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How (not) to administer a liability rule—the German appraisal procedure for corporate restructurings

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ABSTRACT
Mergers, squeeze-outs, and other corporate restructurings serve to transfer control or to save costs by streamlining the corporate structure. However, they also offer an opportunity for controllers to expropriate investors. Corporate law needs to provide safeguards to ensure that the minority shareholders receive fair compensation when they are forced to surrender their shares. This essay in honor of Professor Klaus J. Hopt provides a short overview of the German "Spruchverfahren" (appraisal procedure) that offers shareholders a remedy against receiving insufficient value in corporate restructurings. It then highlights a major flaw in the German appraisal procedure: challenging the transaction has an option value for the minority because the court can only increase, never reduce compensation. As a result, the controller has an incentive to offer less than fair consideration in the original restructuring terms. The limited empirical evidence appears to support this view. The essay concludes with possible avenues for reform.

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Throughout many decades, Professor Klaus J. Hopt has been spearheading key developments in German and European company and financial law. Besides leading the renaissance of capital market law in Germany, he was one of the first to embrace the corporate governance movement and to bring it to Europe and Germany. Conversely, Professor Hopt has been a chief representative of German corporate law on the international stage, not least in the scholarly conversation with the U.S. The following essay in his honor takes up an important topic in the law of corporate restructurings on both sides of the Atlantic: the protection of minority shareholders against transactions that consume or fundamentally alter their membership rights. The common theme in most jurisdictions is seeking the proper balance between allowing majority decision-making on restructurings while preserving the economic value of the minority's stake. In recent years, the appraisal remedy and merger-related fiduciary duties In the U.S. have received much attention. By contrast, the appraisal procedure ("Spruchverfahren") under German law seems to be less known in international circles.[1] The Festschrift in honor of Klaus Hopt provides a welcome opportunity to introduce the German experience to the international debate.

The essay starts out by framing minority appraisal claims as liability rules in the well-known taxonomy of Calabresi and Melamed; the majority is allowed to impinge on the minority's entitlement but only in exchange for full monetary compensation. After explaining the legal mechanics of the German appraisal procedure, a major design flaw is pinpointed: The appraisal right confers an option value on the minority that the parties cannot bargain away. For a controlling shareholder, the best response is to offer less than fair consideration. The appraisal procedure thus contributes to the ill that it is meant to cure. The essay concludes with directions for potential reforms.

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1 See *Alexandros Seretakis*, Appraisal Rights in the US and the EU, in: Thomas Papadopoulos (ed.), Cross Border Mergers Directive: EU Perspectives and National Experiences, 2019, 65, 76 (alleging that "the appraisal remedy remains a sparingly utilized weapon in the arsenal of shareholders in the EU"); contrast this with the data reported *infra* n. 30.

I. Majority decision-making in corporate restructurings as a liability rule

Major corporate restructurings such as mergers, divisions or squeeze-outs serve to transfer control or to streamline the corporate structure. They help to save costs, to implement value-enhancing strategies and to exploit synergies. On the flip side, corporate restructurings offer opportunities for corporate controllers to expropriate outside investors. To prevent their abuse, the law seeks to ensure that dissenters retain at least the full value of their shareholdings before the restructuring. Mergers are an example in point. They aim at combining two businesses or at consolidating the corporate structure within a group. When the law of a jurisdiction permits mergers, it typically requires shareholder resolutions by simple or qualified majority. Yet the majority may well be subject to a conflict of interest, such as when a controlling shareholder is or owns the other merging entity. Corporation law therefore strives to ensure that the consideration for shares surrendered in a merger is fair.

In the taxonomy of Calabresi and Melamed,[2] majority decision-making over mergers and other restructurings constitutes a "liability rule": The majority can encroach on the minority's entitlement without the latter's consent, but only in exchange for full compensation either in cash or in the form of an equivalent entitlement in the new corporate structure. This precludes transactions that only transfer wealth to the majority. The only remaining motive for the majority then is to benefit from an increase in the total value of the firm. A liability rule thus grants unfettered authority to the majority in exchange for full compensation of the minority. By contrast, a "property rule" would insist on a shareholder's consent for any restructuring that affects her legal entitlement. This would empower even a small minority to veto a transaction and to extract private benefits. Alternatively, a property rule might regulate the allowable corporate restructurings. For instance, it could admit mergers without universal consent but conditional on a valid business purpose. This would effectively shift decision-making over corporate restructurings from the board and the shareholders meeting into the courtroom—hardly a desirable institutional

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2 *Guido Calabresi/A. Douglas Melamed*, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, Harvard Law Review 85 (1972), 1089, 1092.

arrangement. In addition, challenging the economic rationale of a transaction would impose a lengthy and costly delay, which would again provide an opportunity for extorting ransom. Overall, a property rule seems unappealing for all but the smallest firms.

With the liability rule as the remaining option, the task lies in ensuring full compensation while minimizing the administrative burden in terms of delay and other costs. The benchmark in the U.S. is the corporation law of Delaware. It provides two procedural avenues to protect the value of the minority's shareholding. The more prominent one is a direct (class) action against the board of directors: Shareholders can contend that directors have violated their fiduciary duties in arranging or approving a merger.[3] If a controlling shareholder is on the other side of the transaction, the Delaware courts apply the exacting "entire fairness" standard to review and possibly adjust the terms of the merger.[4] Absent a controlling shareholder, judicial scrutiny is much lighter and fails to sustain ex post changes to the consideration.[5] The second safeguard is the statutory appraisal right under § 262 Delaware General Corporation Law. Briefly put, it gives the opposing minority a right to surrender its shares for their fair value, which the Delaware Court of Chancery is called upon to determine "tak[ing] into account all relevant factors."[6] A

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[3] Note that § 251(b)(5) Delaware General Corporation Law permits a merger for consideration other than shares in the resulting corporation and thereby allows "cash out" mergers to "freeze out" minority shareholders.

[4] See, seminally, Weinberger v. UOP, 457 A.2d 701, 703–704, 711–715 (Del. 1983) (developing an "expanded appraisal remedy" for a breach of fiduciary duty and the corresponding entire fairness test).

[5] The leading cases are Unocal v. Mesa, 493 A.2d 946, 954–955 (Del. 1985) (imposing an "enhanced duty" on directors facing a hostile takeover attempt); Revlon v. MacAndrews & Forbes, 506 A.2d 173, 182 (Del. 1986) (developing a duty to obtain "the best price for the stockholders at the sale of the company"); but see Corwin v. KKR, 125 A.3d 304, 312 (Del. 2015) (explaining that the Unocal and Revlon standards are meant to provide injunctive relief rather than ex post damage claims).

[6] § 262(h) Delaware General Corporation Law. Surprisingly, no appraisal right is available for exchange-listed shares if the consideration under the merger terms consists in shares ("market-out exception"), § 262(b) Delaware General Corporation Law. The Delaware legislature in 2016 responded to the recent upsurge in appraisal litigation with an additional de minimis exception, see § 262(g) Delaware General Corporation Law.

wallflower for many decades, the appraisal remedy has come to life in the past fifteen years and is among the most discussed topics in U.S. corporate law today.[7]

Despite recent developments, protection offered by Delaware law is rather limited: Fiduciary duty class actions are effectively confined to transactions with controllers and appraisal provides only an exit right to individual shareholders. This contrasts with the more generous safeguards afforded by German law, to be summarized in the following section. The closer analysis will reveal that the German approach is not only broader but also creates perverse incentives for bargaining over the minority's position. Designing a liability rule is trickier than first meets the eye.

II. Spruchverfahren—appraisal proceedings, German style

As other corporate restructurings, a merger under German law requires a shareholder votes with a three-quarters majority.[8] Besides the self-interest of the majority, the Restructuring Act[9] enlists three additional gatekeepers on behalf of the minority: Firstly, the management and supervisory boards of the merging corporations have to provide an extensive report on the adequacy of the exchange ratio;[10] shareholders have a direct claim against directors if they breach their fiduciary duty by allowing consideration to be unfair.[11] Secondly, the court appoints an independent auditor to

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7 See *Wei Jiang/Tao Li/Danqing Mei/Randall Thomas*, Appraisal: Shareholder Remedy or Litigation Arbitrage, J. L. & Econ. 59 (2016), 697, 704–706 (documenting the increase of appraisal claims made from low single-digit percentages to up to a quarter of eligible transactions starting in the mid-2000s); *Audra Boone/Brian Broughman/Antonio J. Macias*, Merger Negotiations in the Shadow of Judicial Appraisal, J. L. Econ. 62 (2019), 281, 295–296 (likewise); see also *Scott Callahan/Darius Palia/Eric Talley*, Appraisal Arbitrage and Shareholder Value, J. L. Fin. & Acct. 3 (2018), 147, 148–149 (summarizing the reasons for the increase). For the legal debate, see, e.g., *Lawrence A. Hamermesh/Michael L. Wachter*, Finding the Right Balance in Appraisal Litigation: Deal Price, Deal Process, and Synergies, Bus. Law. 73, 961; see also, in German, *Holger Fleischer/Christian Kolb*, Abfindungsarbitrage und Unternehmensbewertung, Die Aktiengesellschaft 2019, 57.

8 §§ 50(1), 65(1) Restructuring Act (Umwandlungsgesetz, UmwG). An English translation is available at <http://www.gesetze-im-internet.de/englisch_umwg/index.html> (last accessed 01/01/2020).

9 *Supra* n. 8.

10 Different from Delaware (*supra* n. 3), German law in general permits only shares in the acquiring corporation as consideration in a merger, excluding cash-out mergers, see § 5(1) no. 3 Restructuring Act and the narrow exception in § 62(5) Restructuring Act.

11 §§ 8(1), 25, 26 Restructuring Act.

examine the merger agreement.[12] In her report, the auditor details the valuation methodology and concludes with an explicit determination as to the fairness of the exchange ratio.[13] Finally, the exchange ratio is subject to review by the court: shareholders of an acquired corporation—but not those of the acquirer—can initiate appraisal proceedings ("Spruchverfahren") to claim an additional cash payment complementing an insufficient consideration in the merger terms.[14] The German appraisal claim differs from its Delaware counterpart in that shareholders can petition for court appraisal without abandoning their shareholding. It is not an exit right but serves to correct an unfair price term in the merger agreement.[15] Also, petitioners need not have opposed the merger in the shareholder vote.[16]

The German appraisal procedure likely is the most active area of merger and restructuring litigation in Germany.[17] The fact that only shareholders of the acquired, not the acquiring, corporation can seek appraisal has been criticized not so much because it denies minority shareholders of the acquirer protection but because it preserves their right to seek injunctive relief against an allegedly unfair price.[18] The

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12 Either one separate auditor for each corporation or, upon joint application of the parties, a single auditor for all corporations, see § 10(1) Restructuring Act.

13 § 12(2) Restructuring Act.

14 §§ 14(2), 15 Restructuring Act. The procedural rules are contained in the Appraisal Procedure Act (Spruchverfahrensgesetz, SpruchG). No English translation of the Act is available. The German text can be found at <http://www.gesetze-im-internet.de/spruchg/> (last accessed 01/01/2020).

15 Shareholders have an exit right if the acquiring entity is of a different legal form or shares in the acquired corporation were listed at a securities exchange while those of the acquiring corporation are not, § 29(1) Restructuring Act.

16 Unlike § 262(a) Delaware General Corporation Law (restricting the appraisal right to shareholders who have not voted in favor of the merger).

17 The appraisal procedure applies in the cases enumerated in § 1 Appraisal Procedure Act. Beside cash supplements and exit rights in mergers, divisions and transformations, these instances include monetary compensation for profit transfer or domination agreements, for the integration ("Eingliederung") of one stock corporation in another and for shareholder squeeze-outs. See *infra* n. 30 for data on the incidence of appraisal proceedings.

18 See, e.g., *Walter Bayer/Sven Möller*, Beschlussmängelklagen de lege lata und de lege ferenda, Neue Zeitschrift für Gesellschaftsrecht 2018, 801, 806. see also the reform proposal by the Commercial Law Committee ("Handelsrechtsausschuss") of the German Lawyers Association ("Deutscher Anwaltsverein"), *Gero Burwitz,* Handelsrechtsausschuss des DAV: Gesetzgebungsvorschlag zum Spruchverfahren bei Umwandlung und Sachkapitalerhöhung und zur Erfüllung des Ausgleichsanspruchs durch Aktien, Neue Zeitschrift für Gesellschaftsrecht 2007, 497; *Uwe Hüffer*, Ausgleichsanspruch und Spruchverfahren statt Anfechtungsklage beim Verschmelzungsbeschluss oder Kapitalerhöhungsbeschluss des übernehmenden Rechtsträgers, Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 172 (2008), 8, 12–15.

enormous cost of delaying a major transaction until a valuation dispute has been resolved is, in fact, a primary reason to establish an appraisal procedure: It allows the majority to proceed and leaves valuation to ex post litigation,[19] which is well in line with Calabresi's and Melamed's concept of a liability rule.

The procedural rules of the German appraisal right strongly encourage enforcement. An award to a single claimant has *inter omnes* effect and benefits all shareholders of the corporation.[20] If the petitioner loses, she has to bear her own expenditures but not those of the defendant corporation.[21] If the court finds for the petitioner, it can order the defendant to cover her expenses.[22] In addition, the defendant corporation has to pay court fees and costs, including the very significant cost of expert opinions, as well as attorney fees for a "common representative" of the non-complaining shareholders.[23] Overall, the cost burden of litigating the appraisal claim is borne almost entirely by the defendant.

III. The option value of the German appraisal procedure

The German appraisal right favors petitioners also on substance: The court can increase but not reduce the consideration owed to the shareholders of the acquired corporation. It is all opportunity and no risk for the claimants, and therefore too good a chance to pass up in most restructurings. In the following, a rather simple point will be made: By inducing shareholders to challenge even perfectly adequate

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19 Accordingly, the German legislator has filled the gap by introducing yet another type of liability rule, which eliminates the blocking effect of actions to set aside shareholder resolutions, see for mergers § 16(3) Restructuring Act.

20 See § 13 Appraisal Procedure Act (stating *inter omnes* effect of judgment).

21 If the court views the complaint as frivolous, it can impose court fees on the petitioner under § 15(1) Appraisal Procedure Act.

22 See § 15(2) Appraisal Procedure Act. Litigators report that experienced petitioners tend to hire an attorney only when the complaint turns out to be successful, see *Johannes Deiß*, Die Vergütung der Verfahrensbevollmächtigten und des gemeinsamen Vertreters im Spruchverfahren, Neue Zeitschrift für Gesellschaftsrecht 2013, 248, 249. See also *Jens Erick Gotthardt/Marcel Krengel*, Reformbedürftigkeit des Spruchverfahrens, Die Aktiengesellschaft 2018, 875, 875–877 (describing strategies to raise appraisal claims to extort sidepayments in settlements); *Klaus Henselmann/Michael J. Munkert/Nadine Winkler/Claudia Schrenker*, 20 Jahre Spruchverfahren – Empirische Ergebnisse zur Abfindungserhöhung in Abhängigkeit vom Antragsteller und von den Bewertungssubjekten, Die Wirtschaftsprüfung 2013, 1206, 1208–1209 (providing evidence on the role of professional mass-claimants in appraisal proceedings).

23 See § 6(2) Appraisal Procedure Act.

restructuring terms, the remedy precludes the acquiring corporation from making a fair offer in the first place. This asymmetry produces the very unfairness that the appraisal procedure is meant to correct.

The main issue in reviewing the fairness of consideration in a merger is the valuation of the firms involved. Each of the merging entities has to be valued to determine how many shares in the acquirer are needed to fully compensate the shareholders of the acquired corporation. Assessing the going-concern value of a business is fraught with difficulty and uncertainty.[24] It is quite likely that any two experts, if asked separately to value the same firm, will come up with very different estimates. As the appraisal procedure calls for an independent review, one can think of it as obtaining a second opinion from the court. Combined with the asymmetric nature of the remedy, the shareholders of the acquired corporation find themselves in a most fortunate position. The merger agreement entitles them to a certain number of shares based on a valuation of the merging entities by the boards of directors and the merger auditor. The appraisal procedure adds to this the chance to win a cash supplement based on another roll of the dice—if the court happens to arrive at more favorable valuations.

Financially speaking, the appraisal claim amounts to an option to receive a positive difference between the fair equivalent as determined by the court and the consideration stipulated in the agreement. Shareholders obtain the option almost for free, given the favorable fee shifting rules. Pursuing the option analogy further, the strike price corresponds to the consideration stipulated in the merger agreement. If the acquirer had only the goal of minimizing the value of the shareholders' option, it could raise the consideration promised in the merger agreement. Yet a higher consideration costs the acquirer strictly more than it reduces the option value of the shareholders: It has to be paid with certainty, whereas the probability of the court

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24 A summary of the reasons is provided in *Steven M. Davidoff*, Fairness Opinions, Am. U. L. Rev. 55 (2005), 1557, 1573–1585; see also *Albert H. Choi/Eric Talley*, Appraising the "Merger Price" Appraisal Rule, J. L. Econ. & Organ. 34 (2018), 543, 544 ("Expert testimony […] usually clouds more than it clarifies, with opposing experts typically delivering valuation opinions that diverge substantially. [… A]ppraisal invariably forces the factfinder to wander far into the underbrush of financial valuation techniques […] to divine fair value, a disquieting challenge for generalist judges."); from the perspective of a German judge, see *Matthias Katzenstein*, Schätzung des Unternehmenswerts nach Maßgabe von § 287 Abs. 2 ZPO im Spruchverfahren, Die Aktiengesellschaft 2018, 739, 740–742 (arguing for restricting appraisal to an examination of the valuation opinion by the court-appointed auditor).

awarding an additional (marginal) Euro will often be less than one. Figure 1 illustrates this point. Consider first the left pane. The dashed line depicts the probability that the court holds the full compensation to be at least an amount x. The probability is 1 for values of x which every court will require as full compensation. In the uncertainty range, the probability of a court finding full compensation to amount at least to x declines from 1 to 0. Finally, no court demands any amount of compensation to the right of the uncertainty range.

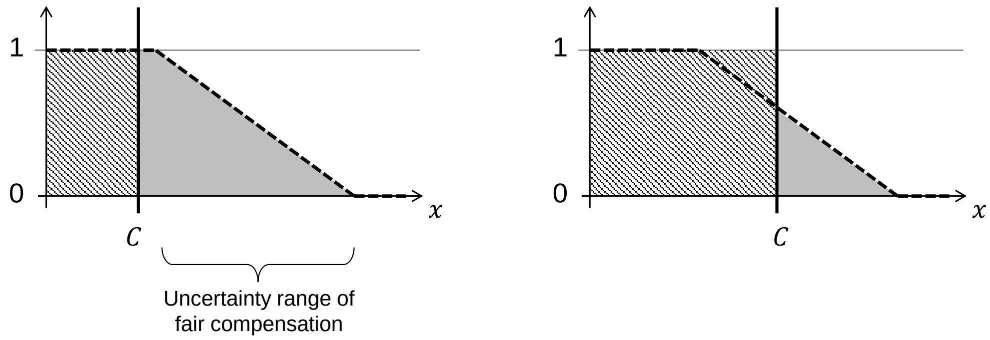

Figure 1: Shareholders' expected value from consideration C stipulated in the merger agreement and from invoking the appraisal procedure. The dashed line indicates the probability that the court finds that full compensation amounts to at least x (assuming a uniform probability distribution). The hatched area represents the expected value from consideration C, which is received with certainty. The grey area is the expected value of the cash supplement awarded by the court.

The hatched and grey areas can be interpreted as weighting each possible Euro of compensation by the probability with which it is received by the shareholders. The hatched area is the expected value from the consideration promised by the acquirer in the merger terms (marked as C in the chart). The grey region is the expected value of the additional cash payment awarded as a result of appraisal proceedings. In the left part of Figure 1, the merger agreement undercompensates the shareholders by keeping the consideration below what any court would require as fair.

The right-hand side of Figure 1 depicts the case that consideration in the merger agreement is set closer to the likely fair price. If valuation errors of the court spread symmetrically around the true value, consideration is fair if C is set exactly in the middle of the uncertainty range. But striving to offer full compensation to shareholders does not serve the acquirer well, as one can tell from comparing the two sides of Figure 1. The expected value of the shareholders from the consideration given under the restructuring terms (the hatched area) and the cash supplement (the shaded area) comes at the acquirer's expense. One immediately sees that the high consideration in the right pane is more costly to the acquirer than setting the exchange ratio too low and waiting for the court to adjust compensation. The reason is the asymmetry of the appraisal procedure. If the judgment award superseded the consideration offered in the merger agreement, shareholders would run a risk of getting less compensation. Offering a fair exchange ratio would become an attractive strategy for the acquirer as she could hope to avoid litigation by dissuading shareholders from invoking the appraisal procedure.

Figure 1 even suggests that the merger terms never set consideration above the minimum award in an appraisal procedure. Any consideration C in the uncertainty zone of Figure 1 would increase the total cost of compensating the shareholders. One complication is that, at least in a merger of independent firms, the consideration likely also reflects the intended sharing of the gains from the transaction. It then depends on whether fairness requires only compensation for the share value without the merger (reflecting the "stand alone" value of the acquired corporation) or whether it extends to a "fair" sharing of gains, such as from merger synergies.[25] The stand-alone approach could reduce the appraisal procedure's option value if the merger agreement gives shareholders more than the minimum compensation based on a stand-alone valuation of the acquired corporation. Another aspect is that appraisal litigation is time consuming. Procedures typically take several years to be resolved.[26] The statute provides for a rather generous interest rate on the cash

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[25] The prevailing view under German law favors the stand-alone approach, see *Rainer Hüttemann*, Neue Entwicklungen bei der Unternehmensbewertung im Gesellschaftsrecht, Corporate Finance 2016, 467, 469–470 (limiting the minority's compensation to the proceeds from a hypothetical liquidation); but see *Tim Drygala*, in: Walter Bayer/Jochen Vetter (eds.), Lutter, Umwandlungsgesetz, 6th ed. 2019, § 5 UmwG para. 28 (arguing that fair merger consideration must reflect the valuation ratios of the merging entities, which results in a gains-sharing rule). For the U.S., see § 262(h) Delaware General Corporation Law (excluding merger-related effects on valuation); DFC Global v. Muirfield Value Partners, 172 A.3d 346, 368 (Del. 2016) (excluding "any portion of value that might be attributed to a synergy premium").

[26] See *Karl Peter Puszkajler/Tino Sekera-Terplan*, Reform des Spruchverfahrens?, Neue Zeitschrift für Gesellschaftsrecht 2015, 1055, 1056 (reporting slightly over 9 years mean time to resolution for proceedings initiated before the 2003 reform; the corresponding average reported for post-reform proceedings is 4 years but likely suffers from selection bias because the sample contains only proceedings that had been concluded by 2015); *Klaus Henselmann/Michael J. Munkert/Nadine Winkler/Claudia Schrenker*, 20 Jahre Spruchverfahren – Empirische Ergebnisse zum gerichtlichen Verfahrensgang und zum Ausgang von Spruchverfahren, Die

supplement.[27] This effectively imposes a percentage penalty for any shortfall in compensation, creating an incentive to offer a higher consideration in the first place.

The prediction derived from Figure 1—that merger terms will undercompensate shareholders—has not been tested empirically. Full compensation would imply that the consideration equals the expected value of the court's fairness assessment. Assuming that the probability distribution of the court's valuation is symmetric as in Figure 1, a fully compensatory C would need to be set in the middle of the uncertainty range. This would imply that a cash supplement should be paid in 50% of cases. Otherwise, if less than fair consideration is offered, one should expect to observe cash awards from the appraisal remedy in more than 50% of restructurings. On a naïve reading, the data seem to confirm the undercompensation hypothesis: Roughly 80% of appraisal proceedings result in a positive cash supplement.[28] Yet many of these outcomes arise in settlements and could reflect a defendant's payment to rid itself from the nuisance and expenses of prolonged appraisal litigation.[29] Also, little reliable data exists regarding how many restructurings lead to appraisal proceedings.[30] As promising cases are more likely to be litigated, a proper empirical test needs to control for selection effects.

Wirtschaftsprüfung 2013, 1153, 1157 (finding a decline of mean duration of 6.6 years to 2.9 years in a different, hand collected sample subject to the same selection bias as the previous study); *Ettore Croci/Olaf Ehrhardt/Eric Nowak*, The corporate governance endgame – minority squeeze-out regulation and post-deal litigation in Germany, Managerial Finance 43 (2017), 95, 104 (mean duration of around four years in appraisal proceedings following a statutory squeeze-out under § 327a Stock Corporation Act ["Aktiengesetz"]).

27 Namely five percentage points atop the statutory base rate, which in turn reflects the refinancing rate of the European Central Bank, see § 15(2) Restructuring Act, § 247 Civil Code (Bürgerliches Gesetzbuch, BGB). Pre-judgment interest in Delaware is similarly generous, § 262(h) Delaware General Corporation Law.

28 *Henselmann/Munkert/Winkler/Schrenker* (n. 26), 1158; *Puszkajler/Sekera-Terplan* (n. 26), 1057.

29 As conjectured by *Henselmann/Munkert/Winkler/Schrenker* (n. 26), 1159.

30 But see *Croci/Ehrhardt/Nowak* (n. 26), 102, Table I (reporting appraisal or other litigation in 82.7% of statutory squeeze-outs); *Christian Aders/Hannes Kaltenbrunner/Bernhard Schwetzler*, Die Kosten des "Taking Private" in Deutschland – Eine empirische Untersuchung, Corporate Finance 2016, 295, 298, Table 1 (showing large incidence of appraisal and other litigation in a sample of taking-private transactions).

IV. Promoting bargaining over fair consideration

Under a standard liability rule à la Calabresi and Melamed, if one party interferes with the other's entitlement, there is still an incentive to bargain over the level of compensation. Costly litigation only occurs if the parties fail to agree. The German appraisal procedure with its asymmetry and *inter omnes* effect defeats this natural tendency to save litigation costs. The minority can realize the option value from the appraisal proceedings only by initiating them. As a result of this, the majority has reason to offer less than a fair consideration because it must subtract the minority's option value, plus the cost of appraisal proceedings. This is an unfortunate state of affairs. Appraisal litigation is costly and should be used sparingly, not as the routine procedure for administering the liability rule for restructurings. Ideally, court appraisal should act as a deterrent to encourage drafters of restructuring plans to stipulate a fair consideration.

The above analysis highlights the asymmetric risk profile of the appraisal procedure for minority shareholders as a cause of its indiscriminate use. Accordingly, one potential reform is to introduce a downside for petitioners. On its face, the appraisal remedy in Delaware is symmetric: The Court of Chancery could determine a fair value that is less than the consideration offered in the merger agreement. In theory at least, shareholders have to weigh the chance of obtaining a higher compensation in court against the threat of receiving less than the consideration under the terms of the merger. They will take the risk of exercising the appraisal right only if they perceive the restructuring as unfair. Could German law adopt a similar, more symmetric approach to appraisals? The Delaware appraisal right affects only the individual shareholders exercising it. The German appraisal, by contrast, is effectively a collective redress procedure in which petitioners act as class representatives. This is hardly compatible with imposing a downside risk on the petitioner or even on all minority shareholders.

An alternative approach at reducing the option value of appraisal proceedings is to reduce the variance of awards by linking court appraisal to the outcome of bargaining over the merger terms. The key idea is to reward procedural fairness in the original valuation and to rely on it when it seems to reflect an impartial assessment. A 2003 reform of the German appraisal procedure took this path by, on the one hand, strengthening the independence of restructuring auditors and, on the other hand, allowing the court to base its own valuation on the auditor's analysis instead of hearing different expert witnesses and conducting a new valuation from scratch.[31] In a sample of 262 appraisal procedures, the mean awards declined considerably from a 26.3% cash supplement (as a percentage of the original consideration offered) to 14.1% after the reform took effect.[32] There is even limited evidence to suggest that the minority simultaneously received higher offers in the original restructuring terms, as one would expect based on the above analysis.[33]

A less sanguine view is that the original auditor may be captured by a dominant party in the transaction.[34] It seems plausible that even a court appointed auditor will not give much assurance that a bargaining outcome is fair, particularly if a controlling shareholder is on the other side of the transaction. This begs the question which conditions would justify greater confidence in the negotiated terms of a restructuring. In this respect, German law could draw inspiration from recent developments in the jurisprudence of Delaware. For the fiduciary duty analysis in the presence of a controlling shareholder, a landmark ruling of the Delaware Supreme Court now grants de facto immunity under the business judgment rule if a deal has been negotiated by a special committee of independent directors and, in addition, has been ratified by a majority of the shareholder minority.[35] As regards the appraisal remedy, the same court has refused to specify a presumption for when the agreed-upon price

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[31] See *supra* n. 12, § 7(3), (6), § 8(2) Appraisal Procedure Act and the draft bill for an Act to Reform the Appraisal Procedure under Corporation Law ("Spruchverfahrensneuordnungsgesetz"), Bundestags-Drucksache 15/371, pp. 14–15, 18. Before the reform, appointment by the court had been an option. See also *Katzenstein* (n. 24), 741–742 (contending that the court should as a rule confine itself to evaluating the methodology used by the original auditor).

[32] *Puszkajler/Sekera-Terplan* (n. 26), 1057 (for 108 observations before and 154 observations after the reform); see also *Croci/Ehrhardt/Nowak* (n. 26), 115 (reporting a decline from 35.0% to 19.7% with statistical significance at the 10% level in a sample of 119 appraisal procedures after a statutory squeeze-out).

[33] *Croci/Ehrhardt/Nowak* (n. 26), note 33 (observing a rise in offer premia from squeeze-outs).

[34] This is suspected by *Puszkajler/Sekera-Terplan* (n. 26), 1058.

[35] Kahn v. M & F Worldwide, 88 A.3d 635, 642–646 (Del. 2014). For an empirical assessment of the effects, see *Fernán Restrepo*, Judicial Deference, Procedural Protections, and Deal Outcomes in Freezeout Transactions: Evidence from the Effect of MFW, available at <https://ssrn.com/abstract=3105169> (last accessed 01/01/2020) (finding no significant changes in deal premia and the success rate of transactions).

can serve as reliable indicator of fair value; it has, however, emphasized the probative weight of a price resulting “from a robust market check”.[36] Putting greater weight on a fair bargaining process in corporate restructurings could be a promising strategy for the German appraisal procedure as well. Unfortunately, the Federal Constitutional Court has limited this approach by insisting that court appraisal cannot confine itself to reviewing the fairness of the bargaining process.[37] This holding precludes the court from rubber-stamping the deal price in appraisal proceedings. It should not be read, however, to rule out a more nuanced consideration of how the terms of a corporate restructuring have been reached.

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36 DFC Global v. Muirfield Value Partners, 172 A.3d 346, 366–372 (Del. 2016); Dell v. Magnetar Global Event Master Fund, 177 A.3d 1, 21–23 (Del. 2017).

37 Federal Constitutional Court (Bundesverfassungsgericht), decision of 5/24/2012, docket 1 BvR 3221/10, Zeitschrift für Wirtschaftsrecht 2012, 1656, para. 27 (arguing that bargaining reflected manifold business considerations besides setting appropriate consideration for shares consumed in a merger).