmidt & Michael Sigl, 'Das elektronische Aktienregister (Musteraktienbuch)', in: Rosen & Seifert, Namensaktie, *supra* note 18, 315, at p. 319 (customizing the register).

[113] Section 67(1), AktG, as amended by the Act Concerning Registered Shares, *supra* note 18; *see supra* part V 1(a) and text accompanying notes 86 & 104.

[114] *See* §§ 219, 220 Delaware General Corporation Law (Delaware Code Annotated, Title 8 (vol. 4, 1991 & Supp. 1998)); §§ 607, 624, New York Business Corporation Law (McKinney 1986 & Supp. 2000); § 16.02, Model Business Corporation Act Annotated (3d ed. loose leaf (Supp. 1998/99)). *See* Michael Wunderlich & Alexander Labermeier, 'Rechtliche Behandlung, Übertragung und Börsenhandel von Namensaktien in den USA', in: Rosen & Seifert, Namensaktie, *supra* note 18, 143, at p. 159.

[115] Section 67(5), AktG, prior to the Act Concerning Registered Shares, *supra* note 18.

[116] Section 67(6), AktG, as amended by the Act Concerning Registered Shares, *supra* note 18 (which replaces the prior § 67(5), AktG). For the legislative history of this change, *see* Seibert, Regierungsentwurf, *supra* note 18, at p. 941; Official Explanation, *supra* note 18, at pp. 11, 20 & 23. *See* the discussion in Huep, *supra* note 18, at pp. 1626–1629. The Federal Council of the German Parliament (*Bundesrat*) proposed, among other amendments to the Act Concerning Registered Shares, to allow shareholders to request information about shareholders owning more than 5% of a corporation's shares. The Government, however, has rejected the proposed amendment. *See* Official Explanation, *supra* note 18, at pp. 20, 23.

course, the inspection of a U.S. share register containing only Cede & Co. and possibly some broker-dealers as shareholders is not of great interest.

2. The Share Register in the United States

For the DaimlerChrysler shares held by DTC in the United States in the form of global certificates and the physical share certificates issued in the United States, a sub-share register is kept in the United States by The Bank of New York, acting as U.S. Registrar. The U.S. Registrar coordinates its data with DTC. Daily adjustments via an electronic link with the global share register assure that the shares held by CBA and DTC and the physical share certificates issued in the United States in the aggregate reflect the total share capital of DaimlerChrysler at any time. Through an electronic link with the global share register, DaimlerChrysler has on-time access to the data concerning its registered shareholders.

In contrast to the German share register, the U.S. share register does not show the names of the economic owners (beneficial owners) of the shares. If shares of a corporation are represented by global certificates deposited with DTC, the share register shows as shareholder for the shares represented by those certificates only DTC's nominee "Cede & Co." In the case of physical share certificates that have been issued, the share register in most cases does not show the owner of such certificates because of the widespread practice to register shares in "street name", *i.e.*, the name of the nominee of the broker of the owner.[117] The share register shows the nominees of those broker-dealers who hold shares in street names for beneficial owners of physical certificates in the indirect holding system. Only those holders of physical certificates who hold such certificates in the direct holding system are directly named as shareholders in the

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In this context it is relevant to note that owners of certain large blocks of shares must make a public disclosure of their holding. The Securities Trading Act (*Gesetz über den Wertpapierhandel*, BGB1. I 1998 p. 2708), as amended, requires each investor whose investment in a corporation listed on a German stock exchange reaches or passes any of the thresholds of 5, 10, 25, 50 or 75% of the voting rights of such corporation or who reduced his investment in such corporation below any of these thresholds to notify such corporation and the Federal Supervisory Authority for Securities Trading (*Bundesaufsichtsamt für das Wertpapierwesen*) without delay, at the latest within seven calendar days of such event. Sections 21-30, Securities Trading Act. Sections 22 & 23, Securities Trading Act contain detailed attribution and computation rules. There is an unsolved issue whether it is the purpose of the notification obligation under the Securities Trading Act to inform the market (*see* Hüffer, AktG, *supra* note 26, appendix to § 22, annot. 1 to § 21 WpHG) or only to inform the corporation (*see* Uwe H. Schneider in: Heinz Dieter Assmann & Uwe H. Schneider (eds), *Wertpapierhandelsgesetz* (2d ed. 1999), § 21, annot. 94). *Compare* SEC Rule 13d-1 (17 C.F.R. § 240.13d-1 (2000)) requiring the beneficial owner of more than 5% of the securities registered pursuant to § 12, Securities Exchange Act of 1934, *supra* note 3, to file with the SEC a form on Schedule 13D).

[117] This system of holding shares in street names simplifies the transfer of the shares; they need not be indorsed by the beneficial owner but are indorsed by the nominee who typically is a partnership formed by employees of the broker. *See* Egon Guttman, *Modern Securities Transfers* (3d ed. 1987), at p. 4-16, ¶ 4.04(1)(d)(i). In the United States, nominee partnerships rather than the broker-dealers or banks themselves are registered as shareholders because the transfer of shares by a corporate entity, such as a bank or broker-dealer, requires the presentation to the transfer agent of a resolution of the board of directors of the transferor authorizing the transfer. *See* Guttman, *supra*, at pp. 13-35, ¶ 13.11.

share register.[118] The share register need not be updated if a share that is represented by a global certificate held by DTC is transferred by a beneficial owner to another beneficial owner who holds his shares through another DTC participant and who does not request the issuance of a physical certificate.

The names of the beneficial owners must be ascertained from the records of the DTC participants. U.S. law contains elaborate and somewhat complex rules relating to this information right. Upon request of a corporation, a registered clearing agency, such as DTC, must promptly furnish a list of those participants in the clearing agency on whose behalf the clearing agency holds the corporation's shares and of the participants' respective positions in such shares.[119] In other words, DTC must furnish to DaimlerChrysler the names of the brokers and banks that hold DaimlerChrysler shares in their DTC accounts and must also notify DaimlerChrysler of the share positions of such brokers and banks. This rule "is not designed to reveal an issuer's beneficial securities owners or to permit issuers to communicate directly with their beneficial security owners".[120]

In order to facilitate communications between a corporation and beneficial owners of its securities held of record in street names or in the name of Cede & Co., the SEC imposes certain obligations on the corporation and broker-dealers and banks.[121] If the corporation intends to solicit proxies for a shareholders meeting, it must inquire of all broker-dealers, banks or voting trustees, or other nominees, holding shares of record, as to the number of copies of the proxies and other soliciting material and, in the case of the annual meeting, the number of annual reports, that is necessary in order to enable such record holders to supply such material to the beneficial owners for whom they hold shares.[122] This inquiry must be made 20 business days prior to the record date for the shareholders meeting.[123] The broker-dealers must respond to this inquiry

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[118] *See infra* part VI 2(b) & (c). The DaimlerChrysler U.S. share register also shows the nominee of The Bank of New York as record owner of the shares represented by a global certificate held by The Bank of New York for brokers that are not DTC participants. *See infra* part VI 4 (b).

[119] SEC Rule 17Ad-8(b) under the Securities Exchange Act of 1934 (17 C.F.R. § 240.17Ad-8(b) (2000)). The regulation calls the information that is required to be submitted by the clearing agency, the "securities position listing". SEC Rule 17Ad-8(a) under the Securities Exchange Act of 1934 (17 C.F.R. § 240.17 Ad-8(a) (2000)).

[120] SEC Release No. 16443 (Dec. 20, 1979), 19 SEC Docket 3, 43 Fed. Reg. 8269, 1979 SEC LEXIS 69, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82.390, *sub* B.

[121] *See* SEC Release No. 34–21901 (Mar. 28, 1985), 32 SEC Docket 1038, 50 Fed. Reg. 13,612, 1985 SEC LEXIS 1854, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,756; SEC Release 34–22533 (Oct. 15, 1985), 34 SEC Docket 384, 50 Fed. Reg. 13612, 1985 SEC LEXIS 530, [1985–1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,930.

[122] SEC Rule 14a-13(a)(1) under the Securities Exchange Act of 1934 (17 C.F.R. § 240, 14a-13(a)(1) (2000)). This rule applies also in the case where the shares are held of record by a nominee of a clearing agency, such as Cede & Co., for DTC. *See* note 1 to SEC Rule 14a-13(a).

[123] SEC Rule 14a-13(a)(3) under the Securities Exchange Act of 1934 (17 C.F.R. § 240.14a-13(a)(3) (2000)).

within seven business days.[124] The corporation is obligated to supply the broker-dealers in a timely manner with the required quantities of proxy materials and annual reports to enable the broker-dealers to send, at the expense of the corporation, one copy of the materials to each beneficial owner.[125] Within five business days of receiving shareholders meeting material from the corporation, the broker-dealer must send the material to the beneficial owners.[126] In the alternative, if requested by the corporation, the broker-dealers must send to the corporation a list of beneficial owners setting forth names, addresses and securities positions of those beneficial owners who have not objected to the disclosure of their identity (nonobjecting beneficial owners — "NOBOs").[127] This enables the corporation to send annual reports and interim reports (but not proxy material or payment of dividends) directly to nonobjecting beneficial owners.[128] If a bank or an employee benefit plan is the shareholder of record, somewhat different rules apply.[129]

The rather complex U.S. rules demonstrate the advantage of a share register that lists the beneficial owners. The state corporation laws and the UCC are based on the concept of the shareholder of record, whereas the U.S. Congress and the SEC are aware that the true owners of a corporation are the beneficial shareholders.[130] The so-called Proxy Rules of the SEC, summarized above, try to overcome this split of legal and beneficial ownership by using the broker-dealers and banks which have the necessary information about their customer-beneficial owners to facilitate communication with the beneficial owners, in particular in connection with

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[124] SEC Rule 14b-1(b)(1) under the Securities Exchange Act of 1934 (17 C.F.R. § 240.14b-1(b)(1) (2000)).

[125] SEC Rule 14a-13(a)(4) under the Securities Exchange Act of 1934 (17 C.F.R. § 240.14a-13(a)(4) (2000)).

[126] SEC Rule 14b-1(b)(2) under the Securities Exchange Act of 1934 (17 C.F.R. § 240.14b-1(b)(2) (2000)).

[127] SEC Rule 14b-1(b)(3) under the Securities Exchange Act of 1934 (17 C.F.R. § 240.14b-1(b)(3) (2000)). There is no limit on the number of times during a year a corporation can request from brokers a list of NOBOs. SEC Release No. 34-21901, *supra* note 121, *sub* II, III B. A request must, however, be directed to all brokers who have customers who are beneficial owners of the corporation's securities. SEC Rule 14a-13(b)(1) under the Securities Exchange Act of 1934 (17 C.F.R. § 240.14a-13(b)(1) (2000)). *See* SEC Release No. 34–21901, *sub* III A. One of the principal objections of broker-dealers to a rule requiring them to furnish the names and securities positions of their customers was the potential of abuse of such information. To meet this objection, SEC Rule 14a-13(b)(4) under the Securities Exchange Act of 1934 (17 C.F.R. § 240.14a-13(b)(4) (2000)) specifically provides that corporations shall use the information furnished "exclusively for purposes of corporate communications". *See* SEC Release No. 34–22533, *supra* note 121, *sub* IV B 3; *see also* Bloomenthal, *supra* note 11, at p. 797.

[128] SEC Rule 14a-13(b)(4) under the Securities Exchange Act of 1934 (17 C.F.R. § 240.14a-13(b)(4) (2000)). *See* Bloomenthal, *supra* note 11, at pp. 794-798; Guttman, *supra* note 117, at pp. 2-1–2-3, n.1.

[129] SEC Rule 14b-2 under the Securities Exchange Act of 1934 (17 C.F.R. § 240.14b-2 (2000) (banks)); SEC Rules 14b-1(c) & 14b-2(c) under the Securities Exchange Act of 1934 (17 C.F.R §§ 240.14b-1(c) & 240.14b-2(c) (2000) (employee benefit plans)). *See* Bloomenthal, *supra* note 11, at p. 797.

[130] *See* SEC Rule 14b-2(a)(2) under the Securities Exchange Act of 1934 (17 C.F.R. § 240.14b-2(a)(2) (2000)) defining beneficial owner as including "any person who has or shares, pursuant to an instrument, agreement, or otherwise, the power to vote, or to direct the voting of a security". *See also* SEC Rules 13d-3 & 16a-1(a) under the Securities Exchange Act of 1934 (17 C.F.R. § 240.13d-3 & § 240.16a-1(a) (2000)).

proxy solicitations.[131] The system seems to work, especially because it is facilitated through electronic communication and through third-party service providers.[132] The U.S. rules are based on the SEC's belief "that an intermediary is necessary to the effective implementation of the shareholders communication system",[133] and the rules encourage, but do not specifically require, the use of an intermediary.[134]

3. Global Share Register

In the case of DaimlerChrysler, the coordination of the two sub-share registers (or "operating share registers") in the global share register is accomplished by Deutsche Bank as Global Registrar. It would also have been possible to transmit the data from The Bank of New York directly to CBA/DBS, which could then fulfill the function of a Global Registrar on the basis of the data received from the U.S. Registrar and its own data. Currently, there is no precedent for that model. To accomplish that model, it would be necessary to establish a link between the U.S. Registrar and CBA/DBS, but at present such a link only exists between CBA/DBS and DTC, and not with the U.S. banks eligible to be U.S. Registrars.

VI. Trading in Shares Between Germany and the United States

1. Transfer of Registered Shares in Germany

Registered shares in Germany may be transferred in one of two basic ways. First, registered shares may be transferred by way of an indorsement and transfer of legal ownership by agreement and delivery.[135] The indorsement must be placed on the share certificate itself or

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[131] *See generally* Guttman, *supra* note 117, 2000 Cum. Supp., at pp. 3-4–3-6, n.9; Bloomenthal, *supra* note 11, at pp. 788-789; Donald, *supra* note 18, at pp. 33–35.

[132] *See* Bloomenthal, *supra* note 11, at pp. 788-793 (discussing the role of Independent Election Corporation of America (IECA)).

[133] SEC Release No. 34–22533, *supra* note 121, *sub* IV A 1.

[134] *See* Bloomenthal, *supra* note 11, at p. 794.

[135] Section 68(1), AktG. Section 68(1), sentence 2, AktG, refers to Articles 12, 13 and 16, Bills of Exchange Act (*Wechselgesetz,* RGBl. I 1933, p. 399), as amended, regarding the form of the indorsement and other legal matters. For details, *see* Hans-Michael Giesen, 'Germany', in: Michael Gruson & Stephan Hutter (eds.), *Acquisition of Shares in a Foreign Country* (1993), 187, at pp. 193–195; Hüffer, *supra* note 26, § 68 annots. 2–6. Note that the above text deals only with the transfer of registered shares. As noted above, *see supra* text accompanying notes 20 & 21, the Global Shares issued by a German corporation will have to be registered shares in order to meet the NYSE listing requirements. The Act Concerning Registered Shares, *supra* note 18, amends § 68(1), sentence 1, AktG to

on an attachment to the share certificate and must not contain any condition.[136] Either the indorsee is specified or a blank indorsement is used. A registered share which contains a blank indorsement may be further transferred either by adding a specific indorsement to a named indorsee or by mere transfer of ownership of the share certificate. In the latter case, the registered share resembles a bearer share.[137]

The transfer of legal ownership (*Eigentum*) requires an agreement (which may be oral) between the owner and the purchaser on the transfer of legal ownership. Under German law, this agreement to transfer ownership is distinct from the agreement to sell.[138] The agreement will be performed through delivery by either transfer of actual possession or constructive possession (*Besitzkonstitut*).[139] German law establishes a presumption that the person holding a registered share certificate containing an uninterrupted chain of indorsements (even if an indorsement within the chain or the last indorsement is a blank indorsement) is the legitimate legal owner of such a share.[140]

In addition to transfer by indorsement, agreement and delivery, a certificated registered share can be transferred by means of an assignment of the rights of the share.[141] In

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make it clear that transfer by indorsement is just one way for transferring shares. For the legislative history of this change, *see* Seibert, Regierungsentwurf, *supra* note 18, at p. 941; Official Explanation, *supra* note 18, at p. 12.

Of course, there must be a legal basis (*causa*) for the transfer, *e.g*., a purchase contract. German law distinguishes that agreement from the agreement to transfer ownership. *See infra* note 138 and accompanying text.

[136] Article 12(1), Bills of Exchange Act, *supra* note 135. The charter of the corporation can provide that the transfer of shares may depend on the consent of the corporation. *See* § 68(2), AktG and *supra* note 35. Partial indorsements are prohibited by § 12(2), Bills of Exchange Act.

[137] *See* Giesen, *supra* note 135, at p. 194; Hüffer, *supra* note 26, § 68, annot. 5; Jürgen Than & Martin Hannöver, 'Depotrechtliche Fragen bei Namensaktien', in: von Rosen & Seifert, Namensaktie, *supra* note 18, 279, at pp. 286–287; Brammer, *supra* note 18, at p. 400.

[138] *See*, *e.g.,* §§ 433 (1), sentence 1, 929, German Civil Code, *supra* note 40. The agreement to transfer ownership is called a *Begebungsvertrag*.

[139] *See* Giesen, *supra* note 135, at p. 193; Blitz, *supra* note 18, at p. 373; §§ 930, 868, 688 German Civil Code, *supra* note 40.

[140] Section 68(1), AktG in connection with Article 16(1), Bills of Exchange Act, *supra* note 135. *See* Giesen, *supra* note 135, at p. 194. This presumption may either be rebutted or be supplemented by other proof of transfer of legal ownership if some elements are missing in the chain of indorsements (*e.g*., in case of shares having been transferred due to inheritance or other transfers by operation of law). A *bona fide* purchaser may acquire legal ownership of the share even if the transferor having physical possession of the share is not the legal owner or authorized by the legal owner to transfer the share. This requires an uninterrupted chain of indorsements leading to the good faith purchaser which chain may include blank indorsements. It must not, however, contain any interruptions (*e.g.*, transfers by operation of law) even if those can be proven separately. The acquiror must have acquired the share in good faith and without any gross negligence. Article 16(2), Bills of Exchange Act, *supra* note 135. *See* Giesen, *supra* note 135, at pp. 193–194.

[141] *See* § 398 and § 413, German Civil Code, *supra* note 40; Hüffer, *supra* note 26, § 68 annot. 3.

such a case, the transferee can demand delivery of possession of the share certificate from any person holding such certificate.[142] In the case of an assignment, however, the transferee cannot acquire the share in good faith if the seller is not the legal owner or has not been authorized by the legal owner to transfer ownership.[143]

Because the transfer of a share requires that the purchaser acquires actual or constructive possession of the share he purchased[144] — *i.e.*, in U.S. legal terms, requires some form of "delivery" — a way had to be found to satisfy this legal requirement and at the same time to meet the needs of the market. In 1997, a system called "Central Application for Settlement, Clearing and Depository Expansion — Registered Shares" (CASCADE-RS) was developed to meet these requirements and needs.[145] The system works as follows: CBA acts as the bank for the central deposit of securities[146] and physically holds the share certificate in its possession as a direct bailee for the legal owner (*unmittelbarer Fremdbesitzer*). The depository bank, which maintains an account with CBA and at the same time maintains a securities account for its customer, holds indirect possession of the share certificate as indirect bailee (*mittelbarer Fremdbesitzer*) for the legal owner.[147] The shareholder who is a customer of the depository bank holds indirect possession as legal owner (*mittelbarer Eigenbesitzer*).[148] To settle a transaction for

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[142] Section 952, German Civil Code, *supra* note 40, by analogy. There is a dispute as to whether the transferee has become legal owner of the certificated share by virtue of the assignment itself and can demand delivery on the basis of such ownership (*see* Giesen, *supra* note 135, at p. 193; Hüffer, *supra* note 26, § 68, annot. 3; Lutter, *supra* note 77, vol. 1, § 68, annot. 17) or whether delivery of the share certificate is a necessary element of the transfer by assignment (*see* Decision of the Reichsgericht (former German Supreme Court) of June 6, 1916, in: *Entscheidungen des Reichsgerichts in Zivilsachen*, vol. 88, 290, at p. 292; Decision of the Bundesgerichtshof (German Supreme Court in Civil Matters) of Dec. 12, 1957, *reprinted* in: (1958) *Neue Juristische Wochenschrift* 302, at p. 303). This method of transfer used to be the customary method in Germany for transferring registered shares that were held by banks in individual custody (*Streifbandverwahrung*). *See* Than & Hannöver, *supra* note 137, at p. 283.

[143] *See* Giesen, *supra* note 135, at p. 193; Lutter, *supra* note 77, vol.1, § 68, annot. 17.

[144] *See* §§ 929 *et seq.*, German Civil Code, *supra* note 40; Giesen, *supra* note 135, at p. 193. For a further discussion of delivery, *see infra* part VI 4.

[145] *See* Than & Hannöver, *supra* note 137, at pp. 284–291 for an overview of CASCADE-RS, and Hans-Jürgen Müller-von Pilchau, 'Von der physischen Urkunde zur "virtuellen" Aktie – Die Realisierung der Girosammelverwahrung für Namensaktien in Deutschland', in: Rosen & Seifert, Namensaktie, *supra* note 18, 97, at pp. 97–126 for a historic overview of the delivery practice. *See also* Kastner, *supra* note 89, at pp. 335 *et seq.*; Blitz, *supra* note 18, at pp. 374–375; Chaduska, *supra* note 18, at pp. 356, 358.

[146] Only banks that have been authorized by the authorities of the state of their seat to act as central depositories for securities (*Wertpapiersammelbanken*) are permitted to maintain collective share deposits (*Girosammelverwahrung*). Sections 1(2) & 5, Depository Act, *supra* note 46. Today, CBA is the only *Wertpapiersammelbank.*

[147] *See* Mathias Habersack & Christian Mayer, 'Globalverbriefte Aktien als Gegenstand sachenrechtlicher Verfügungen?', (2000) *Zeitschrift für Wirtschafts- und Bankrecht, Wertpapiermitteilungen* 1678, at pp. 1678–1684. The depository bank is an intermediate bailee (*Zwischenverwahrer*) within the meaning of § 3(2), Depository Act, *supra* note 46.

[148] *See* Than & Hannöver, *supra* note 137, at pp. 284–285. *See*, for an extensive discussion of this issue, Habersack & Mayer, *supra* note 147, at pp. 1679–1681.

the sale and purchase of shares, the banks of the seller and the purchaser simply transfer the data-entry relating to the shareholder on their records and give corresponding instructions to CBA. CBA makes the appropriate entries on its records by debiting the account of the seller's bank and crediting the account of the purchaser's bank.[149] The share certificate itself is not moved in any way. In this respect it does not matter whether the registered shares are evidenced by individual physical certificates deposited with CBA or — as is becoming more customary — are evidenced by a global certificate held by and registered in the name of CBA.[150]

A depository bank that maintains securities accounts for its customers is permitted to keep the securities deposited with it with CBA in global custody in a collective deposit.[151] Under German law, a shareholder is a pro rata co-owner with all other shareholders (*Miteigentümer nach Bruchteilen*) of shares held by CBA in collective deposit. Each shareholder has an undivided fractional ownership interest in the collective deposit.[152] Shares represented by a global certificate held by CBA are held in collective deposit by CBA. A crucial prerequisite for the collective deposit of shares is that the shares be fungible.[153] Registered shares carry individual names and indicate that they were transferred through a legitimizing indorsement. At first glance it therefore appears as if registered shares are non-fungible due to these individualizing features. If, however, registered shares are indorsed in blank (*Blankoindossament*),[154] they have lost their individualizing features and have become fully fungible,[155] and may be held in a collective deposit. A shareholder's co-ownership interests in registered shares indorsed in blank and held in a collective deposit can be transferred by bookkeeping entry.[156] The indorsement in blank of registered shares held in a collective deposit

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[149] *See* Nos. 2 & 8, Terms and Conditions of CBA, *supra* note 106; Blitz, *supra* note 18, at p. 377; Siegfried Kümpel, *Bank- und Kapitalmarktrecht* (2d ed. 2000), annot. 11.179 [*herein* Kümpel, Kapitalmarktrecht].

[150] *See* Than & Hannöver, *supra* note 137, at pp. 284, 288–289 and Blitz, *supra* note 18, at p. 377 for a description of the clearing process. Global certificates are permitted by § 9a, Depository Act, *supra* note 46.

[151] Section 5, Depository Act, *supra* note 46.

[152] Section 6, Depository Act, *supra* note 46; No. 29, Terms and Conditions of CBA, *supra* note 106; Dorothee Einsele, *Wertpapierrecht als Schuldrecht* (1995), at pp. 13, 23–25. This co-ownership is similar to a tenancy in common.

[153] *See* § 5, Depository Act, *supra* note 46. Fungibility is defined in § 91, German Civil Code, *supra* note 40.

[154] *See* Than & Hannöver, *see supra* note 137, at p. 286. *See* § 26(1), FSE Conditions, *supra* note 35 (good delivery of registered shares requires that the last indorsement and only the last indorsement is in blank); No. 46(1), Terms and Conditions of CBA, *supra* note 106 (registered shares of German issuers that are listed on a German exchange can be subject to global custody at CBA if the shares are indorsed in blank).

[155] *See* Siegfried Kümpel, 'Zur Girosammelverwahrung und Registerumschreibung der vinkulierten Namensaktien – Rationalisierung des Depot- und Effektengeschäfts', (1983) *Zeitschrift für Wirtschafts- und Bankrecht, Wertpapiermitteilungen* (Sonderbeilage 8) 3, at p. 4 [*herein* Kümpel, Rationalisierung]; Einsele, *supra* note 152, at p. 23. *See* also Than & Hannöver, *supra* note 137, at p. 286; Brammer, *supra* note 18, at p. 400 (the indorsement in blank transforms for all practical purposes the registered security to a bearer security).

at CBA has an effect similar to the registration of U.S. shares in the name of Cede & Co., the nominee of DTC; in both cases transfers by account entries are possible. The only difference between the U.S. and the German system is that the co-owners of the collective deposit at CBA are considered to be shareholders, and as such will be registered in the share register, whereas in the U.S. system the beneficial owners of the shares registered in the name of Cede & Co. can only be ascertained from the records of the DTC participants.[157]

The indorsement in blank makes further indorsements unnecessary and still permits a *bona fide* acquisition.[158]

The requirement of the German Corporation Act, prior to its amendment by the Act Concerning Registered Shares, that the share certificate had to be presented to the corporation in connection with the request to register the transfer of the share to the purchaser,[159] was satisfied if the certificate was located at CBA which acted in that respect as representative of the corporation.[160]

In legal terms, the transfer of a share that is evidenced by a global certificate indorsed in blank and deposited with CBA requires an agreement between the seller and the purchaser to transfer the seller's co-ownership interest in the global certificate corresponding to the share. The agreement is entered into through the seller's and the purchaser's depository banks. At the same time, the seller instructs CBA, through his depository bank, henceforth to hold possession of the seller's co-ownership interest in the global certificate not for the seller but for the purchaser.[161] Thus, all elements of a valid transfer (indorsement, agreement and delivery) are met.

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[156] *See* No. 46(1), Terms and Conditions of CBA, *supra* note 106 (referring to restricted registered shares; s*ee supra* note 35).

[157] *See supra* part V 1(a) & 2.

[158] *See supra* note 140 and accompanying text; Than & Hannöver, *supra* note 137, at p. 287.

[159] Section 68(3), sentence 2, AktG, which has been replaced by § 67(3), AktG by the Act Concerning Registered Shares, *supra* note 18. *See supra* text accompanying note 94.

[160] *See* Than & Hannöver, *supra* note 137, at pp. 290–291; Kümpel, Rationalisierung, *supra* note 155, at p. 18. Diekmann, *supra* note 18, at p. 1987 and Leuering, *supra* note 73, at p. 1747 argue convincingly that a proper interpretation of § 68(3), AktG, leads to the conclusion that presentation is not required if, in the case of a global share certificate deposited with CBA, CBA completes the transfer by a book entry. The Act Concerning Registered Shares, *supra* note 18, deletes the presentation requirement. *See supra* note 94.

[161] *See* Than & Hannöver, *supra* note 137, at pp. 287, 289–291. *See also* Müller-von Pilchau, *supra* note 145, at p. 108; Kümpel, Kapitalmarktrecht, *supra* note 149, annot. 11.174. If a German bank acting as broker for its customer purchases shares that are held in a collective deposit at CBA, the bank promises that it will obtain for its customer a co-ownership interest in that collective deposit. *See* No. 11, Special Conditions for Securities Transactions *(Sonderbedingungen für Wertpapiergeschäfte)* of Deutsche Bank, Brokerage 24, *Sonderbedingungen für Wertpapiergeschäfte* http://www.brokerage24.de/antrag/agb_sonderbedingungen_wp_gesch.html> (last visited

2. Transfer of Registered Shares in the United States

(a) General

The transfer of shares under the laws of most states of the United States is governed by Article 8 of the UCC. Article 8, UCC is based on the concept that a person may acquire securities in one of two ways: (i) by delivery or (ii) by establishing a relationship that Article 8, UCC calls a *security entitlement* with a securities intermediary,[162] *i.e.*, a broker. Article 8, UCC describes the acquisition in the second case in terms of a person acquiring a security entitlement to the security.[163] Although a security entitlement is a means of holding the underlying security, a person who has a security entitlement does not have any direct claim to a specific asset in the possession of the securities intermediary.[164] Article 8, UCC calls the acquisition of a security by delivery an acquisition in the *direct holding system*, and the acquisition of securities through the acquisition of a security entitlement to a security an acquisition in the *indirect holding system*.[165] In either case, Article 8, UCC contemplates a consensual transaction between two parties for the sale of shares.[166]

(b) Transfer in the Direct Holding System

The performance of a contract for the sale of a security in the direct holding system requires transfer of the security sold, and this transfer is performed by delivery of the security.[167] The delivery of a certificated security to a purchaser can be accomplished in several ways. First, the purchaser may acquire possession of the security certificate.[168] Second, delivery may occur when a person (other than a securities intermediary) either acquires possession of the security certificate on behalf of the purchaser or, having previously acquired possession of the

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Nov. 5, 2000). The Terms and Conditions for doing business are identical for all German banks. *See* Kümpel, Kapitalmarktrecht, *supra,*annot. 10.22.

[162] Section 8-104(a), UCC and § 8-104, UCC, Official Comment 1.

[163] Section 8-104(a)(2), UCC.

[164] Section 8-104, UCC, Official Comment 2.

[165] Section 8-104, UCC, Official Comment 1.

[166] *See* Michael Gruson & Stephan Hutter, 'United States of America', in: Michael Gruson & Stephan Hutter (eds.), *Acquisition of Shares in a Foreign Country* (1993), 423, at p. 437. As to the general inapplicability of the Statute of Frauds to such agreement, *see* § 8-113, UCC.

[167] Section 8-301, UCC. *See also* § 8-304(c), UCC.

[168] *See* § 8-301(a)(1), UCC.

certificate, acknowledges that it holds the certificate for the purchaser.[169] Third, delivery may occur when a securities intermediary who is acting on behalf of the purchaser acquires possession of the security certificate, if the certificate is in registered form and has been specially indorsed to the purchaser by an effective indorsement.[170] Section 8-301, UCC contains the general rule that a purchaser can take delivery through another person who actually acts on behalf of the purchaser, but this rule does not apply to the acquisition of possession of a security by a securities intermediary, because a person who holds a security through a securities account acquires a security entitlement, rather than a direct interest in the security.[171]

An indorsement[172] of the certificate representing a registered certificated security is not required for a valid transfer, and, further, an indorsement does not constitute a transfer until delivery is made of the certificate on which such indorsement appears.[173] As between the parties to a sales agreement, the transfer of a registered security is complete upon delivery; however, a transferee cannot become a protected purchaser (*i.e.*, a *bona fide* purchaser[174]) until the seller indorses the certificate.[175] A proper indorsement is one of the prerequisites for transfer, which a purchaser of a certificated security has a right to obtain.[176] Thus, for practical purposes, share transfers in the direct holding system practically always include an indorsement.

No provision of the UCC requires that an indorsement be printed on the reverse of a share certificate. In fact, in the United States it is customary not to indorse a share certificate

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[169] *See* § 8-301(a)(2), UCC. For the definition of *securities intermediary*, *see infra* note 181.

[170] *See* § 8-301(a)(3), UCC. This alternative describes a rather unusual case, because securities delivered to securities intermediaries are usually not specially indorsed to the purchaser.

[171] *See* § 8-301, UCC, Official Comment 2. *See also* § 8-501, UCC. The customer of a securities intermediary can be a direct holder only if the security certificate is registered in the name of or specially indorsed to the customer, and has not been indorsed by the customer to the securities intermediary or in blank. Sections 8-501(d), 8-301(a)(3), UCC, § 8-501, Official Comment 4. For definition of *securities account*, *see infra* note 182.

[172] Section 8-102(11), UCC, defines *indorsement* as a signature that, alone or accompanied by other words, is made on a security certificate in registered form or on a separate document for the purpose of assigning or transferring the security or granting a power to assign or transfer it.

[173] Section 8-304(c), UCC.

[174] The 1994 revisions to Article 8 of the Uniform Commercial Code replaced the term "*bona fide* purchaser" in § 8-303 with *protected purchaser*. Pursuant to § 8-303(a), UCC, a *protected purchaser* is a purchaser who (1) gives value, (2) without notice of any adverse claim to the security, and (3) obtains control of the security. *See* § 8-102(a)(1), UCC for the definition of *adverse claim* and § 8-105, UCC for the definition of *notice of adverse claim*.

[175] *See* § 8-304(d), UCC and § 8-304, UCC, Official Comment 4. As to the cut-off of issuer's defenses, *see* § 8-202, UCC.

[176] *See* § 8-307, UCC and § 8-304, UCC, Official Comment 4. The purchaser can insist on an indorsement. The transferee's right to compel an indorsement where a securities certificate has been delivered with intent to transfer is recognized in the case law. *See* Coats v. Guaranty Bank and Trust Co., 170 La. 871, 129 So. 513 (1930).

on the certificate itself (although share certificates customarily do contain a form for indorsement on the reverse side) but to place the indorsements on a separate document, called a stock power.[177] However, the NYSE Manual requires the printing of a form of indorsement on share certificates.[178]

The registration of a transfer by the issuer is not a condition to a valid transfer.[179]

In order to meet the legal requirements for a transfer of individual share certificates under U.S. and German law, the DaimlerChrysler individual share certificates contain, on the reverse side, a form of indorsement using language customary in the United States and a form of assignment using language customary in Germany.[180] DaimlerChrysler expected that compliance with either German or U.S. law would satisfy the legal requirements of many jurisdictions in which individual share certificates may be transferred.

(c) Transfer in the Indirect Holding System

In the vast majority of cases, securities are held through a securities intermediary,[181] *e.g.*, a broker, in a securities account[182] and the security is not registered in the name of or specially indorsed to the customer.[183] This applies to individually certificated shares held by a securities intermediary as well as to interests in global certificates held by DTC. Generally speaking, if a financial intermediary credits a securities account maintained by it for

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[177] *See* § 8-304(c), UCC and § 8-304, UCC, Official Comment 1.

[178] Paragraphs 501.01(B) and 501.03, NYSE Manual, *supra* note 20. *See also* Rule 195, NYSE Guide ¶ 2195, *supra* note 70 (providing that a stock certificate shall be accompanied by a proper assignment on the certificate itself or on a separate paper).

[179] *See* § 8-401, UCC; Anderson, *supra* note 100, § 8-401:7. For Delaware, *see* Edward P. Welch & Andrew J. Turezyn, in: *Folk on the Delaware General Corporation Law, Fundamentals* (ed. 2000), § 159.4.

[180] *See* the reverse side of the DaimlerChrysler share, reprinted as Appendix III to this article.

[181] *Securities intermediary* means (i) a clearing corporation or (ii) a person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity. Section 8-102(a)(14), UCC. The most common examples of securities intermediaries are clearing corporations holding securities for their participants, banks acting as security custodians, and brokers holding securities on behalf of their customers. *See* § 8-102,UCC, Official Comment 14.

[182] *Securities account* is defined in § 8-501(a), UCC as an account to which a security is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the persons for whom the account is maintained as entitled to exercise the rights that comprise the security. Note that, in the context of the indirect holding system, the UCC does not speak about securities, but about *financial assets*, defined in § 8-102(a)(9), UCC to include securities.

[183] *See* § 8-501(d), UCC. If the security is registered in the name of or specially indorsed to the customer and has not been indorsed by the customer to the securities intermediary or in blank, the security is in the direct holding system and will be taken by delivery. Section 8-301(a)(3), UCC. *See supra* notes 170 & 171.

its customer with a security that has been indorsed in blank or to the securities intermediary, such customer acquires a "security entitlement",[184] not a direct interest in the security.[185] A security entitlement is a "package of rights that a person has against the person's own intermediary with respect to the positions carried in the person's securities account".[186] These rights are partly contractual, partly property rights.[187] A security or interest therein that is held in the indirect holding system is not transferred by delivery of the security but by termination of the security entitlement of the seller and the creation of a security entitlement of the purchaser. Or, in plain English, the broker terminates the account entry in favor of the seller and makes an account entry in favor of the purchaser (if the purchaser is also the broker's customer), or the seller's broker gives an instruction to the clearing corporation to debit its account and to credit the account of the purchaser's broker and the purchaser's broker makes an account entry in favor of the purchaser (if seller and purchaser use different brokers).[188] If the seller's broker holds physical securities indorsed in blank or in its nominee's name, it will deliver such securities to the purchaser's broker who then will create an entitlement in favor of the purchaser. In the indirect holding system, therefore, not the acquisition of rights by virtue of a transfer of a security is the significant fact, but rather that the securities intermediary has undertaken to treat the customer as

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[184] *See* § 8-501(b), UCC. Section 8-501(b), UCC provides that a person acquires a security entitlement if a securities intermediary: (1) indicates by book entry that a security has been credited to the person's securities account, (2) receives a security from the person or acquires a security for the person and, in either case, accepts it for credit to the person's securities account, or (3) becomes obligated under other law, regulation, or rule to credit a security to the person's securities account. Number (2) is not limited to the case in which the securities intermediary receives a security certificate in physical form, but also covers the case in which the securities intermediary acquires a securities entitlement with respect to a security which is to be credited to the account of the securities intermediary's own customer. Section 8-501, UCC, Official Comment 2. *See* § 8-501(c), UCC which provides, in effect, that the entitlement holder's rights against the securities intermediary do not depend on whether or when the securities intermediary acquired its interest.

[185] The customer of a securities intermediary is not a direct holder of and has no direct interest in a security. For a limited exception to that rule, *see supra* notes 170 and 183. *See* § 8-501, UCC, Official Comment 4.

[186] Section 8-501, UCC, Official Comment 5.

[187] *See* § 8-503 to § 8-508, UCC. Section 8-503, UCC expresses the ordinary understanding that securities that a firm holds for its customers are not general assets of the firm subject to the claims of creditors. Section 8-503(a), UCC provides that, to the extent necessary to satisfy all customer claims, all units of a security held by the firm are held for the entitlement holders, are not property of the securities intermediary, and are not subject to creditors' claims, except as otherwise provided in § 8-511, UCC. The incidents of the property interest of the customers in securities held by a securities intermediary do not follow common law property concepts. *See* § 8-503, UCC, Official Comments 1 & 2. Article 8, UCC creates a *sui generis* form of property interest (s*ee* § 8-104, UCC, Official Comment 2) and abandons the concept that the transfer of a security in the indirect holding system should follow the rules of transfer of a chattel.

[188] Official Comment 5 to § 8-501, UCC states: "That package of rights is not, as such, something that is traded. When a customer sells a security that she had held through a securities account, her security entitlement is terminated; when she buys a security that she will hold through her securities account, she acquires a security entitlement. In most cases, settlement of a securities trade will involve termination of one person's security entitlement and acquisition of a security entitlement by another person. That transaction, however, is not a 'transfer' of the same entitlement from one person to another".

entitled to the security.[189] A transfer of a security held in a security account requires that the entitlement holder[190] give an entitlement order[191] to its securities intermediary directing a transfer of a security to which the entitlement holder has a security entitlement.[192] The entitlement order in the indirect holding system has a function analogous to that of the indorsement in the direct holding system: it is the means of disposition of the security entitlement.[193] The broker who receives the entitlement order, in turn may be a security entitlement holder with respect to the securities in question which are held in a securities account with a participant of DTC. The participant, in turn, has a securities account and entitlement relationship with DTC.[194] The financial intermediary that holds the certificated shares, or DTC in case of a transfer of a share evidenced by a global certificate, will make the transfer by book entry.

No adverse claim can be asserted against a person who acquires a security entitlement for value and without notice of an adverse claim.[195]

3. Law Applicable to a Transfer of Shares

A cross-border transfer of Global Shares of a German corporation such as DaimlerChrysler is subject to the conflict of laws rules of Germany and the countries in which the transfer takes place. This article will address only the applicable conflict of laws rules of Germany, the country of the issuer, and the United States.

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[189] Section 8-501, UCC, Official Comment 3.

[190] *Entitlement holder* is defined in § 8-102(7), UCC as the person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary.

[191] *Entitlement order* is defined in § 8-102(8), UCC as a notification communicated to a securities intermediary directing transfer of a security to which the entitlement holder has a security entitlement. *See also* § 8-507, UCC (duty of securities intermediary to comply with entitlement order).

[192] The entitlement order does not refer to instructions to a broker to make trades, that is, to enter into contracts for the purchase or sale of securities. Rather, the entitlement order is the mechanism of transfer for securities held through intermediaries, just as indorsements and instructions are the mechanism for securities held directly. *See* § 8-507, UCC, Official Comment 5. *See also* § 8-102, UCC, Official Comment 8.

[193] *See* § 8-102, UCC, Official Comment 8.

[194] *See* § 8-501, UCC, Official Comment 1.

[195] Section 8-502, UCC. In order to have the benefit of § 8-502, UCC, the security entitlement must have been acquired under § 8-501, UCC; *see supra* note 184. Section 8-502, UCC plays a role in the indirect holding system analogous to the rule of the direct holding system that protected purchasers take free from adverse claims (§ 8-303, UCC). *See* § 8-502, UCC, Official Comment 1.

(a) German Conflict of Laws Rules

To determine the law applicable to the transfer of registered shares under German conflict of laws rules one has to consider the legal nature of registered shares. Registered shares embody a "membership" (*verkörperte Mitgliedschaftsrechte*) in the corporation which has issued this type of share and they do not qualify as tangible property.[196] Hence, the owner of registered shares does not own tangible property (a chattel) but rights in relation to the corporation which has issued the shares.[197] Consequently, pursuant to German conflict of laws rules, the law of the jurisdiction of incorporation of the issuer of the shares applies to the transfer of registered shares, because rights in relation to the corporation are being transferred and not merely tangible property.[198] This means for the transfer of registered shares of a German corporation that the transfer can only be made in accordance with German law,[199] irrespective of the place at which the registered shares are located at the time of transfer or where the transfer takes place.[200]

This is in contrast to the transfer of bearer shares. Because bearer shares are qualified as tangible property,[201] pursuant to German conflict of laws rules the principle of *lex rei sitae* applies to the transfer of bearer shares. Under this principle, the law of the place where the actual share certificate is located applies.[202]

A transfer by the seller to the purchaser of a co-ownership interest in shares held in a collective deposit at CBA (including shares evidenced by a global certificate held by CBA) is completed when the depository bank with which the purchaser maintains a securities account credits the purchaser's account.[203] In 1999, Germany adopted a special conflict of laws rule for

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[196] *See* Lutter, *supra* note 77, vol. 1, § 68 annex, annot. 31; Erhard Bungeroth & Wolfgang Hefermehl in: Geßler & Hefermehl, *supra* note 95, vol. 1, § 68, annot. 193 .

[197] *See id*.

[198] *See* Ludwig Schnorr v. Carolsfeld, 'Bemerkungen zum Aktienrecht', (1963) *Deutsche Notar Zeitschrift* 404, at p. 421; Lutter, *supra* note 77, vol. 1, § 68 annex, annot. 31.

[199] Hence, transfer of DaimlerChrysler Global Shares must be made in accordance with § 68, AktG, in connection with Article 12, Bills of Exchange Act, *supra* note 135, or pursuant to §§ 413, 398 *et seq.*, German Civil Code, *supra* note 40. For a discussion of these two methods of transfer, *see supra* part VI 1.

[200] *See* Lutter, *supra* note 77, vol. 1, § 68 annex, annot. 31.

[201] *See* Bungeroth & Hefermehl in: Geßler & Hefermehl, *supra* note 95, vol. 1, § 68, annot. 192; Gerhard Kegel & Klaus Schurig, *Internationales Privatrecht* (8 ed. 2000), at p. 664.

[202] *See id*. One wonders why a registered share indorsed in blank which becomes for all practical purposes like a bearer share (*supra* note 137) is not transferred under the conflicts of laws rules applicable to bearer shares.

[203] *See* Dietrich Schefold, 'Grenzüberschreitende Wertpapierübertragungen und Internationales Privatrecht', (2000) *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 468, at p. 475-476; Kümpel, Kapitalmarktrecht, *supra* note 149, annot. 11.317. Section 24(2), sentence 1, Depository Act, *supra* note 46, is not applicable, *see* Schefold, *id*; Einsele, *supra* note 152, at pp. 161-163.

transborder transfers of securities. A new § 17a, Depository Act[204] provides that a transfer of securities held in a collective deposit or co-ownership interests in securities held in a collective deposit (*Sammelbestandsanteile*), which becomes legally effective upon crediting a securities account, is governed by the law of the country in which the bank,[205] which credits the account of the purchaser, is located.

In other words, a transfer of DaimlerChrysler shares by a seller who maintains his securities account with Merrill Lynch in New York to a purchaser who maintains his securities account with Dresdner Bank in Frankfurt, Germany, is subject to German law because the transfer is completed when Dresdner Bank credits to the securities account of the purchaser the number of DaimlerChrysler shares being sold.[206] Thus, § 17a, Depository Act confirms the application of German law to a transborder transfer of registered shares from a seller in the United States to a purchaser in Germany.[207] Section 17a, Depository Act looks only to the law of the country of the location of the bank which credits the purchaser's securities account and disregards all intermediary steps involved in the transfer from a U.S. seller to a German purchaser. Such transfer involves (i) a termination of the seller's security entitlement at Merrill Lynch, (ii) a credit by DTC of the securities sold to CBA's account maintained by DTC, (iii) a debit by CBA to the DTC account maintained by CBA with the securities sold, and (iv) a credit

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[204] Section 17a, Depository Act, *supra* note 46, added by the Act Modifying Certain Provisions of the Insolvency Act and Provisions Relating to Credit (*Gesetz zur Änderung insolvenzrechtlicher und kreditwesenrechtlicher Vorschriften*, BGB1. I 1999, p. 2384). Section 17a transformed into German law § 9(2), Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, (O.J. Eur. Comm. No. L 166 p. 45 (1998)) (this directive is generally referred to as the "Finality Directive"). For the official explanation of said Act (*Begründung*), *see* Bundestags Drucksache 14/1539 of July 9, 1999. *See also* the discussion of § 17a, Depository Act in Kümpel, Kapitalmarktrecht, *supra* note 149, annot. 11.349; Schefold, *supra* note 203, at pp. 473-476; Christoph Keller, 'Die EG-Richtlinie 98/26 von 19.5.1998 über die Wirksamkeit von Abrechnungen in Zahlungs- sowie Wertpapierliefer- und –abrechnungssystemen und ihre Umsetzung in Deutschland', (2000) *Zeitschrift für Wirtschafts- und Bankrecht, Wertpapiermitteilungen* 1269, at p. 1281.

[205] Section 17a, Depository Act, *supra* note 46, refers to the main office (*Hauptstelle*) or branch (*Zweigstelle*) of the depository bank at which the account is maintained. *See* § 3, Depository Act; Bundestags Drucksache, *supra* note 204, at p. 16. Dorothee Einsele, 'Wertpapiere im elektronischen Bankgeschäft', (2001) *Zeitschrift für Wirtschafts- und Bankrecht, Wertpapiermitteilungen* 7, at p. 15, takes the position that § 17a, Depository Act, is misconceived and does not accomplish any purpose, because the crediting of the purchaser's securities account by a depository bank does not create an ownership right of the purchaser in the purchased securities. She argues that the purchaser receives ownership in the purchased securities, as described above in part VI.1., and that the book entry by the depository bank is not required to make such transfer legally effective and, therefore, does not meet the requirements of § 17a. An interpretation of a statute that gives effect to the legislative intent is preferable to an interpretation that renders the statute meaningless and, therefore, the requirement of § 17a that the book entry in favor of the purchaser must create the purchaser's right to the securities (*rechtsbegründende Gutschrift*) must be disregarded. Einsele's rejection of this interpretation is not convincing.

[206] As to the completion of the transfer, *see supra* note 203 and accompanying text.

[207] In the case of bearer securities, § 17a, Depository Act, *supra* note 46, *modifies* prior law which would have applied the *lex rei sitae* to a transfer. *See supra* text accompanying notes 201 & 202 for a discussion of *lex rei sitae*.

by CBA of such securities to Dresdner Bank's account at CBA.[208] Section 17a, Depository Act disregards all these steps and looks only to the account entry by the purchaser's bank in favor of the purchaser, in order to achieve certainty about the applicable law and to avoid the application of several laws to one transfer.[209]

In the reverse case, a transfer of DaimlerChrysler shares by a seller who maintains his securities account with Dresdner Bank in Frankfurt, Germany, to a purchaser who maintains his securities account with Merrill Lynch in New York, is subject, pursuant to § 17a, Depository Act, to New York law. This is so because Merrill Lynch's account entry by which the shares are credited to the purchaser's account makes the transfer legally effective[210] by creating a security entitlement in favor of the purchaser.[211] Again, all intermediary account entries (Dresdner Bank debiting the seller's account, CBA debiting Dresdner Bank's account and crediting DTC's account, DTC debiting CBA's account and crediting Merrill Lynch's account) are disregarded.[212]

A transfer of DaimlerChrysler shares by a seller who maintains his security account with a broker located in the United States to a purchaser who maintains a securities account with another broker located in the United States is subject, pursuant to § 17a, Depository Act, to the law of the state of the purchaser's broker.

As *lex specialis*, § 17a, Depository Act, supersedes with regard to the issues covered by it the general German conflict of laws rules relating to the transfer of registered shares.[213]

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[208] *See supra* part VI 2(b).

[209] Bundestags Drucksache, *supra* note 204, at p. 16; Schefold, *supra* note 203, at p. 476.

[210] Section 8-501(b)(1), UCC (a person acquires a security entitlement if a securities intermediary indicates by book entry that a security has been credited to the person's securities account). Note, however, that in the cases of § 8-501(b)(2) & (3), UCC an account credit is not required to create a security entitlement, rather the acceptance for credit or the obligation to credit suffices to create a security entitlement. Presumably, § 17a, Depository Act, *supra* note 46, does not intend to distinguish between the three cases of § 8-501(b), UCC.

[211] Section 17a, Depository Act, *supra* note 46, requires a "*rechtsbegründende Gutschrift*" (rights creating book entry) by the bank in favor of its customer, the purchaser. Einsele, *supra* note 205, at p. 16 is of the view that the creation of a security entitlement does not constitute an book entry in the meaning of § 17a, Depository Act, *supra* note 46, because the creation of a security entitlement establishes a contractual relationship between the customer and the securities intermediary. Einsele relies on a distinction between contractual and property rights that Art. 8, UCC tries to overcome. *See supra* part VI.2.(c).

[212] *See supra* note 209.

[213] *See* Schefold, *supra* note 203, at p. 476; Keller, *supra* note 204, at p. 1282. Section 17a, Depository Act, *supra* note 46, only applies to securities held in collective custody (S*ammelverwahrung*) and to co-ownership interests in securities held in collective custody accounts; § 17a does not apply to the transfer of securities held by a bank in individual custody (*Streifbandverwahrung*). *See* Bundestags Drucksache, *supra* note 204, at p. 16.

Section 17a, Depository Act does not apply to the contract between the seller and the purchaser to sell shares; it applies only to the transfer of ownership in performance of the contract.[214]

(b) U.S. Conflict of Laws Rules

Section 8-110, UCC contains choice of law rules relating to certain enumerated matters covered by Article 8, UCC and excludes for those matters the general conflict of laws rules of § 1-105, UCC. The distinction between the direct and the indirect holding system plays a significant role in determining the governing law. An investor in the direct holding system is registered on the books of the issuer and/or has possession of a security certificate. Accordingly, the jurisdiction of incorporation of the issuer or location of the certificate determines the applicable law. By contrast, an investor in the indirect holding system has a security entitlement, which is a bundle of rights against the securities intermediary with respect to a security, rather than a direct interest in the underlying security. Accordingly, in the rules for the indirect holding system, the jurisdiction of incorporation of the issuer of the underlying security, or the location of any certificates that might be held by the securities intermediary or a higher-tier intermediary, do not determine the applicable law.[215]

Section 8-110(a), UCC provides that the law of the jurisdiction under which the issuer is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer,[216] governs certain issues as to which the substantive rules of Article 8, UCC determine the issuer's rights and duties. These issues are the validity of the security, the effectiveness of registration of transfer by the issuer, whether the issuer owes any duty to an adverse claimant to a security, and whether an adverse claim can be asserted against a person to whom a transfer of a security is registered.[217] The local law of the place of delivery governs

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[214] *See* Bundestags Drucksache, *supra* note 204, at p. 16 (stating that § 17a, Depository Act, *supra* note 46, applies only to the "*sachenrechtliche Verfügungen*" (transfer of ownership) and not to "*schuldrechtliche Ansprüche*" (contractual obligations)).

[215] *See* § 8-110, UCC, Official Comment 1.

[216] *See* § 8-110 (d), UCC. The New York UCC in § 8-110(d) permits a corporation organized under the laws of the State of New York to specify the laws of another jurisdiction as the law governing the matters specified in § 8-110, UCC. Section 8-110(d) of the UCC as adopted in Delaware (Delaware Code Annotated, Title 6 (vol. 3, 1999)) does not permit a Delaware corporation to specify the law of another jurisdiction as the law governing the matters specified in § 8-110(a), UCC.

[217] Section 8-110(a), UCC.

adverse claim issues that may arise in connection with the delivery of security certificates.[218] These provisions ensure that a single body of law will govern these questions.[219]

Section 8-110(b), UCC provides that the law of the securities intermediary's jurisdiction governs certain issues concerning the indirect holding system that are dealt with in Article 8, UCC, namely the acquisition of a security entitlement from the securities intermediary; the rights and duties of the securities intermediary and entitlement holder arising out of a security entitlement; whether the securities intermediary owes any duty to an adverse claimant to a security entitlement; and whether an adverse claim can be asserted against a person who acquires a security entitlement from the securities intermediary.[220] The policy of § 8-110(b), UCC is to ensure that a securities intermediary and all of its entitlement holders can look to a single, readily identifiable body of law to determine their rights and duties.[221] Since a security or an interest therein that is held in the indirect holding system is transferred by terminating the security entitlement of the seller and by creating a security entitlement of the purchaser, the law governing a transfer of securities in the indirect holding system is, pursuant to § 8-110(b), UCC, the law of the securities intermediaries' jurisdictions: the acquisition of the purchaser's security entitlement is governed by the law of the jurisdiction of the purchaser's securities intermediary and the termination of the seller's security entitlement is governed by the law of the jurisdiction of the seller's securities intermediary.[222] The law of the securities intermediary's jurisdiction is determined in accordance with § 8-110(e), UCC. Section 8-110(e)(1), UCC permits specification of the governing law by agreement between the securities intermediary and the security entitlement holder. The validity of the parties' selection of the applicable law is not conditioned upon determining that the jurisdiction whose law is chosen bears a "reasonable relation" to the transaction.[223] Furthermore, § 8-110(e), UCC sets out a sequential series of tests to facilitate the identification of the applicable law in the absence of a stipulation by the parties.

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[218] Section 8-110(c), UCC (referring to the local law of the jurisdiction in which a security certificate is located at the time of delivery) and § 8-110, UCC, Official Comment 4.

[219] *See* § 8-110, UCC, Official Comment 2.

[220] *See* § 8-110, UCC, Official Comment 3.

[221] *Id*.

[222] *See supra* part VI 2 (c) for a discussion of the creation and termination of security entitlements. Section 8-110(b), UCC expressly mentions the acquisition of a security entitlement but not the termination of a security entitlement. Termination is implied in the acquisition (§ 8-110(b)(1), UCC) or covered by the clause relating to the rights and duties of the securities intermediary and the entitlement holder (§ 8-110(b)(2), UCC).

[223] *See* § 8-110, UCC, Official Comment 3. Section 1-105, UCC and New York's common law conflict of laws rules require that the law chosen by the parties bear a reasonable relation to the transaction. The reasonable relationship requirement is discussed in Joseph A. Kilbourn & Jeffrey M. Winn, 'The Rules of Construction in Choice-of-Law Cases in New York', (1988) 62 *St. John's Law Review* 243; Michael Gruson, 'Governing Law Clauses in Commercial Agreements – New York's Approach', (1979) 18 *Columbia Journal of Transnational Law* 323. Section 5-1401, New York General Obligations Law (McKinney 1989 & Supp. 2000) abolishes the reasonable relationship requirement, also for purposes of the UCC, for contracts stipulating New York law and arising out of

To the extent that § 8-110, UCC does not specify the governing law, general choice of law rules apply. This is the case for the agreement between purchaser and seller to transfer securities in the direct or in the indirect holding system and for the transfer itself of certificated securities in the direct holding system.[224] Thus, the transfer of certificated shares in the direct holding system, effected by delivery, is subject to the general choice of law rules.[225] That means that the parties to a transfer may agree on a law to govern the transfer.[226] Failing an agreement on a governing law, the law of the state with the most appropriate relationship or the most significant contacts[227] or the law of the jurisdiction having the most interest in the disputed matter[228] will be applied. If the parties to an agreement stipulate a law to govern their agreement, they refer to the "local law" of the named jurisdiction, not to the conflict of laws rules.[229]

The agreement between a customer and a New York broker relating to the customer's securities account and his security entitlements will most likely be governed by New York law, and the agreements between the participants of DTC and DTC are governed by New York law.[230] Furthermore, even in the direct holding system most transfers will be carried out by brokers and will be subject to the account agreements which will be governed by New York law

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transactions covering in the aggregate $250,000. *See* Committee on Foreign and Comparative Law, 'Proposal for Mandatory Enforcement of Governing Law Clauses and Related Clauses in Significant Commercial Agreements', (1983) 38 *Record of the Association of the Bar of The City of New York* 537 (Michael Gruson, subcommittee chair); Joseph D. Becker, 'Choice-of-Law and Choice-of-Forum Clauses in New York', (1989) 38 *International and Comparative Law Quarterly* 167.

[224] Section 8-110(a)(2) & (3), UCC addresses only the registration of transfer, not the transfer of securities as such. The same was true for the conflict of laws provision § 8-106 of the previous version of Article 8, UCC. *See* Gruson, *supra* note 223, at pp. 357–358. Note that § 8-110, UCC, Official Comment 2 does not refer to Part 3 of Article 8 which covers the transfer of securities.

[225] *See* Gruson & Hutter, *supra* note 166, at pp. 432 *et seq*. *See* § 303, Restatement of the Law (Second), Conflict of Laws (1971) [*herein* Restatement], which applies the local law of the state of incorporation to determine who are shareholders of a corporation in order to achieve a uniform treatment of this issue. This rule does not apply, however, to a transfer of title to shares. *See* § 303, Restatement, comment e; § 302, Restatement, comment e.

[226] *See supra* note 223.

[227] *See* Gruson, *supra* note 223, at pp. 327–329; Restatement, *supra* note 225, § 188. *See*, *e.g*., Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).

[228] *See* Gruson, *supra* note 223, at pp. 327-329. *See, e.g.*, Intercontinental Planning, Ltd. v. Daystrom, Inc., 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969).

[229] *See* Gruson, *supra* note 223, at pp. 362–369; Siegelman v. Cunard White Star Ltd., 221 F.2d 189 (2d Cir. 1955); Reger v. National Association of Bedding Manufacturers Group Insurance Trust Fund, 83 Misc. 2d 527, 372 N.Y.S.2d 97 (Sup. Ct. 1975); Restatement, *supra* note 225, § 4. *See* § 8-110, UCC, Official Comment 1. This is in accord with the policy of § 8-110, UCC to ensure that a single body of law will govern the issues in question. *See* § 8-110, UCC, Official Comments 2 & 3.

[230] CBA's account maintained by DTC is governed by New York law.

if New York brokers are involved. It is irrelevant whether the securities account agreement meets the $250,000 threshold requirement of § 5-1401, N.Y. General Obligations Law,[231] because a reasonable relationship between the securities account opened by a New York broker and the State of New York will exist.

In the rare cases in which a transfer takes place in the direct holding system other than through a broker, the parties may or may not specifically agree on an applicable law. If they do not, a U.S. court would, under general conflict of laws principles, apply the law of the jurisdiction which has the most significant contact with the matter in dispute or the law of the jurisdiction having the most interest in the disputed issue. It cannot be predicted whether a court would apply New York or German law under these principles.

New York law, other than German law, does not contain specific conflict of laws provisions relating to transborder transfers. Section 8-110, UCC clearly applies to interstate transactions, but the application to international transactions is less clear. According to § 8-110(b)(1), UCC, the local law of the securities intermediary's jurisdiction governs the acquisition of a security entitlement from a securities intermediary. The acquisition of a security entitlement is governed by § 8-501, UCC. These provisions apply to the determination of the law governing a transfer accomplished by Dresdner Bank, Frankfurt, Germany by crediting the account of its customer only if Dresdner Bank is a securities intermediary within the meaning of the UCC. Pursuant to § 8-102(14), UCC, a securities intermediary includes "a person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity". Although *broker* is defined by reference to the U.S. securities laws, [232] *bank* is not defined by reference to U.S. laws.[233] At any rate, Dresdner Bank is a *person* within the meaning of § 8-102(14)(ii), UCC. It is not clear, however, whether a U.S. court would apply the concept of a *security entitlement* to the interest of a customer of a foreign bank in securities held by such foreign bank. However, if a sale of securities by a seller who has a security entitlement with a New York based bank to a purchaser who maintains a securities account with a New Jersey broker or bank is performed by the creation of a security entitlement with the New Jersey bank under New Jersey law,[234] it is reasonable to assume that the UCC intends German law to apply if the purchaser maintains a securities account with a German bank and the sale is performed by the German bank crediting such securities account with the securities sold. In the typical case in which a transfer of securities involves several tiers of securities intermediaries (broker - participant of DTC - DTC), the UCC, contrary to German law, determines the law governing the acquisition of the security entitlement on each tier separately.[235]

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[231] *See supra* note 223.

[232] Section 8-102(3), UCC.

[233] Section 1-201(4), UCC.

[234] *See* § 8-110(b)(1) & (e), UCC.

[235] Section 8-110, UCC Official Comment 5. As to German law, *see supra* text accompanying notes 208, 209 & 212.

(c) Conflict Between New York and German Conflict of Laws Rules

The above discussion shows that a clash exists between the New York and the German conflict of laws rules with respect to transfers of registered shares of a German corporation in the direct holding system. Under German conflict of laws rules, the law of the jurisdiction of incorporation, *i.e.*, German law, will be applied to the transfer of registered shares, whereas under New York law, the law agreed upon by the parties will be applied, and that law will in many cases be New York law.

The problem arises from a different qualification of the issues in Germany and New York: Germany characterizes the transfer of registered shares as the transfer of membership rights, and New York characterizes the transfer of shares as involving contractual relationships. The question arises as to which qualification should prevail. German law applies the principle of *lex fori* to qualification. Under that principle, a German court will apply the law of the jurisdiction in which it is sitting to the proper qualification of the issue before it, *i.e.*, it will qualify the transfer of registered shares as a transfer of membership rights and apply German law.[236] Similarly, a New York court and a federal court sitting in New York[237] will apply New York law for the qualification of the issue. They will look at the contractual relationship involved in the share transfer and apply the law governing such relationship. Thus, they would give effect to the law chosen by the parties.[238]

Insofar as registered shares in the U.S. indirect holding system, or its German equivalent, the collective deposit of securities (S*ammelverwahrung*), are concerned, the law governing transfers is to some extent the same under New York and under German conflict of

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[236] *See* Andreas Heldrich in: Palandt, *Bürgerliches Gesetzbuch* (60th ed. 2001), (IPR) Introduction before EGBGB § 3, annot. 27.

[237] If the jurisdiction of a federal court is based on diversity jurisdiction, it applies the law of the state in which it is sitting. *See* Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938); Klaxon Co. v. Stentor Electric Manufacturing Co., Inc., 313 U.S. 487 (1941). Pursuant to 28 U.S.C. § 1332(a) (1994 & Supp. 1999), federal courts have diversity jurisdiction in "all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between— (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States".

[238] For the approach taken by U.S. courts, *see* § 7(2), Restatement, *supra* note 225, which in relevant part reads: "[T]he classification and interpretation of Conflict of Laws concepts and terms are determined in accordance with the law of the forum . . .". *See also* Eugene F. Scoles, Peter Hay, Patrick J. Borchers & Symeon C. Symeonides, *Conflict of Laws* (3d ed. 2000), ch. 3, at p. 120 who emphasize that subject matter characterization, the first step in the characterization process, "by practical necessity is controlled by the forum's legal system including its conflict of laws rules." Note that the process of characterization is variously referred to as classification, qualification or interpretation. *See* § 7, Restatement, comment a.

laws rules: both jurisdictions would apply the law of the securities intermediary (bank), which credits the securities account of the purchaser maintained by it with the securities being transferred, to the establishment of a security entitlement (New York) or the legal effectiveness of a transfer (Germany) in favor of the purchaser.[239] Both jurisdictions differ on the importance of intermediary booking transactions of tiered financial intermediaries, in particular central depositories. Whereas New York looks separately at the establishment of a security entitlement on each tier and determines separately the law governing such establishment, Germany disregards the tiers and applies the law governing the security entitlement of the purchaser to the overall transaction, even to the transfer of the shares by DTC to CBA when DTC debits the U.S. participant's account and credits CBA's account. Under New York law, this transaction creates a security entitlement in favor of CBA and is governed by the security intermediary's law, *i.e.*, the law agreed upon by DTC and CBA, namely New York law.[240]

The adoption of § 17a, Depository Act solved a very serious conflict between New York and the German conflict of laws rules with respect to the transfer of registered shares of German corporations in the indirect holding system. The innovative Article 8, UCC has long recognized that if shares are held by a bank or broker for its customers (indirect holding system), the ownership rights in and possession of the shares are not the determinative legal relationships but rather the account relationship between the customer and the securities intermediary. German law, prior to the adoption of § 17(a), Depository Act, however, emphasized the membership aspect of registered shares and, therefore, applied the law of the jurisdiction of incorporation of the issuer to all the transfers, even those taking place in foreign countries.

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[239] A clash between the German and the New York conflict of laws rules applicable to transfers in the indirect holding system or collective deposit of securities can still arise because § 8-110(e), UCC determines the law at the securities intermediary's jurisdiction in the first place by reference to the law agreed upon between the securities intermediary and the entitlement holder (§ 8-110(e)(1), UCC), and only in the absence of such agreement, by reference to the jurisdiction in which the account is maintained as expressly specified (§ 8-110(e)(2), UCC), in the absence of such agreement and such specifications, by reference to the jurisdiction in which is located the office identified in an account statement as the office serving the entitlement holder's account (§ 8-110(e)(3), UCC), and in the absence of such agreement, such specification and such identification, by reference to the jurisdiction in which is located the chief executive office of the securities intermediary (§ 8-110(e)(4), UCC). Section 17a, Depository Act, *supra* note 46, does not permit a stipulation of the applicable law and refers only to the principal office or branch of the depository bank which maintains the securities account of the purchaser (and which credits such account) (s*ee supra* note 205 and accompanying text). It is not likely that the differences between § 8-110, UCC and § 17a, Depository Act will lead to conflicts in many cases because a New York located broker or a New York branch of an out-of-state broker will usually stipulate New York law in its account agreements and will also maintain its customer's account in New York.

[240] *See supra* part VI 3(b).

4. Cross-Border Transfer and Delivery of Global Shares

While the trading in shares in Germany[241] and in the United States[242] follows established trade, as well as clearing and settlement procedures, special issues arise in the case of cross-border trading of Global Shares between the two countries.

(a) Delivery of Shares via the DTC/CBA Interface

Until 1998, a unilateral link existed between CBA and DTC under which only CBA maintained an omnibus account at DTC.[243] This link permitted a DTC participant to settle a cross-border transaction with a CBA participant by making a book-entry delivery, on a "free of payment" basis, from its participant account at DTC to the CBA omnibus account at DTC and by identifying the CBA participant account to which the delivered securities should be credited. However, a CBA participant could not make book-entry delivery of securities held in its account at CBA to a DTC participant's account at DTC. In order for a CBA participant to make a delivery of securities to a DTC participant's account at DTC, the CBA participant had to deliver the physical securities to DTC. In 1998, the SEC granted permission to DTC to open and maintain an omnibus account at CBA in order to create a two-way interface between the two clearing systems, DTC and CBA.[244]

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[241] For the trading of stocks in Germany, the Stock Exchange Act (*Börsengesetz,* BGB1. I 1998, p. 2682), as amended, contains detailed provisions. *See* especially §§ 7 *et seq.*, Stock Exchange Act. Furthermore, § 4, Stock Exchange Act empowers the council of each stock exchange (*Börsenrat*) to establish rules which are binding on the affected brokers. On the basis of this authority, the FSE Conditions, *supra* note 35, were adopted.

[242] *See* Securities Exchange Act of 1934, as amended, and the regulations issued thereunder. Additionally, each stock exchange issued rules for transactions at the stock exchange, *e.g.*, the NYSE Guide, *supra* note 70.

[243] A deposit account of CBA with DTC may be maintained pursuant to § 5(4), Depository Act, *supra* note 46. The 1978 version of the UCC made an account of DTC with CBA (or its predecessor) impracticable because *bona fide* purchases of shares deposited with a foreign institution as custodian were not possible. *See* Donald, *supra* note 18, at p. 20.

[244] The proposed rule change was filed on September 15, 1998 by DTC in connection with the DaimlerChrysler transaction pursuant to § 19(b)(1), Securities Exchange Act of 1934 (15 U.S.C. § 78s(b)(1) (1994)), SEC Release No. 34-40660 (Nov. 10, 1998) (International Series Release 1170), 68 SEC Docket 1378, 63 Fed. Reg. 50950, 1998 SEC LEXIS 2457. The SEC noted in the Release that both the U.S. and the German transfer agents, The Bank of New York and Deutsche Bank, were registered as transfer agents under § 17A, Securities Exchange Act of 1934 (15 U.S.C. § 78q-1 (1994)).

The rule change permits book-entry movements of securities from a CBA participant's account at CBA to a DTC participant's account at DTC. Thus, a CBA participant is now able to settle cross-border transactions with a DTC participant by making a book-entry delivery, on a "free of payment" basis, from its participant account at CBA to the DTC omnibus account at CBA.

In order to activate the DTC – CBA link, DTC must transfer DaimlerChrysler shares held by it through its global certificate to the omnibus account maintained for it by CBA, and CBA must transfer DaimlerChrysler shares held by it through its global certificate to the omnibus account maintained for it by DTC. DTC instructs The Bank of New York to transfer the desired number of shares, for example 100,000 shares, via Deutsche Bank to CBA. The Bank of New York, the U.S. Registrar, decreases the holdings of Cede & Co. (DTC's nominee which is registered as shareholder on the U.S. subregister maintained by The Bank of New York) on the U.S. subregister by 100,000 shares and also decreases the number of shares evidenced by the DTC global certificate by 100,000 shares. The Bank of New York communicates this transfer to Deutsche Bank, the German Registrar. Deutsche Bank increases the number of shares evidenced by the CBA global certificate by 100,000 shares and registers DTC as registered holder of such 100,000 shares in the German subregister. CBA credits 100,000 shares to the DTC omnibus account maintained by it. Thus, the number of shares reflected in the U.S. subregister decreases and the number of shares reflected in the German subregister increases, but the total number of shares reflected in the global register does not change. DTC now participates with 100,000 shares in the CBA system. The number of shares held by Cede & Co. does not decrease, but it holds the 100,000 shares no longer as holder registered in the U.S. subregister by way of the DTC global certificate. It now holds these shares by way of the omnibus account maintained by CBA as holder registered in the German subregister and it is co-owner of the CBA global certificate. Deutsche Bank as Global Registrar will make the corresponding entries in the global register.

CBA transfers shares held by it through its global certificate to the omnibus account maintained by DTC in a corresponding manner and after such transfer CBA participates in the DTC system, although in accordance with the U.S. system, CBA is not a registered holder of shares evidenced by the DTC global certificate.

Assume that a U.S. shareholder who holds his shares in a securities account with a DTC participant, for instance Merrill Lynch, sells 100 DaimlerChrysler shares on the FSE to a German purchaser who maintains a securities account with a CBA participant, for instance Dresdner Bank. Merrill Lynch must deliver 100 shares to Dresdner Bank. Merrill Lynch identifies to DTC the CBA participant to whom the shares should be transferred. DTC debits the Merrill Lynch account with 100 shares and credits to the CBA omnibus account maintained by it 100 shares. CBA debits the DTC omnibus account maintained by it with 100 shares and credits to the Dresdner Bank participant account 100 shares. The total number of shares outstanding has not changed and the number of shares evidenced by each of the two global certificates has not changed either, but DTC participates with 100 shares less in the CBA system.

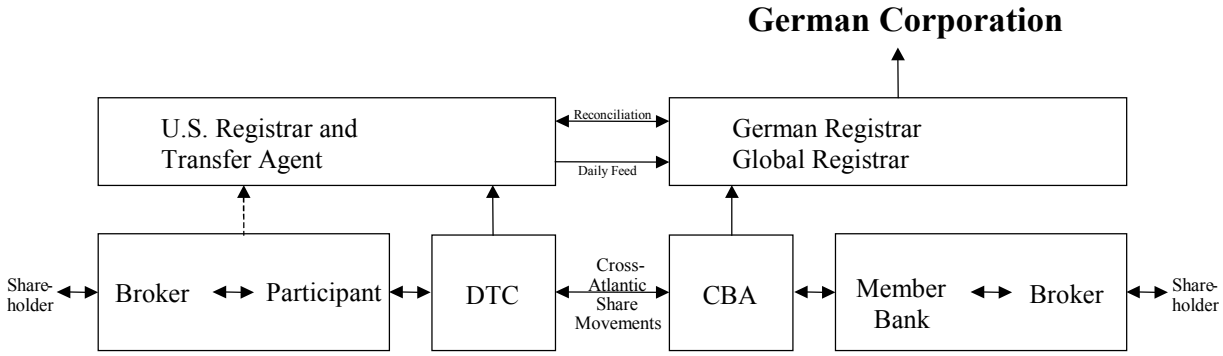
If a German DaimlerChrysler shareholder sells 100 shares on the NYSE, his depository bank, for instance Dresdner Bank, must deliver 100 shares to the U.S. broker of the

purchaser, for instance Merrill Lynch. Dresdner Bank identifies to CBA Merrill Lynch as transferee of 100 shares and CBA transfers 100 shares by book-entry from the Dresdner Bank account at CBA to the DTC omnibus account at CBA. DTC then transfers the shares from the CBA omnibus account at DTC to the Merrill Lynch account at DTC. The receiving DTC member can then deliver the shares, which have been credited to its DTC account within DTC through a book-entry movement, on either a "free of payment" or "against payment" basis.

DTC transactions occurring before 10:00 a.m. New York time can be booked the same day at CBA (4:00 p.m. German time).

This DTC-CBA link of collective share deposits is built on a "free of payment" basis, which means that the cash settlement in consideration of the purchased shares takes place through a separate payment system.

The following chart shows the share movements and registration process between the United States and Germany.



(b) Delivery of Shares via The Bank of New York/ Deutsche Bank Interface

In addition to the possibility of settling a transaction via the DTC/CBA interface, the DaimlerChrysler transaction also provides the option of a functional link between The Bank of New York (the U.S. Registrar) and Deutsche Bank (the German Registrar and Global Registrar).[245] The Bank of New York maintains an account with Deutsche Bank, and Deutsche Bank by crediting this account can transfer to The Bank of New York and its customers undivided fractional ownership interests in the global certificate held by DBA. A U.S. investor may choose between holding DaimlerChrysler shares through DTC or through The Bank of New York. The Bank of New York holds a global certificate to facilitate cross-Atlantic share transfers that use the link between Deutsche Bank and The Bank of New York.

(c) Delivery of Physical Shares in Germany

In the event that physical share certificates issued in the United States are presented in Germany in order to settle a sale of DaimlerChrysler shares, they will be accepted only after having been deposited with CBA (through a depository bank), the withdrawal of the share certificates from circulation by CBA and the crediting of the equivalent number of shares to the collective share deposit represented by the CBA global certificate. Thereafter, the physical share certificates will be accepted as "good for delivery" in a German stock transaction. Thus, although physical share certificates cannot be delivered to the purchaser in settlement of a transaction on the FSE, the delivery of physical certificates by the seller constitutes "good delivery", subject to the above procedure. The account of the purchaser with his depository bank will be credited with the number of shares purchased and those shares will be held in global

[245] *See* Brammer, *supra* note 18, at p. 415.

custody form by CBA. The situation could arise that a physical share certificate that was transferred to Germany was cancelled, but the shares represented by such a certificate could not be credited on the same day to the collective share deposit represented by the CBA global certificate. In order to avoid such a situation, Deutsche Bank holds a global certificate to which such shares are credited at the close of each day on an interim basis.

(d) Different Settlement Dates for Share Transactions

While stock transactions in Germany generally have to be performed on the second day after the sale is entered into ("T+2"),[246] stock transactions in the United States generally have to be performed on the third day after the sale is entered into ("T+3").[247] If an investor who is holding his shares in Germany sells his shares into the United States, no specific problems concerning the delivery of the shares will arise: the investor has to perform the transaction one day later than he would have to in a German stock transaction and, therefore, remains the owner of the shares for one additional day. More problematic, however, is the reverse case in which an U.S. investor sells his shares into Germany. In that case, the investor, contrary to the U.S. rules, has to deliver T+2, which means that he has to deliver the shares one day earlier. The U.S. investor may have to borrow the necessary shares to make the delivery if he has not yet acquired the shares under the T+3 system. Usually, the necessary shares are made available from the holdings of the bank or broker. The problem of different settlement dates for stock transactions in different countries can only be solved by harmonizing those settlement dates.

VII. Payment of Dividends

1. Different Procedures in the United States and Germany

Dividend payment on the Global Shares creates a problem because two totally different systems for the determination of the entitlement to receive dividends have developed in Germany and in the United States.

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[246] *See, e.g.,* § 15(1), FSE Conditions, *supra* note 35.

[247] *See* SEC Rule 15c6-1(a) under the Securities Exchange Act of 1934 (17 C.F.R. § 240.15c6-1(a) (2000)); Rule 64(a)(3), NYSE Guide ¶ 2064, *supra* note 70 (delivery "regular way"). *See also* Meyer-Sparenberg, *supra* note 8, at p. 1122.

In the United States, dividends are declared by the board of directors of the corporation.[248] Because of this, the dividends are distributed without any relation to the date of the shareholders meeting (*Hauptversammlung*).[249] Those shareholders are entitled to receive a dividend who are registered as owners in the share register on the record date fixed by the board of directors.[250] The practice of dividend distribution on shares traded on the NYSE is influenced by the NYSE's three-day delivery rule (T+3), pursuant to which contracts made on the NYSE for the purchase and sale of securities are settled by delivery on the third business day after the contract is made.[251] Because of this delivery rule, shares are traded ex dividend beginning on the second business day preceding the record date until and including the record date.[252] This means that the seller, who still is the registered owner on the record date, is entitled to receive the dividends, whereas the purchaser who purchases on or before the record date but receives the shares after the record date is not entitled to the dividend payment.

The system in Germany is different because dividends are declared by a shareholder resolution at the shareholders meeting.[253] Most German corporations (including DaimlerChrysler) pay dividends annually, thus dividends are declared at the annual shareholders meeting. Furthermore, shares are traded with a detachable dividend coupon, which is a bearer security and entitles the holder thereof to receive the declared dividends, regardless of whether

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[248] *See* §§ 510, 701, New York Business Corporation Law (McKinney 1986 & Supp. 2000); §§ 170, 173, Delaware General Corporation Law (Delaware Code Annotated, Title 8 (vol. 4, 1991 & Supp. 1998)); § 6.40(a), Model Business Corporation Act Annotated, *supra* note 114.

[249] It is noteworthy that in Leibert v. Grinnerl Corp., 194 A.2d 846 (Del. Ch. 1963), the court held that stockholders might not even be able to compel directors to declare dividends even though (1) there is a large surplus and (2) the corporation is a holding company whose charter states that its purpose is to receive and distribute dividends.

[250] *See* §§ 510, 701, New York Business Corporation Law (McKinney 1986 & Supp. 2000); §§ 170, 173, Delaware General Corporation Law (Delaware Code Annotated, Title 8 (vol. 4, 1991 & Supp. 1998)); §§ 6.40(a), 7.07(a), Model Business Corporation Act Annotated, *supra* note 114.

[251] *See supra* note 247.

[252] The term "ex dividend" means "without dividend". The buyer of a stock selling "ex dividend" does not receive the recently declared dividends. For example, a dividend may be declared as payable to holders of record on the books of the corporation on a given Friday. Since three business days are allowed for delivery of stock in "regular way" transactions on the NYSE, the NYSE would declare the stock "ex dividend" as of the opening of the market on the preceding Wednesday. That means anyone who bought it on or after that Wednesday would not be entitled to that dividend. When stocks go ex dividend, the stock tables include the symbol "x" following the name of the issuer. *See* NYSE Glossary of Terms & Acronyms, p. 10.

Rule 235, NYSE Guide ¶ 2235, *supra* note 70, provides: "Transactions in stock (except those made for 'cash') shall be ex-dividend or ex-rights on the second business day preceding the record date fixed by the corporation or the date of the closing of transfer books. Should such record date or such closing of transfer books occur upon a day other than a business day, this Rule shall apply for the third preceding business day. Transactions in stock made for 'cash' shall be ex-dividend or ex-rights on the day following said record date or date of closing of transfer books. The Exchange may, however, in any specific case, direct otherwise".

[253] Section 174(1), AktG.

such holder is registered in the share register or not.[254] The purchaser of a share who purchases on or before the day of the shareholders meeting is entitled to receive the current coupon together with the share certificate and thereby to receive the dividend payment; consequently, pursuant to German practice, such a purchaser does not purchase the share ex dividend but with dividend (cum dividend). A sale ex dividend prior to the date of the shareholders meeting would not be possible because dividends have not been declared at that time. The purchaser of the share on the day after the day of the shareholders meeting is entitled to and will receive a share certificate without the detached coupon relating to the recent dividends. Thus, in Germany, shares are traded ex dividend beginning on the day after the day of the shareholders meeting.[255] The existence of the coupons renders the record ownership in the share register on the day of the shareholders meeting irrelevant for the entitlement to the dividends declared on that day. Only the ownership of the bearer security "coupon" is determinative. It stands to reason that Germany's two-day delivery rule, pursuant to which contracts made on an exchange for the purchase and sale of securities are settled by delivery on the second business day after the contract is made,[256] does not influence the entitlement to receive dividends.

At the time of close of trading on the exchange (*Handelsschluss*) on the day of the shareholders meeting, shareholders holding shares (and coupons) in form of physical share certificates in their own custody will separate the coupon, which has been called for dividend payment, from the share certificate[257] and present the coupon at the counter of a German bank for payment. If a shareholder holds shares (and coupons) in form of physical share certificates in individual custody of his bank (*Streifbandverwahrung*), these acts are performed by the bank. [258] If the shareholder who is owner of record at the close of trading on the day of the shareholder meeting has sold (but not yet delivered) his individually certificated share, he is obligated to deliver the coupon to the purchaser (because the sale was cum dividend). It is immaterial whether the person presenting a coupon is a registered shareholder.

Under German law, if the shares of a corporation are evidenced by a global certificate held by CBA, all shareholders whose shares are held in global custody have a fractional co-ownership interest in the global certificate[259] and in the coupon when such global coupon is attached to the global certificate. The holder of the global certificate is also a holder of

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[254] *See* Diekmann, *supra* note 18, at p. 1987; Hüffer, *supra* note 26, § 58, annot. 29; and *supra* part IV 3. *See* § 21(4), FSE Conditions, *supra* note 35.

[255] *See* Nos. 33(1) & (6), Terms and Conditions of CBA, *supra* note 106.

[256] *See*, for the settlement date in Germany, *supra* part VI 4(d).

[257] No. 33(6), Terms and Conditions of CBA, *supra* note 106.

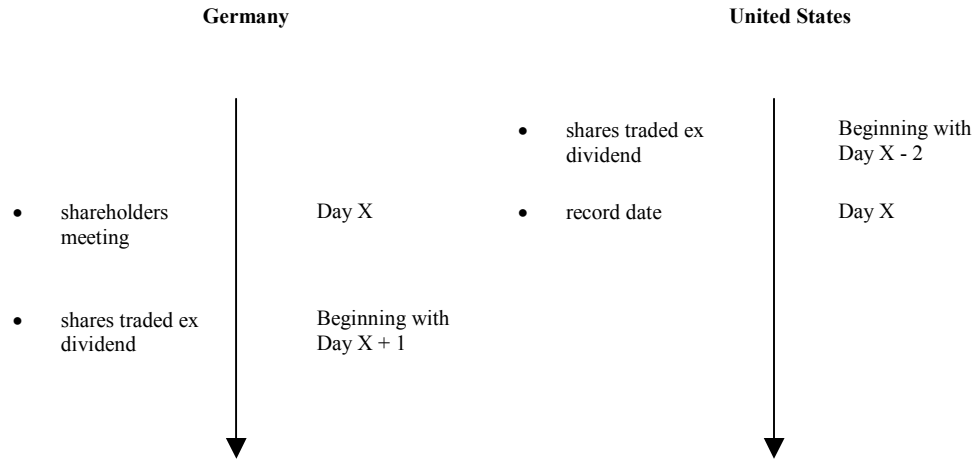
[258] *See* No. 14(1), Special Conditions for Securities Transactions, *supra* note 161 (the bank with whom the customer maintains his securities account will ensure that dividends on coupons are paid. No. 14(1) does not distinguish between shares held in individual or collective custody). *Streifbandverwahrung* means that the depository bank holds customers' securities on special deposit. Section 2, Depository Act, *supra* note 46.

[259] *See supra* text accompanying note 152.

the coupon. The purchaser of a co-ownership interest in a global share also acquires a co-ownership interest in the coupon, irrespective of whether or not he is being registered in the share register. Dividends are paid to CBA by the corporation as the holder of the global coupon.[260]

In the case of registered shares without coupons, payment must be made to the persons registered in the share register at the close of trading on the day of the shareholders meeting, *i.e*., the day on which the dividend is declared, because the corporation can only treat as shareholders those persons who are registered in the share register.[261]

Time Chart I: Traditional Dividend Payment and Share Trading



Day X = Event determining the respective ex dividend dates.

Because of these different concepts, the ex dividend dates on the FSE and the NYSE Exchange do not coincide, and a method had to be found to reconcile these two systems in a way that respects U.S. and German law and practices.

2. Dividends on the Global Shares in Germany

(a) CBA

Dividends on Global Shares evidenced by a global certificate deposited with CBA are paid, in accordance with current German payment procedures, not to the shareholders shown on the share register (the shareholders of record), but through CBA to the CBA participants. CBA debits DaimlerChrysler's paying agent for the total amount of all dividends payable to the

[260] *See* Brammer, *supra* note 18, at pp. 403–404, and *infra* VII 2(a) for a further discussion of the procedure of dividend payments on shares represented by a global certificate.

[261] Section 67(2), AktG. *See supra* text accompanying notes 95 & 98.

CBA participants and credits its participants according to the total number of shares held by each participant in global custody as shown on the records of CBA. The CBA participants in turn credit their customers according to the shares held by them in global custody for such customers. These payments are made on the day after the day of the meeting of shareholders in the form of bank transfers, with value as of the day of the meeting of shareholders.[262] This procedure is in accordance with German law, because, under the German Corporation Act, not the registered shareholder but the owner of the dividend coupon is entitled to dividends, and all shareholders are co-owners of the global coupon attached to the global certificate.[263] If a shareholder has sold his share on the day before or on the day of the shareholders meeting, he is entitled to receive the dividend because on the day of the shareholders meeting he is still co-owner of the global coupon by reasons of the T + 2 rule. However, under German practice, the purchaser has not purchased the share ex dividend, but cum dividend. Therefore, the seller (who cannot deliver the physical coupon because he is only co-owner of a global coupon) is deemed to have assigned the claim for the payment of dividends to the purchaser and to have instructed the corporation to make payment to the purchaser when he sells his share through the CBA clearing mechanism. Because of this assignment, the purchaser receives the dividends for which he has paid (because he did not purchase ex dividend) but to which he is not entitled because he did not receive delivery of the share and the coupon (or of a co-ownership interest therein) on the day of the shareholders meeting.[264] This assignment is settled in the CBA system, which debits the seller's bank and credits the purchaser's bank.

Payment of dividends based on the share register, rather than on CBA's accounts, would confuse the efficient payment procedure presently in place in Germany and a considerable number of shareholders who are not (yet) registered in the share register would not receive dividends.[265] A system in Germany that requires payment of dividends on the basis of the share

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[262] Pursuant to § 271, German Civil Code, *supra* note 40, the dividend claim of the shareholder is due directly after the resolution of the shareholders meeting. However, in accordance with the principle of equity codified in § 242, German Civil Code, because of technical reasons, the corporation is given a few days to make the dividend payment. *See* Lutter, *supra* note 77, vol. 1, § 58, annot. 109.

[263] *See supra* part IV 3, note 260 and text accompanying note 259. *See* Leuering, *supra* note 73, at p. 1749 (for the notion that the owner of the coupon and not the registered shareholder is entitled to receive dividend payments). The German dividend payment procedure for shares held in global custody that does not look to the share register but to the accounts of CBA does not violate the German Corporation Act. Section 67(2), AktG provides that only those persons are recognized as "shareholders" who are registered in the share register; however, not the shareholders of record but all owners of shares are co-owners of the global coupon, and thus are entitled to dividends, *i.e.*, persons who took delivery of the shares. *See supra* part VI 1 for a discussion of transfer of registered shares.

[264] *See* Memorandum of Aug. 12, 1998 from Gunnar Schuster to the (DaimlerChrysler) Equity Capital Markets Group concerning the Form of DaimlerChrysler Stock Certificates (Coupons vs. No Coupons) (*memorandum in possession of the author*). *See also* Memorandum of Aug. 21, 1998 from Gunnar Schuster to the Equity Capital Markets Group concerning the Form of DaimlerChrysler Shares (Coupons vs. No Coupons) – Procedures for Dividend Payments and Capital Increases with Subscription Rights (*memorandum in possession of the author*); Than & Hannöver, *supra* note 137, at p. 289. The legal analysis set forth above has not been tested before a German court. The transferee bears the risk of a bankruptcy of the transferor.

[265] *See supra* note 87 and *supra* text accompanying notes 107 & 108.

register would require a very speedy registration of transfers, a process that is initiated by the transferee and beyond the control of the corporation or the registrar. More important, if coupons are attached, the record ownership of the shares is not relevant for the entitlement to receive dividends. The need to pay dividends according to the records of the central depository rather than on the basis of the share register arises in Germany and not in the United States, because the U.S. share register shows only Cede & Co., the nominee of DTC, as registered holder of all shares evidenced by global certificates, whereas the German register contains the names of the registered beneficial owners (*i.e.*, the co-owners of the global certificate). In effect, in the United States as in Germany payments of dividends on global certificates are made to the central depository, which distributes the dividends according to its records to the participants. Germany and the United States reach the same result by way of different legal analyses.

Withholding tax (*Kapitalertragsteuer*)[266] and solidarity surcharge (*Solidaritäts-zuschlag*) on dividend payments on Global Shares are handled in accordance with customary German practice. Dividends distributed by a corporation with legal seat in Germany are subject to a withholding tax of 25% of the cash dividend approved by the shareholders meeting [*herein* cash dividend] and a solidarity surcharge of 5.5% levied thereon (corresponding to 1.375% of the cash dividend). Withholding tax and the solidarity surcharge thereon will be tax-credited to the individual or corporate income tax obligation of a shareholder who is tax resident in Germany, or be refunded to him.

For shareholders who have an unlimited tax liability in Germany, the corporation tax credit system (*Anrechnungsverfahren*) leads to neutralization of the corporate income tax levied on the dividend-paying corporation, *i.e.*, the dividend income will be taxed at the rate of the shareholder's individual or corporate income tax. In order to achieve this, taxation of the shareholder's income will be made on the basis of a gross dividend (cash dividend plus tax credit). The shareholder who is liable for tax in Germany receives 51.54% of the gross dividend paid in cash and a tax credit of 48.46% (17.5% as tax credit from withholding tax (plus 0.96% tax credit for the solidarity surcharge) and 30% as tax credit for the corporate income tax paid by the corporation). If the shareholder's individual or corporate income tax rate, plus the solidarity surcharge, on the gross dividend is less than the tax credit of 48.46%, the excess tax is refunded.[267] If the personal income or corporate income tax rate is higher, then additional income tax, plus solidarity surcharge, will be incurred.

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[266] Section 43(1), no. 1, § 43a(1), no. 1, Income Tax Law of 1997 (*Einkommensteuergesetz,* BGB1. I 1997, p. 821), as amended. Although the shareholder is the taxpayer, the corporation is obliged to withhold the tax and to pay the amount to the tax office. *See* Lutter*, supra* note 77, vol. 1, § 58, annot. 112.

[267] *See* § 36(2), no. 2 & no. 3, Income Tax Law, *supra* note 266. The Tax Reduction Act (*Gesetz zur Senkung der Steuersätze und zur Reform der Unternehmensbesteuerung – Steuersenkungsgesetz*, BGBl. I 2000, p. 1433), which became effective (with certain exceptions) on Jan. 1, 2001, cuts the corporate income tax to a uniform 25%. *See* Article 3(8), Tax Reduction Act, which adds a new § 23 to the Income Tax Law. Because of the Tax Reduction Act, the corporation tax credit system will be applicable for the last time in 2001. From 2002, this system will be replaced by the so-called half-income system, which means that only half of the distributed profits of a corporation will be included in the shareholder's income tax base. In addition, it will no longer be possible to credit the corporate income tax paid by the corporation against the shareholder's income tax. *See* Article 1(22), Tax

In accordance with German practice, a tax receipt is issued by the depository bank at which the shareholder maintains its securities account, stating the deducted amount of withholding tax and solidarity surcharge, as well as the entitlement to a corporation tax credit.[268]

According to the provisions of the double taxation treaty between the United States and Germany,[269] the German withholding tax rate on dividends paid by a corporation, tax-resident in Germany, to a shareholder who is a tax resident in the United States is reduced. A shareholder who has a claim for a reduced withholding-tax rate pursuant to the double taxation treaty, must, as a rule, apply to the German tax authorities for a refund of the amount by which the withholding tax and solidarity surcharge exceed the amount which may be levied in accordance with the double taxation treaty. Only if further prerequisites are fulfilled may the corporation be entitled from the start to retain the withholding tax at a reduced rate.

Since May 1999, certain U.S. shareholders whose shares are deposited with DTC may make applications for refunds by using a simplified refund procedure. Instead of filing individual refund claims with the German Federal Tax Authority (*Bundesamt für Finanzen*), they may file applications in a collective procedure with the aid of the "Elective Dividend Service" (EDS) installed at DTC. In the system, DTC compiles the reports of the individual participants into a collective application and submits this application to the German Federal Tax Authority. The German Federal Tax Authority, upon initial checking of arithmetical correctness, will make a refund as required to DTC, which will distribute the refund amounts in accordance with EDS data to the participants, to be passed on to the beneficial owners.

Reduction Act. The withholding tax rate on dividends will be reduced to 20% plus 5.5% solidarity surcharge thereon. The reduced withholding tax rate is not applicable for dividends still subject to the corporation tax credit system. For a graphic juxtaposition of the old and new law on dividend taxation, *see* German Federal Department of Finance (*Bundesministerium der Finanzen*), at <http://www.bundesfinanzministerium.de/infos/divi.pdf> (last visited Oct. 19, 2000).

[268] For practical purposes, depository banks are reluctant to issue tax receipts if no coupon is represented. Pursuant to § 45a(6), Income Tax Law, *supra* note 266, issuers of such tax receipts are liable for any wrongfully granted tax-credits if tax receipts were issued although the legal requirements for the issuance were not met. In case of shares that do not have a coupon attached, the shareholder might have transferred the share without a right to receive dividend payments or vice versa. The likelihood that tax receipts will be issued wrongfully is therefore greatly increased for couponless shares. In the case of Global Shares, the global coupon is inseparably linked to the global certificate. Thus, the depository banks do not face the uncertainties as to the rightful recipient of dividends. *See also* Brammer, *supra* note 18, at pp. 404, 409–410.

[269] Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital and to Certain Other Taxes, Aug. 29, 1989, U.S.-F.R.G., CCH Tax Treaties, vol. 2, ¶ 3249.07; 1708 United Nations Treaty Series 52 (*Doppelbesteuerungsabkommen mit den Vereinigten Staaten von Amerika, 29.08.1989*, BGB1. II 1991, p. 354).

(b) Physical Share Certificates

The dividend entitlement of shareholders in Germany who hold physical (individually certificated) share certificates is different: because there are no coupons attached to the DaimlerChrysler physical share certificates that can be cashed as they would be under the traditional German system, dividends are paid to shareholders of record in the German share register who hold physical share certificates. Dividends are paid to the shareholder registered in the share register on the date of the shareholders meeting. Payment is made by way of checks issued by the corporation or by the paying agent appointed by the corporation. This procedure is followed for all shares not held in global custody, regardless of whether a shareholder holds the share certificates in his own custody or in individual custody of his depository bank (*Streifbandverwahrung*). The share register indicates in which form shares are held: if the shares are held in global custody, the share register contains the designation "GS" (for *Girosammelverwahrung*); if they are held in an individual deposit (own custody by the shareholder or individual custody of a depository bank), the share register contains the designation "EV" (for *Eigenverwahrung*). The symbol "EV" also indicates that the shares are individually certificated. Shareholders who purchase individually certificated shares in the secondary market have to make sure that they are entered in the share register in order to be recognized as shareholders by the corporation and to be entitled to receive dividend payments.[270] The rules on ex dividend trades and on the assignment of claims for the payment of dividends in the case of a sale of a certificated share on the day before or on the day of the shareholders meeting applicable to global certificates in Germany apply equally to the trading of individual certificates.[271]

Withholding tax and solidarity surcharge on, and corporation tax credits for, dividend payments are handled in accordance with the customary German practice. Dividends will be paid net of withholding tax (and solidarity surcharge thereon), and the corporation or its principal paying agent (rather than a depository bank) will issue a tax certificate certifying the withholding tax, solidarity surcharge and the entitlement to the corporation tax credit.[272]

Because of the necessary time delay, receiving a dividend check by mail is disadvantageous to the shareholder compared to receiving payment by money transfer. The intention is, however, to treat German and U.S. holders of individually certificated shares equally, and dividend payments in the United States, as most other payments in everyday life, are customarily not made by money transfer but by check.

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[270] *See* § 67(2), AktG.

[271] *See supra* part VII 2(a).

[272] Since the physical share certificates do not have a coupon attached, the depository bank of the shareholder is unwilling to issue the tax certificate. *See supra* note 268 for a discussion of this reluctance to issue tax certificates. It must be noted that a purchaser of a DaimlerChrysler share on the FSE cannot obtain delivery of an individually certificated share.

3. The U.S. System

(a) DTC

The day of the shareholders meeting (which represents the German "record date") of DaimlerChrysler also constitutes the U.S. record date. As stated above, under U.S. law, those shareholders who are registered on the record date in the shareholder register are entitled to receive dividends.[273] Because different ex dividend trading dates in New York and Frankfurt could not be accepted and because ex dividend trades before the day on which dividends were declared make no sense, the NYSE gave up its customary ex dividend trading practice in connection with the DaimlerChrysler Global Share,[274] and determined that DaimlerChrysler shares are traded in the United States during the period beginning with the second business day preceding the day of the shareholders meeting until and including that day, not ex dividend but with dividend (cum dividend). This time period corresponds to the delivery period in the United States (stock transactions have to be performed on the third day after the sale is made ("T+3")), and the period in which shares normally are traded in the U.S. ex dividend.[275] The seller, who will be the holder on the record date and as such is entitled to receive the dividend payment (because the sale is not yet performed, he still is the holder of record), [276] is required to assign the dividend payments to the purchaser (who has purchased cum dividend). The reason for this assignment is that the purchaser, in accordance with the German system, should receive the dividends, but is not entitled to the dividend payments pursuant to the U.S. law. Such assignment is made by way of the so-called "due bills".[277] The seller delivers the due bill to the purchaser, along with the shares covered by the sales contract in settlement of the contract. The due bill is redeemed by the seller's delivery of the dividend distribution to the holder of the due bill.[278] This process is transparent to U.S. investors since due bills net out in the clearing process. To avoid any potential confusion with respect to the ex dividend date, the NYSE endeavors to

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[273] *See supra* text accompanying notes 97–99 & 250.

[274] *See supra* part VII 1 and SEC Release No. 34-40597, *supra* note 66, *sub* II A(1) n.3.

[275] *See supra* part VII 1.

[276] *Id.*

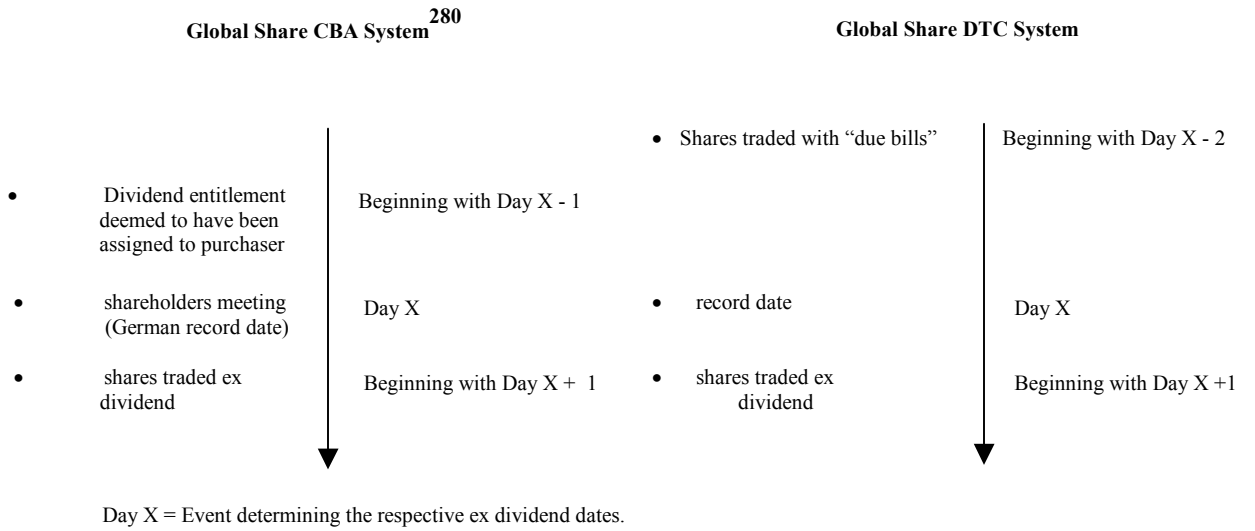
[277] *See* SEC Release No. 34-40597, *supra* note 66, *sub* II A(1) n.3. When a security is not ex dividend on the date it ordinarily should be ex dividend, due bills are required to accompany delivery of the security. *See* Rule 259, NYSE Guide ¶ 2259, *supra* note 70. Rule 255(a), NYSE Guide ¶ 2255 provides: "The term 'due bill', as used in the Rules, means an assignment or other instrument employed for the purpose of evidencing the transfer of title to any dividend, interest or rights pertaining to securities contracted for, or evidencing the obligation of a seller to deliver such dividend, interest or rights to a subsequent owner". Due bills must be in a form approved by the NYSE. *See* Rule 256, NYSE Guide ¶ 2256. For the NYSE approved form of a due bill, *see* Appendix IV to this article. The transferee bears the risk of a bankruptcy of the transferor.

[278] *See* Rule 259, NYSE Guide ¶ 2259, *supra* note 70.

notify its member organizations of this procedure well in advance of a dividend declaration date.[279]

By using the due bill system, the German system of declaring dividends on the day of the shareholders meeting by a shareholders resolution and trading shares ex dividend only the day thereafter was preserved and the U.S. practice was modified to accomplish this goal. This leads to an ex dividend trading of DaimlerChrysler shares on the FSE as well as the NYSE on the day following the day of the shareholders meeting, *i.e.*, the German and the U.S. record date. Ex dividend trading on the day following the day of the shareholders meeting differs, as pointed out above, from the typical practice of the NYSE to trade ex dividend on, and two business days prior to, the record date. In the United States as in Germany, the seller of a DaimlerChrysler share who sells on or before but settles after the day of the shareholders meeting assigns his dividend right to the purchaser.

Time Chart II: Dividend Payments and Share Trading in the Global Share System



Day X = Event determining the respective ex dividend dates.

(b) Physical Share Certificates

In the United States, dividends are paid to the shareholders of record holding individual physical share certificates on the record date in accordance with the customary terms of payment. The U.S. Registrar knows the shareholders holding individual physical share certificates from the U.S. sub-share register and makes the dividend payments to such shareholders by sending them a check. Physical share certificates are traded the same way as those shares held in global form by DTC, using the "due bill" system. The actual payment of the dividends takes about 10 days plus the time for the delivery of the check by mail.

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[279] *See* SEC Release No. 34-40597, *supra* note 66, *sub* II A(1) n.3.

[280] The CBA -system is, in respect of time management, identical to the traditional German system.

VIII. Participation in the Shareholders Meeting and Voting Rights

In the case of DaimlerChrysler, the participation in the shareholders meeting and the exercise of the voting rights follow German law, but some customary German and U.S. procedures had to be modified.

1. Record Date for the Shareholders Meeting

The German Corporation Act does not provide for a record date before the shareholders meeting for determining the shareholders who may attend the meeting. Pursuant to the German Corporation Act, only shareholders who, in the case of registered shares, are entered in the share register on the date of the shareholders meeting are entitled to attend the meeting and to exercise their voting rights. Furthermore, a corporation may not fix a day before the shareholders meeting on which it may stop the registration of transfers. A registration stop can only be a function of the delays in registration caused by technical realities. It has been argued that it should be possible to register transfers within 24 hours, and the 24-hour period should also apply to the registration stop.[281]

In contrast to the German system (in which the record date for voting at a shareholders meeting is the meeting date), the NYSE Manual recommends that the record date to determine the shares entitled to vote at a shareholders meeting be at least 30 days before the date of the shareholders meeting, to give ample time for the solicitation of proxies,[282] and, in addition to this, the NYSE has to be notified of the record date at least 10 days prior to that date.[283] Cede

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[281] *See* Huep, *supra* note 18, at pp. 1629–1630; *See* Noack, Namensaktie, *supra* note 18, at p. 1309 (2 days); Noack, Neues Recht, *supra* note 18, at p. 1997 (3 days); Leuering, *supra* note 73, at p. 1747 (maximum 3 days); Hüffer, *supra* note 26, § 68 annot. 17 (reasonable time necessary to check the application for registration). *See also* Diekmann, *supra* note 18, at p. 1989 (all transfers that are technically possible must be made). All the above authors are of the view that a registration stop is not permissible. The official explanation of the Act Concerning Registered Shares, *supra* note 18, envisions a registration stop in order to avoid technical difficulties. The official explanation states that the length of the period depends on the technical developments and at any rate must not exceed seven days. *See* Official Explanation, *supra* note 18, at p. 11; Seibert, Regierungsentwurf, *supra* note 18, at p. 940. The official explanation erroneously calls the registration stop a record date.

U.S. stock exchange-listed companies do not stop registration of transfers in order to avoid the effect this may have on the market. They rely on the record date as a cut-off date. In the United States, pursuant to SEC Rule 17Ad-2(a) under the Securities Exchange Act of 1934 (17 C.F.R. § 240.17 Ad-2(a) (2000)), every registered transfer agent must turn around within three business days of receipt at least 90% of all routine items received for transfer during a month.

[282] Paragraph 401.03, NYSE Manual, *supra* note 20. *See also* § 213(a), Delaware General Corporation Law (Delaware Code Annotated, Title 8 (vol. 4, 1991)), stating that the "record date shall not be more than sixty nor less than ten days" before the date of the shareholders meeting.

[283] Paragraph 204.29, NYSE Manual, *supra* note 20.

& Co., the nominee of DTC, recommends that corporations notify it of the record date and shareholders meeting date at least 20 business days in advance of the record date.[284] As a German corporation, DaimlerChrysler has to comply with the German rules regarding the record date for the shareholders meeting and cannot fix a record date before the date of the shareholders meeting.

2. Voting by Proxy

Under German law, if shares are registered in the name of the owner of the shares, the bank with which the shareholder keeps his securities account obviously can vote shares only on the basis of a proxy.[285] Furthermore, the bank which acts as nominee and is registered as holder of shares of its customer is, under German law, not the "owner" of the shares[286] and needs a proxy from the customer in order to be able to vote the shares.[287]

In the United States, Cede & Co., the nominee of DTC, as the shareholder of record, has the right to vote the shares registered in its name. However, Cede & Co. does not exercise voting rights for these shares, but issues an omnibus proxy naming each of its broker-dealer or bank participants for which it is holding such shares, appointing them as proxies to vote the number of shares shown by their respective securities positions on the record date.[288] Each of the broker-dealers and banks has the legal authority to vote the shares as to which it has been designated as proxy by Cede & Co. and the shares registered in its name as nominee for its

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[284] *See* Bloomenthal, *supra* note 11, at p. 791; SEC Rule 14a-13(a) under the Securities Exchange Act of 1934 (17 C.F.R. § 240.14a-13(a) (2000)).

[285] Section 135(1), sentence 1, AktG, as amended by the Act Concerning Registered Shares, *supra* note 18, makes it clear that a bank that is not a shareholder of record requires a proxy from the shareholder in order to vote. For the legislative history of this amendment, *see* Seibert, Regierungsentwurf, *supra* note 18, at p. 945; Official Explanation, *supra* note 18, at pp. 15–16. Although not explicitly stated, the same is true under the prior version of the German Corporation Act because the irrebuttable presumption of § 67 (2), AktG (*see* supra text accompanying note 95) is not applicable if the bank is not registered as a shareholder. *See* Hüffer, *supra* note 26, § 135, annot. 24.

[286] *See supra* note 88.

[287] Section 135(7), sentence 1, AktG. The Act Concerning Registered Shares, *supra* note 18, amends § 135(7), sentence 1, without changing its substance insofar as registered shares are concerned. For the legislative history of these changes, *see* Seibert, Regierungsentwurf, *supra* note 18, at p. 945; Official Explanation, *supra* note 18, at p. 16. Section 135(7) also has the effect that a bank need not report under § 21, Securities Trading Act, *supra* note 116, shares registered in the name of the bank as nominee. *See* Official Explanation, *supra,* at p. 16; Seibert, Regierungsentwurf, *supra,* at p. 945.

[288] The Depository Trust Company, Participant Operating Procedures, Proxies V 100 & V 110 (effective date Aug. 1995); a more recent version is available on the CD-ROM of DTC's Services Guide version June 2000. *See* Bloomenthal, *supra* note 11, at p. 791. DTC mails the omnibus proxy to the corporation on the day following the record date. *Id. See also* Tino Preissler, 'Wahrnehmung der Aktionärsrechte in der Hauptversammlung einer deutschen Aktiengesellschaft mit globalen Namensaktien durch in den USA ansässige Aktionäre', (2001) *Zeitschrift für Wirtschafts- und Bankrecht, Wertpapiermitteilungen* 112.

customers.[289] The NYSE, however, requires its members to distribute proxy material and other communications to the beneficial owners and to request instructions as to the voting of the shares held for such beneficial owner.[290]

Proxies used in a shareholders meeting of a German corporation, even those issued by U.S. shareholders, must, of course, meet the requirements of the German Corporation Act.[291]

Thus, in spite of different legal approaches, both U.S. and German law achieve the same result: the bank or broker-dealer can vote shares of its customers only on the basis of proxies given by the customer to the bank or broker-dealer. One major difference between U.S. and German law that affects the conduct of shareholders meetings must be mentioned: although the management of a U.S. corporation may — and typically does — solicit proxies from its shareholders, the management of a German corporation probably cannot do so.[292]

3. Mailing of Shareholders Meeting Material

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[289] Broker-dealers generally do not attend shareholders meetings and vote but give proxies to persons (including the corporation itself) soliciting proxies. Broker-dealers frequently delegate the authority to act as its proxy (as well as the responsibility for distributing proxy statements and other shareholder communications) to third party service providers, such as Independent Election Corporation of America. *See* Bloomenthal*, supra* note 11, at pp. 791-793.

[290] *See* Bloomenthal, at p. 790-791; Rule 451(b), NYSE Guide ¶ 2451, *supra* note 70. Rule 451, NYSE Guide ¶ 2451 provides the following: Whenever a person soliciting proxies furnishes a NYSE member organization with copies of the solicitation material and assurance of reimbursement, such member organization shall transmit the proxy material to the beneficial owner of shares in its possession or control and request voting instructions, together with a statement that it may give a proxy in its own discretion if no instructions are received within a time period specified by the rules. If no instructions are received, the member organization may vote in its discretion on uncontested matters, but not on matters which may affect substantially the rights or privileges of such stock. The member organization may also transmit to the beneficial owner a signed proxy together with a letter informing the beneficial owner of the necessity for completing the proxy form and forwarding it to the person soliciting proxies in order that the shares may be represented at the meeting. The second method is rarely used. Rule 451 does not apply to beneficial owners outside the United States.

Rule 452, NYSE Guide ¶ 2452 provides that a member organization shall give a proxy for shares registered in its or its nominee's name only at the direction of the beneficial owner, except in narrowly circumscribed situations. The member organizations do not attend the shareholders meeting to vote but give proxies in accordance with the instructions received to the person soliciting proxies.

[291] *See* §§ 134, 135, AktG.

[292] The German Corporation Act allows voting by proxy, *see* § 134(3), AktG. However, there is a dispute as to whether proxy voting by the corporation or its management board (*Vorstand*) is permissible under German law. *See* Hüffer, *supra* note 26, § 134, annot. 25; Wolfgang Zöllner in: Wolfgang Zöllner (ed.) *Kölner Kommentar zum Aktiengesetz*, vol. 1 (1985), § 134, annot. 79; Decision of the District Court of Stuttgart (*Landgericht Stuttgart*) of Nov. 30, 1973, (1974) *Die Aktiengesellschaft* 260; Ulrich Eckhardt in: Ernst Geßler & Wolfgang Hefermehl, *Aktiengesetz* (1974), vol. 2, § 136, annot. 41.

In order to adjust to the U.S. requirements, DaimlerChrysler has agreed to prepare and mail shareholders meeting materials (invitations to the meeting, agenda, resolutions proposed by management and resolutions proposed by shareholders), which previously were usually sent out one month before the shareholders meeting in Germany,[293] approximately 45 days prior to the meeting, in order to permit the solicitation of proxies in the United States in the customary time frame.[294] DaimlerChrysler also has agreed to give the NYSE 10 days' notice of the record date.[295]

The mailing of proxies before the shareholders meeting carries the risk of a multiple mailing of proxies for the same share and, therefore, of an inadmissible multiple exercise of voting rights. The identity of the record and shareholders meeting dates creates the possibility that a shareholder who already signed a proxy sells the shares prior to the date of the shareholders meeting, and thereafter, the buyer also signs a proxy for the same shares. To address this issue of potential double voting of DaimlerChrysler shares, both the U.S. Transfer Agent (which is The Bank of New York for DaimlerChrysler) and Automatic Data Processing ("ADP"), the proxy agent for most NYSE member organizations, instituted procedures to

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[293] Pursuant to the AktG prior to its amendments by the Act Concening Registered Shares, *supra* note 18, a German corporation had to deliver the shareholders meeting material within 12 days after the publication of the invitation of a shareholders meeting in the Official Gazette (*Bundesanzeiger*) to the banks that in the last shareholders meeting acted as proxies for shareholders (§ 125(1), AktG). The banks were required to promptly forward such material to the shareholders for whom they maintain securities accounts (§ 128(1), AktG). Today, large corporations with registered shares tend to notify their shareholders directly on the basis of the share register. *See* Huep, *supra* note 18, at p. 1625; Gregor Bachmann, 'Namensaktie und Stimmrechtsvertretung', (1999) *Zeitschrift für Wirtschafts- und Bankrecht, Wertpapiermitteilungen* 2100, at pp. 2101–2102; Diekmann, *supra* note 18, at 1988; Than & Hannöver, *supra* note 137, at pp. 299–300. The invitation must be published one month before the shareholders meeting (§ 123(1), AktG). The Act Concerning Registered Shares, *supra* note 18, by amending § 125(2), no. 3, AktG, imposes on the corporation the obligation to send shareholders meeting materials to all registered shareholders. In addition, the Act, by amending § 128(1), AktG, eliminates the general obligation of banks to inform holders of registered shares for whom they maintain securities accounts about upcoming shareholders meetings, and imposes the obligation to forward shareholders meetings materials to customers only on banks that are registered in the share register as nominees for shares owned by their customers. *See supra* note 88. Insofar as the corporation is concerned, the nominee bank is the shareholder entitled to notification. *See supra* note 88. The Act Concerning Registered Shares thus eliminates the double mailing requirement of prior law pursuant to which, even if the corporation mailed shareholders meeting material to shareholders, the depository banks were not relieved from this obligation. For the legislative history of these changes, *see* Official Explanation, *supra* note 18, at pp. 12–13; Seibert, Regierungsentwurf, *supra* note 18, at pp. 941–942. *See* Huep, *supra* note 18, at pp. 1624–1625.

The U.S. rules on mailing of proxy statements to beneficial shareholders are discussed, *supra* part V 2.

[294] *See* SEC Release No. 34-40597, *supra* note 66, *sub* II A(1). The proxy solicitation rules of the NYSE are set forth in Paragraph 402, NYSE Manual, *supra* note 20. Attention must be paid to SEC Rule 14a-13(a) under the Securities Exchange Act of 1934 (17 C.F.R. § 240.14a-13(a) (2000)). In connection with the distribution of proxy material, this Rule requires a corporation to make appropriate inquiry of a registered clearing agency (such as DTC) whose name appears on the corporation's list of security holders and, thereafter, of the participants as early as possible so that adequate supplies of proxy material can be forwarded by the corporation or its agent to the participants for timely distribution and completion. *See supra* part V 2 for further discussion.

[295] *See* SEC Release No. 34-40597, *supra* note 66, *sub* II A(1).

monitor changes in the shareholder list between the date the proxy material is mailed and the day of the shareholders meeting. These procedures are designed (i) to permit the cancellation of the proxies of persons who submit proxies but sell their shares prior to the meeting date, and (ii) to facilitate voting by persons who purchase shares after the time the proxy material is first mailed out, but before the shareholders meeting date.[296] Both the U.S. Transfer Agent and ADP will produce shareholder lists on the day designated for mailing the proxy material (approximately 30-45 days prior to the meeting). The Transfer Agent's list will reflect the names of the registered holders and ADP's list will reflect the names of the beneficial owners.[297] The shareholder lists are updated periodically up until the date of the shareholders meeting, and prior to the meeting date the Transfer Agent and ADP will each produce a current shareholder list.[298] If holders no longer appear on any one of the lists, the proxies submitted by them are cancelled. If new holders appear on one of the lists, proxy materials are mailed to them on a best-efforts basis by the Transfer Agent, in the case of registered owners, and by ADP, in the case of beneficial owners.[299] The goal is to assure that even those shareholders who purchase their shares shortly before the date of the shareholders meeting still receive proxy material on time; for example, via electronic notification or expedited delivery service.

The Act Concerning Registered Shares[300] introduces a relief from the need to send proxy material until the day of the shareholders meeting. The official explanation to the Act states that a corporation is required to send shareholders meeting information only to persons who are shareholders of record on a day prior to the 12th day after the publication of the invitation to the shareholders meeting in the Official Gazette (*Bundesanzeiger*).[301] The invitation must be published at least 30 days before the day of the meeting.[302] However, this mailing cut-off day does not constitute a record date, because persons who become registered shareholders after the cut-off date are not prevented from attending the shareholders meeting and from voting.[303]

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[296] SEC Release No. 34-40597, *supra* note 66, *sub* II A(1). The purpose of the SEC Release No. 34-40597 is to accept the procedures for shareholders meetings of DaimlerChrysler as being in compliance with NYSE procedures.

[297] *See* SEC Release No. 34-40597, *supra* note 66, *sub* II A(1).

[298] *See* SEC Release No. 34-40597, *supra* note 66, *sub* II A(1). *See* Diekmann, *supra* note 18, at p. 1989. A corporation is not permitted to stop the registration of new shareholders prior to the shareholders meeting. *Id*.

[299] SEC Release No. 34-40597, *supra* note 66, *sub* II A(1).

[300] *See supra* note 18.

[301] *See* Official Explanation, *supra* note 18, at pp. 12–13; Seibert, Regierungsentwurf, *supra* note 18, at p. 942 (commenting on § 125(2) no. 3, AktG, as modified by the Act Concerning Registered Shares, *supra* note 18). DaimlerChrysler will have to determine whether the relief from mailing proxy material granted by the Act contradicts the terms of SEC Release No. 34-40597, *supra* note 66.

[302] *See* § 123(1), AktG.

[303] *See* Official Explanation, *supra* note 18, at pp. 12–13; Seibert, Regierungsentwurf, *supra* note 18, at p. 942.

The proxy materials describe the voting procedures in detail and inform of the automatic revocation of the proxy if the holder sells his shares prior to the day of the shareholders meeting.[304] Finally, as a check, the total number of votes cast in nominee name at the shareholders meeting may not exceed the total position so held.[305]

IX. Increase of Share Capital and Subscription Rights

In the case of an issue of new shares, a distinction must be made with respect to subscription or preemptive rights (*Bezugsrechte*)[306] between shareholders holding shares through CBA or through DTC and shareholders holding individually certificated share certificates.

To shareholders holding shares through CBA, the established German procedures apply. In the case of the DaimlerChrysler Global Shares, the global coupon referred to above relates not only to dividends but also to all subscription rights.[307] The discussion relating to the right to receive dividend payments applies equally to the entitlement to subscription rights.[308] All shareholders, whether or not shareholders of record, who own shares in global custody through CBA on the record date for the subscription rights (and thus are co-owners of the global coupon representing the subscription rights for the shares held by CBA) are entitled to exercise subscription rights. Immediately before the first day of trading subscription rights, the shareholders' accounts maintained by their depository banks are credited with the appropriate number of subscription rights and the shareholders are informed by their depository banks about the various options they have (exercising, selling or purchasing of subscription rights).

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[304] SEC Release No. 34-40597, *supra* note 66, *sub* II A(1).

[305] *Id.*

[306] Shareholders of a German corporation have statutory preemptive or subscription rights. Section 186(1), AktG. In New York, in the case of corporations in existence on February 22, 1998, preemptive rights apply to all shares having either unlimited dividend rights after payment of preferences or voting rights, unless the certificate of incorporation limits or denies preemptive rights. Section 622(b)(1), New York Business Corporation Law (McKinney 1986 & Supp. 2000). The rule is just the opposite for corporations formed after February 22, 1998: shareholders have no preemptive rights unless the certificate of incorporation expressly provides for them. Section 622(b)(2), New York Business Corporation Law (McKinney 1986 & Supp. 2000). In Delaware, preemptive rights are not automatically granted by statute but must be explicitly granted in the certificate of incorporation. Section 102(b)(3), Delaware General Corporation Law (Delaware Code Annotated, Title 8 (vol. 4, 1991 & Supp. 1998)).

[307] *See supra* part VII 2(a).

[308] *See* Lutter, *supra* note 77, vol. 5/1 (1995), § 186, annot. 11; Hefermehl, *supra* note 95, vol. 4 (1988), § 186, annot. 19; Hüffer, *supra* note 26, § 186, annot. 7. The DaimlerChrysler Global coupon reads: "The bearer [a more correct translation of the German word *Inhaber* would have been "owner"] of this global dividend coupon is entitled to claim the economic benefits resulting from the above-mentioned global share." *See* Appendix II to this article.

In the United States, information about rights offerings is given by the U.S. Registrar. A rights offering by a publicly held corporation requires registration of the offered securities, *i.e.*, the underlying shares, under the Securities Act of 1933. Although the subscription rights also qualify as securities under the Securities Act of 1933, they themselves need not be registered under the Act because they are granted to the shareholders free of consideration.[309] German corporations whose shares are registered with the SEC have been able to synchronize efficiently the U.S. public offering procedures with the customary German procedures dealing with subscription rights.

For shareholders in Germany holding physical share certificates representing Global Shares, a new procedure had to be developed, since no coupons embodying the subscription rights are delivered with the individually certificated shares.[310] Only shareholders registered in the share register are entitled to subscription rights. One possibility is to mail to such shareholders a tradable subscription certificate (*Bezugsberechtigungsschein*), a security representing the number of subscription rights to which the shareholder is entitled corresponding to the number of shares held by such shareholder, as indicated in the share register. Another possibility is to send a letter to such shareholders advising them to contact their banks and to request that their banks credit their accounts with the subscription rights to which they are entitled or sell or exercise their subscription rights or purchase additional subscription rights for their accounts. The U.S. Registrar will inform shareholders of record holding physical share certificates in the United States of their subscription rights and of their options. Under any of the methods referred to above relating to notification or solicitation of instructions from shareholders, the two-week subscription period for trading in the subscription rights will be shortened for holders of physical share certificates.[311]

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[309] *See* Johnson & McLaughlin, *supra* note 16, pp. 860–861. Because these offerings, if addressed to United States investors, require compliance with the registration requirements of § 5, Securities Act of 1933 (15 U.S.C. 77e (1994 & Supp. IV 1998)), and more specifically the prospectus delivery requirement of §§ 5(b)(1) & 10 under the Securities Act of 1933 (15 U.S.C. 77e(b)(1) & 77j (1994 & Supp. IV 1998)), U.S. investors are oftentimes excluded or cashed out of rights offerings by foreign issuers, thus allowing these issuers to avoid compliance with the registration and disclosure requirements of the Securities Act of 1933. The SEC has addressed this issue in a 1991 Release (*see* SEC Release No. 33-6896 (International Series Release No. 284) (June 5, 1991), 48 SEC Docket 1617, 56 Fed. Reg. 27564, 1991 SEC LEXIS 1025), [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,802)), by proposing a small issues exemption under § 3(b) of the Securities Act of 1933 (15 U.S.C. 77c(b) (1994)) covering up to US$ five million of equity securities offered or sold in the United States in order to facilitate the extension of rights offerings to U.S. investors. However, the SEC has not taken any action on the 1991 proposals. *See* Johnson & McLaughlin, p. 629. Once a German corporation has listed its shares on the NYSE, it will no longer be able to exclude its U.S. shareholders from rights offerings or to cash them out.

[310] *See supra* part IV 3. The holder of the coupon, not the registered shareholder, is entitled to the subscription right. *See* Diekmann, *supra* note 18, at p. 1987. Shareholders owning share certificates with attached coupons would detach the appropriate coupon and instruct their German bank to sell the coupon or to exercise the subscription right for them (possibly after purchasing additional subscription rights).

[311] *See* Gunnar Schuster Memorandum of Aug. 21, 1998, *supra* note 264.

X. Conclusion

The merger between Daimler-Benz AG and Chrysler Corporation in November 1998 marked the first time a corporation incorporated outside the United States directly listed the same common shares on both a U.S. and its home stock exchange. The creation and implementation of the DaimlerChrysler Global Share therefore constitutes a landmark in the history of the NYSE. Apart from its significance for the future of cross-border trading of securities, the DaimlerChrysler transaction is an excellent example of a solution by private ordering of cross-border transactional problems created by different laws and regulations of the countries involved.

In light of the globalization of financial markets and increased cross-border merger and acquisition activity, there is a growing need for corporations to offer one class of securities to its investors worldwide. The DaimlerChrysler Global Shares enable virtually seamless trading on stock exchanges around the world, allowing non-U.S. corporations to increase liquidity and pricing efficiency in the U.S. market while permitting U.S. investors access to the foreign shares on the same terms as those available to foreign investors. Although a number of differences between U.S. and German law and practice exists, they could be overcome and all holders of the DaimlerChrysler Global Shares have direct voting rights and essentially equal status with respect to dividend payments, shareholders meeting invitations, rights offerings, etc.

The application of German law to a transfer of registered shares of a German corporation which are not held in global custody (*Sammelverwahrung*) at a depository bank causes conflicts if shares are also traded in other countries.[312] It seems unrealistic to subject a transfer of physical shares to German law even if the shares are located and the transfer takes place outside of Germany. However, in 1999 German law has made a big step in the direction of a harmonization of conflict of laws by adopting § 17a, Depository Act,[313] which determines the law applicable to transfers of shares held in global custody and which is applicable to transfers of shares in the U.S. indirect holding system. It appears that the law applicable under § 17a to the transfer of shares to the ultimate purchaser would in most cases coincide with the law applicable to such transfers under the UCC in the indirect holding system. Nevertheless, the somewhat simplistic approach of § 17a, which disregards the segments of a security transfer that takes place on tiers of financial intermediaries other than the tier of the purchaser's depository bank, creates new conflicts with applicable foreign laws.[314]

In the future, a Global Share program could be even more successful if the corporation could completely exclude the shareholders' rights for individual certificated shares. The Uniform Commercial Code does not require the issuance of physical share certificates and

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312 *See supra* part VI 3(a).

313 *Id.*

314 *See supra* part VI 3(c).

allows the exclusive use of a central depository system.[315] Once the right to individual certification can be excluded in a Global Share program, many of the problems concerning design, contents, layout, numbering and transfer of actual share certificates that had to be solved in the DaimlerChrysler transactions could be avoided. This means, for the transfer of shares, that the transfer through the direct holding system with all its implications, such as delivery of shares, could be avoided. The NYSE as well as the foreign issuers of Global Shares would profit. It is hoped that the NYSE will eventually adopt this position. There is no principled reason for giving individual shareholders a right to receive individual certificated shares; on the contrary, U.S. law even envisions the absence of any certificated shares.

From a jurisprudential point of view one might say that German law solves the issue of shareholder communication by avoiding the dichotomy between registered and beneficial shareholders and by including in the share register the names of all shareholders. This is accomplished, of course, with the help of the legal theory of co-ownership by all shareholders of the global certificate — a theory that appears strained in the light of reality. The German goal of a complete share register will break down if the practice of registering banks as nominees increases.

Dividend payments to shareholders who are not registered are justified with the help of the concept of a coupon that, in the case of a global certificate, is co-owned by all owners of shares, regardless of whether they are registered or not. The coupon was developed in connection with the bearer share and seems to be conceptually out of place in connection with registered shares. On the other hand, the coupon permits distribution of dividends through the central depository in the same way as dividends are distributed in the United States where the central depository is the sole registered shareholder. From a jurisprudential point of view it would be desirable if German law could be adjusted to achieve this result without having to utilize the artificial concept of a global coupon.

U.S. law has developed the innovative Article 8, UCC, which deals with share transfers in the indirect holding system without the help of dated legal fictions. However, U.S. law has not yet dealt in a conceptual way with the split between legal and beneficial ownership. This split is bridged by a patchwork of rather intricate SEC rules and rules of self-regulatory organizations. The U.S. legislator and the SEC ultimately do not favor direct shareholder communications by the corporation but prefer the dissemination of shareholder information through the broker-dealer network with the help of independent service providers.

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[315] Article 8, UCC, was revised in this respect in 1977 to accomplish this result. The Official Comment No. 2 to § 8–313 on this issue in relevant part reads: "This section is intended to bring the law of securities transfers into line with modern security trading practices and to allow for future development of those practices. It is recognized that most transfers are not effected through physical delivery of a certificate from seller to buyer, but rather through adjustments in balances of the parties' accounts with various intermediaries. Whether each intermediary has physical possession of a certificate to match every security it 'holds' in its customer accounts is of no importance. So long as the intermediary exercises ultimate control, the securities may equally well take the form of an account with a securities depository, with another intermediary or with a transfer agent" (*see* § 8-313(1)(b), UCC in the 1978 version and for New York in the 1982 version (McKinney 1990)). Article 8, UCC, was once again substantially revised in 1994 (in New York 1997); these revisions strengthened that approach.

APPENDIX I

DaimlerChrysler Global Share

APPENDIX II

DaimlerChrysler Global Coupon

APPENDIX III

DaimlerChrysler Individual Share Certificate

Transfers in the United States of America
Übertragungen in die Vereinigten Staaten von Amerika

The following form of endorsement is intended for share transfers in the United States of America and may be used in other jurisdictions where accepted as a valid endorsement.
Das folgende Indossament ist für die Übertragung von Aktien in die Vereinigten Staaten von Amerika bestimmt. Es kann in anderen Staaten verwendet werden, die es als wirksames Indossament anerkennen.

Please insert social security number, tax identification number or other identification number of assignee

For value received, the undersigned hereby sells, assigns and transfers unto

_____
(Please print or type name, occupation and address including postal/zip code of assignee)

_____ no par value registered shares represented by the within Certificate,

and does hereby irrevocably constitute and appoint

_____Attorney to transfer the said shares on the share register of DaimlerChrysler AG with full power of substitution on the premises.

Date:_____Signature:_____

Notice: The signature to this assignment must correspond with the name as written upon the face of this Certificate in every particular, without alteration or enlargement or any change whatever. The signature must be guaranteed by an Eligible Guarantor Institution such as a commercial bank, trust company, securities broker/dealer, credit union or a savings association participating in a Medallion program approved by the Securities Transfer Association, Inc.

Übertragung in der Bundesrepublik Deutschland
Transfers in the Federal Republic of Germany

Übertragung aller in dieser Urkunde verbrieften Aktien
Transfer of all shares represented by this certificate

Das folgende Indossament ist für die Übertragung der Aktien in der Bundesrepublik Deutschland bestimmt, wenn sämtliche umseitig genannten Aktien übertragen werden. Es kann außer in den Vereinigten Staaten von Amerika in anderen Staaten verwendet werden, die es als wirksames Indossament anerkennen.
The following form of endorsement is intended for share transfers in the Federal Republic of Germany if all shares stated on the face hereof are transferred and may be used in other jurisdictions, other than the United States of America, where accepted as a valid endorsement.

Ich/wir übertrage(n) sämtliche in dieser Urkunde verbrieften, auf den Namen lautende Stückaktien der Daimler/Chrysler AG auf

Name: _____
Adresse: _____
Beruf: _____

_____ _____
Datum Unterschrift

Übertragung von weniger als der Gesamtzahl der in dieser Urkunde verbrieften Aktien
Transfer of less than all of the shares represented by this certificate

Die nachfolgende Erklärung ist zusätzlich zur Vorlage der Abtretungserklärung abzugeben, wenn ein Aktionär außerhalb der Vereinigten Staaten von Amerika weniger als alle umseitig genannten Aktien übertragen hat.

The following statement must be provided in addition to presenting the form of assignment if a shareholder has effected a transfer outside of the United States of America of less than all of the shares stated on the face hereof.

Ich/wir zeige(n) hiermit an, _____ Stück auf den Namen lautende Stückaktien der DaimlerChrysler AG an

Name: _____
Adresse: _____
Beruf: _____

(nachfolgend "Zessionar(e)") abgetreten zu haben und beantrage(n) auf den/die Namen des Zessionars/ der Zessionare eine Aktienurkunde über die genannte Anzahl abgetretener Aktien sowie eine weitere Aktienurkunde auf meinen/unseren Namen über die weiterhin von mir/uns gehaltenen auf den Namen lautenden Stückaktien der DaimlerChrysler AG auszustellen. Beide Aktienurkunden sollen mir/uns persönlich übergeben oder an folgende Anschrift (auch bei Personenmehrheit nur eine Anschrift angeben) übersandt werden:

_____

_____ _____
Datum Unterschrift

APPENDIX IV

Due Bill pursuant to Rule 256, NYSE Guide ¶ 2259 (Form 17)

FOR VALUE RECEIVED, the undersigned, holder of record at the close of business on _____, of _____ ( ) shares of _____ Stock of _____, represented by Certificate No. _____, hereby assigns, transfers and sets over unto _____ the cash dividend of _____ ($) to which the undersigned is entitled.

Dated _____ Signature _____

Arbeitspapiere
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