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CO-DETERMINATION IN WEST GERMANY—THROUGH THE BEST (AND WORST) OF TIMES

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Frequently during the contemporary debate concerning the country's economic difficulties and possible methods for revitalizing ailing sectors of the economy like the automobile and steel industries, attention focusses on methods for inducing greater cooperation between management and labor. Even though this concern existed before the latest recession, the economic dislocations caused by the recent downslide have accentuated the need for cooperation as troubled industries seek substantial wage concessions from labor unions, more often than not behind thinly-veiled threats of additional work force reductions. Many different companies have introduced and experimented with innovative ideas and strategies, ranging from discussion groups for production shifts to the election of Douglas Fraser, President of the United Auto Workers, to Chrysler Corporation's board of directors.¹ Many of these innovations were patterned after practices common to the economies of our major trading partners, including the members of the European Economic Community; some of these particular innovations have often been admired in this country.²

West Germany is widely recognized as a fertile source of these innovations. The Federal Republic has long enjoyed a post-war tradition of co-determination, worker participation in corporate decision-making, stemming from two major pieces of legislation whose scope and coverage have been gradually expanded over the years: the Co-Determination Act (*Mitbestimmungsgesetz*)³ and the Works Council

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1. See generally, *Worker Participation in Corporate Government: The U.A.W.-Chrysler Experience*, 58 CHL-KENT L. REV. 949 (1982).

2. See, e.g., *id.* at 971.

It just so happens, that if you look at the social history of the world, we learned from a lot of other people. I look at the German situation where their labor unions have a very, very meaningful role on a supervisory board. In fact, they're in a very strong minority position. They just lack the deliberately designed board so that the management has a majority of one. And then people, in Congress particularly, always marvel at the economy of Germany, and how stable it is, relatively speaking. Germany has a low inflation rate and low unemployment. I can make the argument that a lot of that is due to the meaningful role that the labor movement plays in Germany.

3. Gesetz über die Mitbestimmung der Arbeitnehmer of May 4, 1976, Bundesgesetzblatt

Act (*Betriebsverfassungsgesetz*).⁴ These statutes are the product of West Germany's post-war socialist tradition and close cooperation between the Social Democratic Party and the trade unions. German trade unions attempted several times during the post-war period to expand co-determination. However, these attempts to secure wider co-determination became successful only after the Social Democratic Party joined the governing coalition in 1968.⁵ The West German tradition of democratic socialism that made the expansion possible certainly is one not shared in this country. Consequently, although certain principles and ideas from each of these statutes may have been adopted in various sectors of the American economy or have been the inspiration for various experiments, the differing political milieu of the two countries alone probably precludes the wholesale adoption in the United States of German co-determination principles and works councils.

Nevertheless, these concepts warrant careful examination, especially as American employers adopt more innovative and flexible management arrangements in an attempt to enhance competitiveness and to overcome seemingly intractable productivity problems. Although an analysis of the total political environment in which the two German statutes were enacted lies beyond the scope of the present article, an exposition of the statutes' major provisions should provide some helpful background for Mr. Fraser's comments and highlight the forms of West German worker participation. In addition, a short look at how these forms of worker participation have actually reacted to West Germany's own recent downturn may suggest some limitations on worker participation.

GERMAN CO-DETERMINATION LAWS

Early Versions

The origins of German post-war co-determination are actually British because the important steel and coal enterprises of the Ruhr Valley are located in the old British occupation zone. The early forms of co-determination were introduced in these industries. The British

BGBI I 1153 (W. Ger.) [hereinafter cited as Co-Determination Law]. English translations of the Co-Determination Law can be found in M. PELTZER, CO-DETERMINATION ACT (2d ed. 1976), or D. HOFFMAN, THE GERMAN CO-DETERMINATION ACT 1976 (1976).

4. *Betriebsverfassungsgesetz* of Jan. 15, 1972, BGBI I 13 (W. Ger.) [hereinafter cited as Works Council Act]. An English translation of the 1972 Works Council Act can be found in GERMAN WORKS COUNCIL ACT 1972 (CCH) (H. Beinhauer trans. 1972).

5. Vorbrugg, *Labor Participation in German Companies and Its European Context*, 11 INT'L LAW. 249, 255 (1977) [hereinafter cited as Vorbrugg].

military government required that the coal and steel enterprises be controlled by eleven-person boards composed of five shareholder representatives and five employee representatives. The eleventh member, the tie breaking chairman, was elected by the other ten.⁶ The British system first implemented the principle of "parity" co-determination, the equal representation of labor and shareholder interests on the governing board. Parity co-determination, as adopted in the coal and steel industries, was retained in those industries when the first federal Co-Determination Law of 1951,⁷ the *Mortan* Act, was adopted after the occupying forces had transferred power back to the West German federal government.⁸

This statute provided that German workers in the steel, iron, coal and supporting industries would directly elect five of the eleven members of each company's supervisory board (*Aufsichtsrat*). The *Aufsichtsrat*, an institution peculiar to West Germany, reflected the strict separation in German corporations between management boards, responsible for daily operations in discrete areas, and the supervisory boards that are responsible for corporate-wide policy.⁹ The five employee *Aufsichtsrat* members exercised a voice equal to the five shareholder representatives resulting in a system of parity co-determination. The element of parity was further preserved by requiring all ten members to select the chairman. Even though these particular industries were heavily unionized at the time and the *Mortan* Act passed in large measure because of union pressure, the 1951 Act required only that two of the five employee seats be reserved for trade union members. Of the remaining three seats, one went to a salaried employee, one to a blue collar worker, and one to someone not connected with the union or the corporation, often a professor or labor lawyer.¹⁰ Thus, although organized trade unions were instrumental in obtaining the law's enactment, the 1951 Act did not exclusively benefit trade union members by permitting only their interests to be represented on the *Aufsichtsrat*. In the coal and steel industries, the law ensured that the interests of non-production workers such as clerical, supply and maintenance workers could also be represented on the *Aufsichtsrat*.

The *Aufsichtsrat* is responsible for broad corporate policy. Under

6. Gruson & Meilicke, *The New Co-Determination Law in Germany*, 32 BUS. LAW. 571, 572 (1977) [hereinafter cited as Gruson & Meilicke].

7. Mitbestimmungsgesetz of May 21, 1951, BGBI I 347.

8. See generally Gruson & Meilicke, *supra* note 6, at 572.

9. Vorbrugg, *supra* note 5, at 253.

10. Comment, *Co-Determination in West Germany*, 51 OR. L. REV. 214, 215-16 (1971) [hereinafter cited as Comment].

the 1951 Act, this board was also responsible for appointing a three-member managing board (*Vorstand*).¹¹ This entity, in accordance with Germany's two-tiered management system, was responsible for running each company on a day-to-day basis and addressing specific technical and scientific problems. The 1951 Act was careful to protect the role of professional managers by mandating the use of a *Vorstand*, but it did not require that any of the three *Vorstand* members be employees. The worker participation on the *Aufsichtsrat* or supervisory board thus tended to be restricted to the policy-making level and did not immediately lead to greater participation on the technical managing boards.¹²

Even though the initial co-determination arrangements provided for parity employee representation on each *Aufsichtsrat*, subsequent attempts to extend the parity principle were far less successful. For example, a 1952 law¹³ permitted worker participation in a few industries other than coal and steel, but allocated to employees only one-third of the available seats on each *Aufsichtsrat*.¹⁴ This minor form of co-determination was made mandatory for German publicly-owned corporations, privately-owned companies and miners' unions with more than 500 employees.¹⁵ Labor unions and their close political allies, the Social Democratic Party, spearheaded throughout the post-war period the political effort to extend the principles of co-determination to new industries. These efforts continued throughout the decade of the 1970's and eventually resulted in the 1976 Act.

The 1976 Co-Determination Law

The 1976 Co-Determination Law greatly expanded the number of business entities that are ostensibly subject to the principle of parity co-determination. The provisions of the Co-Determination Law now apply to most legal entities, including joint-stock companies (*Aktiengesellschaft*), limited liability companies (*Gesellschaft mit beschränkter Haftung*), and partnerships limited by shares (*Kommanditgesellschaft auf Aktien*).¹⁶ Generally, however, these business entities must employ

11. *Id.* at 216.

12. *Id.* at 217.

13. *Betriebsverfassungsgesetz* of Oct. 11, 1952, BGBI I 681.

14. *Id.* See generally Comment, *supra* note 9, at 217.

15. Woolridge, *The System of Co-determination in Western Germany and its proposed reform*, 5 ANGLO-AM. L. REV. 19, 21 (1976). The statute excluded the coal, iron and steel industries. *Id.* at 37 n. 26.

16. Co-Determination Law, § 1(1).

more than 2,000 employees.¹⁷ Excluded are entities already regulated by other co-determination laws, such as the coal and steel industries that still are subject to the 1951 act, as well as political or charitable organizations, and news media organizations.¹⁸

Additional provisions define the applicability of the Co-Determination Law to special situations. For example, when entities subject to the act are organized as a joint venture in the form of a limited partnership, but the limited partners hold the majority of the shares of the general partnership, then the employees of each limited partner are treated as employees of the general partner to determine if total employees number more than 2,000;¹⁹ if a limited partner is in turn the general partner of a partnership, the employees of the limited partner will be expanded to include the employees of each subsidiary limited partner.²⁰ Other sections specify the manner in which the employees of subsidiary or controlled companies of other enterprises already subject to the Co-Determination Law will be counted.²¹

Each enterprise subject to the Co-Determination Law is required to create an *Aufsichtsrat*, if it does not already have one.²² Each *Aufsichtsrat* has an equal number of shareholder and employee members.²³ The Co-Determination Law contains language specifying the *Aufsichtsrat's* size, calculated on a sliding scale according to the number of employees, and also specifies the proportion of union and other employees entitled to sit on each supervisory board.²⁴ An accommodation between the possibly divergent interests of organized and unorganized workers is necessary in those enterprises where union members do not constitute the entire work force. Office staff and clerical workers are entitled to vote directly for a number of electors proportionate to their representation in the total work force.²⁵ The electors shall in turn vote for the *Aufsichtsrat* members, unless the employees choose to conduct direct elections.²⁶ These arrangements suggest a leg-

17. *Id.*

18. *Id.* § 1(4).

19. *Id.* § 4.

20. *Id.*

21. *Id.* § 5.

22. *Id.* § 6(1).

23. *Id.* § 7(1).

24. *Id.* §§ 7(1) & 7(2). The Co-Determination Law provides that an *Aufsichtsrat* containing six to eight employee members must seat two union representatives, and a ten-member board must seat three union members. Nothing in the Co-Determination Law interferes with the internal union procedures by which these union members are selected. The Law's intent to obviate the possibility of union-dominated employee representatives is manifest.

25. *Id.* § 11(2).

26. *Id.* § 9(1).

islative purpose, in spite of adverse union pressure, to prevent industrial production workers from dominating completely the employee *Aufsichtsrat* seats. Requiring proportional representation obviously prevents the more numerous production workers in some firms from easily blocking the election of any representatives from the clerical staff minority. The Co-Determination Law thus recognizes that groups of employees constitute separate interest groups according to their work classification. Mandating a sliding quota of union *Aufsichtsrat* seats in section 7 may, however, overstate union influence, especially in those enterprises in which union members are only an insignificant percentage of the total work force. In all co-determination firms employees vote for employee *Aufsichtsrat* members according to their job classifications; elections are held on a plant-by-plant basis with office staff and industrial workers in the enterprises employing more than 8,000 employees required to vote for official employee electors, while the employees of smaller firms (those enterprises employing less than 8,000)²⁷ vote directly for employee board members. The employees in these smaller firms, however, may choose to use electors.²⁸

Perhaps even more surprising to American observers is the Co-Determination Law's treatment of managerial employees. Because the co-determination principle has primarily addressed the relationship between owners (*i.e.*, shareholders) and employees, the issue of how to treat supervisory or other managerial personnel was not deemed critical. The specific interests of senior supervisory employees are probably more closely identified with ownership interests, although the Co-Determination Law defines them as office staff.²⁹ The Co-Determination Law elects to treat senior supervisors as part of the office worker category; the law also permits the senior supervisors to elect directly one *Aufsichtsrat* elector, whenever the concern is large enough to justify the allocation of more than nine employee seats to the *Aufsichtsrat*.³⁰

Each of these provisions dilutes the influence of unionized industrial workers on the *Aufsichtsrat* by reducing the number of seats available to trade union members. Union representatives must compete with office staff representatives and senior supervisory employees on the *Aufsichtsrat* for recognition as spokespersons for the employees in the enterprise. This dissection of "employee" points of view probably dilutes employee influence on the *Aufsichtsrat* on many issues espe-

27. *Id.*

28. *Id.* § 9(2).

29. *Id.* § 3(3)(1).

30. *Id.* § 11(2).

cially since senior supervisors would probably identify with shareholder interests, but one would still expect employee interests to coincide on the most important issues.

The Co-Determination Law authorizes the *Aufsichtsrat* to appoint a labor director (*Arbeitsdirektor*), who must be a member of the enterprise's *Aufsichtsrat*. Even though trade unions lobbied extensively for the creation of this post, no formal requirement exists that the labor director come from either the trade union ranks, the enterprise's other employees, or from the office staff. The labor director exercises powers and duties prescribed by the Co-Determination Law, as well as those provided by other laws.³¹ This official is regarded as a member of an enterprise's management, similar to a *Vorstand* member. The Co-Determination Law requires that all the responsibilities for labor and social activities be concentrated in the duties of the labor director; these responsibilities may not be diluted by delegating them to lower levels of responsibility.³² As is true with the specialized managers appointed to the *Vorstand*, divesting shareholders of the previously exclusive right to appoint the labor and personnel manager constitutes a significant gain of influence for employees of all enterprises. The act apparently is a closer step toward the realization of German labor's long-term goal of parity industrial democracy.

Constitutional Challenge

By mandating sweeping co-determination in a wide range of new firms, the Co-Determination Law intended a wide readjustment of corporate decisionmaking power. Consequently, it is not surprising that the Co-Determination Law evoked strong opposition from business interests who mounted a serious constitutional challenge.

In this constitutional challenge, a group of employer associations attacked the Co-Determination Law on three separate grounds. They alleged an abridgement of the constitutional protections accorded to the rights of association and coalition,³³ the freedom of choice of pro-

31. Labor Management Relations Act of 1952, BGBI I 681; Labor Management Relations Act of 1972, BGBI I 13.

32. See D. HOFFMANN, THE GERMAN CO-DETERMINATION ACT 1976 at 34 (1976).

33. Article 9 of the Basic Law provides:

The right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and to all trades, occupations and professions. Agreements which restrict or seek to impair this right shall be null and void; measures directed to this end shall be illegal. Measures taken pursuant to Article 12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a, or to Article 91, may not be directed against any industrial conflicts engaged in by associations within the meaning of the first

fession,³⁴ and the preservation of property clause.³⁵ The German Federal Constitutional Court upheld the constitutionality of the Co-Determination Law³⁶ and addressed both constitutional and prudential considerations. The Court noted that the Co-Determination Law did not grant employees the right to parity co-determination;³⁷ in actuality, ultimate power to arbitrate disputes remained with shareholder interests. For example, the Court noted, in the event the *Aufsichtsrat* is unable to select its chairman by the required two-thirds first ballot vote, with employees and shareholders voting their economic interests, shareholders alone would be entitled to vote for the chairman on a second ballot.³⁸ The importance of the chairmanship, of course, is based in its statutory role in resolving *Aufsichtsrat* deadlocks. On a body where opposing interests are equally represented under a system of parity co-determination, some tie breaking mechanism is not only desirable, but necessary to ensure that the enterprise can, in fact, resolve internal policy disputes. The Co-Determination Law supplies this necessary mechanism by permitting the *Aufsichtsrat* chairman to cast a tie breaking vote on the second ballot of any deadlocked issue.³⁹

As a consequence of this provision, employee *Aufsichtsrat* representatives may find it extremely disadvantageous to resist stridently certain proposals. If polarization in such circumstances increases the likelihood that a board dispute will reach a second ballot, the employee representatives may have very strong incentives to moderate their views and reach negotiated accommodations of the dispute. In at least a few instances, it appears that such a conciliatory process may have oc-

sentence of this paragraph in order to safeguard and improve working and economic conditions.

GRUNDGESETZ [GG] art. 9, para. 3 (W. Ger. 1949, amended 1968). An English translation is found in THE BASIC LAW (Federal Republic of Germany Press and Information Office trans. 1973).

34. Article 12 of the Basic Law provides:

All Germans shall have the right freely to choose their trade, occupation, or profession, their place of work and their place of training. The practice of trades, occupations, and professions may be regulated by or pursuant to a law.

GG art. 12, para. 1.

35. Article 14 of the Basic Law provides in part:

Property imposes duties. Its use should also serve the public well.

GG art. 14, para. 2.

36. A summary of the opinion of the Federal Constitutional Court of March 1979 appears in Wiedemann, *Co-determination by Workers in German Enterprises*, 28 AM. J. OF COMP. L. 75, 88 app. (1980) [hereinafter cited as Opinion of the Court].

37. *Id.* at 89.

38. Co-Determination Law, § 27(2). Note that although shareholders are given this specific and exclusive power, their influence is diluted slightly by the corresponding power of employee representatives to elect directly the deputy chairman.

39. *Id.* § 29(2). The deputy chairman is not permitted to vote.

curred.⁴⁰ The Court held that the private property interests of shareholders were not abrogated by the Co-Determination Law because the *Aufsichtsrat* structure ensured the preeminence of shareholder interests with the tie breaking prominence of the chairman. Stockholders also could not maintain, in the Court's view, their claim that the law unconstitutionally halved their property rights because in actuality the chairman provision bestows upon shareholders a "determinative influence in the enterprise."⁴¹

The Court observed, moreover, that the Co-Determination Law's actual effect was limited to defining the limits of property, a function that legislative discretion traditionally exercises.⁴² Possibly dispositive for the Court was its observation that private property under West German law has a social nature which varies according to the property's social function and social impact.⁴³ Apparently, in the area of co-determination this social nature of private property outweighs the interests and private rights of the individual property owners (*i.e.*, the shareholders), which in fact are not severely abridged. Needless to say, this analysis is in many ways alien to our system of jurisprudence, especially in its emphasis on the social nature of property. Finally, the Court upheld the Co-Determination Law against claimed violations of the rights of free association and the freedom of occupation.⁴⁴

The employers' associations also argued that the Co-Determination Law interfered with industrial relations. In part, the associations were concerned with the potential for severe conflict of interests between employee *Aufsichtsrat* representatives and the unions.⁴⁵ The Court, however, rejected this challenge, reasoning that because employee *Aufsichtsrat* representation is actually less than parity, those employee members could not significantly interfere with the employer associations that coordinate and conduct collective bargaining on behalf of the firms.⁴⁶ Nor did the Court perceive any conflict of interest resulting from employee *Aufsichtsrat* representatives' access to corporate books.⁴⁷ To American observers, for whom conflict of interest problems constitute some of the most vexing and obdurate obstacles to

40. See *infra* notes 93-98 and accompanying text.

41. Opinion of the Court, *supra* note 37, at 90.

42. *Id.*

43. *Id.*

44. *Id.* at 91.

45. Similar concerns, of course, have also been raised concerning Mr. Fraser's service on the Chrysler Board. See generally, *Worker Participation in Corporate Government: The U.A.W.-Chrysler Experience*, *supra* note 1, at 961.

46. Opinion of the Court, *supra* note 37, at 92.

47. *Id.*

an acceptance of the co-determination concept, the German Court's dismissal of these issues is difficult to comprehend. This dismissal is even more mystifying when one realizes the variety of business entities to which the Co-Determination Law applies.⁴⁸

The German Co-Determination Law is very broad in terms of intent, execution and application. Now that it has weathered a constitutional challenge, the Co-Determination Law's broad strokes possibly will significantly affect corporate decision making in West Germany. Whether this impact has actually materialized will be discussed below. Because many provisions are attributable to the influence of the socialist political tradition, this scheme of cooperative industrial decision-making is not directly transferrable to our industrial system. Without question, the major focus of the Co-Determination Law is parity participation in corporate decision making. Although equal employee representation on policy boards such as the *Aufsichtsrat* constitutes a potentially significant development, one must question whether formal structural mechanisms such as this provide needed worker input at the possibly more critical lower levels of corporate operations. This specific need, one that many American firms now recognize, is addressed by the Works Council Act.

THE WORKS COUNCIL ACT OF 1972

The other major source of employee participation in West German industrial enterprises is the 1972 Works Council Act (*Betriebsverfassungsgesetz*).⁴⁹ First enacted in 1952, the Works Council Act introduces co-determination principles at the shop level, as opposed to the corporate boardroom. The 1972 Works Council Act also applies to many smaller enterprises not subject to the 1976 Co-Determination Law. Accordingly, the influence of the former on industrial relations probably is far more pervasive than that of the latter. In all probability, the Works Council Act contains provisions and innovations that ultimately might prove to be quite significant in the democratization of the American workplace. A close examination of the provisions of this Act is certainly warranted.

The Works Council Act is universal in scope. Any enterprise (*Betrieb*) employing "as a rule" five or more employees shall elect works councils. At least three of the enterprise's employees must be eligible

48. See *supra* text accompanying note 15.

49. See *supra* note 4. This law amends and extends the 1952 Works Council Act. See note 13 *supra*.

as electors.⁵⁰ The Works Council Act requires all works councils to cooperate with employers for the welfare of "the employees and the enterprise."⁵¹ Trade unionism and the works council scheme apparently coexist in the German workplace.⁵² Where an enterprise has several different plants or facilities, each facility is required to establish its own works council if basic tests of distance and independence are satisfied; otherwise, the works council of the home plant or facility controls.⁵³

Other provisions define which employees are eligible to serve on the works councils. As is true with the Co-Determination Law, some provision is made in the Works Council Act to provide for the proportionate representation of different classifications of employees. Unlike the Co-Determination Law, however, formal trade union organizations do not benefit from these provisions. No works council seats are reserved for union members; rather, only wage earners and salaried employees are entitled to reserved seats.⁵⁴ The rationale for this limited classification of employees probably lies in the political environment underlying the passage of the laws, but the practical consequences of this classification are negligible. Even if no formal trade union seats are set aside on each works council, the councils are likely to include trade union members. Normal union grievance procedures are also still available, as are many specific arrangements established by individual collective bargaining agreements. The mechanisms of the Works Councils Act do not operate in a vacuum, but in an environment of preexisting union arrangements.

Part Four of the Works Council Act has the greatest impact upon industrial relations. Works councils have been given the following "general tasks":

1. to see to it that the laws, regulations, work safety rules, collective bargaining agreements and labor-management contracts that are in effect for the benefit of employees are observed;
2. to request the employer to take measures that are in the interests of the enterprise and the employees;
3. to accept suggestions made by employees and the youth council

50. Works Council Act § 1. See §§ 7-9 for the eligibility rules for election to a work council.

51. *Id.* § 2(1).

52. The relationship between the Works Council Act and the formal trade unions are prescribed in a number of sections scattered throughout the Act. See *id.* §§ 2, 3, 14(7), 16(2), 17, 23, 31, 43, 48, 66 & 74. These provisions either allow union officials to participate in various limited aspects of works council activities as union representatives or insulate union activity from works council interference.

53. *Id.* § 4.

54. *Id.* § 10.

- and, if they appear to be justified, to prevail upon the employer to carry out the suggestions; it must inform the employees concerned about the progress and the result of the negotiations;
4. to promote integration of severely disabled employees and other persons requiring special protection;
 5. to prepare and carry out the election of the youth council and to cooperate closely with it in the task of promoting the interests of juvenile employees; it may ask the youth council to submit its proposals and views;
 6. to promote employment of older persons in the enterprise;
 7. to promote integration in the enterprise of foreign workers and to foster understanding between them and German employees.⁵⁵

A common thread running through each of these goals is the idea that the works council will serve as an advocate in a variety of matters for employee interests or the interests of specific subgroups of employees ranging from juvenile employees to older or foreign workers. Although excluding issues of industrial relations that fall traditionally into the scope of collective bargaining, the Works Council Act includes an impressive variety of substantive areas, from the integration of handicapped, older and foreign workers to the active solicitation of employee suggestions. In essence, the Works Council Act establishes a sanctioned mechanism through which employee input and interests are identified, encouraged and then forwarded on to corporate policy-makers.

But the role of the works council is not limited to that of soliciting and facilitating employee suggestions; the works councils are also granted a specific, but limited, role in resolving policy issues and disputes. Each works council may propose to the employer specific policy proposals that the employer may accept, modify or reject. If rebuffed, the works council may invoke additional mechanisms that might cause its view to prevail. The mechanism employed in these circumstances is the conciliation board, a review board one-half of whose members are selected separately by the employer and the other half by the works council.⁵⁶ In addition, each side must agree mutually upon the conciliation board chairman.⁵⁷ The conciliation board resolves, by majority vote, appeals from disputes between the works council and the employer, with the chairman voting only as a tie breaker on a second ballot. Unlike a co-determination supervisory board whose chairman is selected by the shareholders,⁵⁸ this tie breaking procedure does not

55. *Id.* § 80.

56. *Id.* § 76(2).

57. *Id.*

58. Co-Determination Law § 27.

favor automatically the employer's interests since the works council conciliation board chairman will be selected by a neutral party, the federal labor court, if works council members and the employer are unable to agree on a chairman.⁵⁹

A conciliation board decision creates a contract between the works council and the employer that "shall be fulfilled by the employer unless individual cases provide otherwise."⁶⁰ These conciliation board contracts are enforceable at law. Normally the works council and the employer would respond to employee suggestions by agreeing upon accommodations, which agreements will be formalized as contracts binding both the works council and employer to its terms. The parties should resort to the conciliation board only on a case-by-case basis when they have reached an impasse after good faith negotiating.⁶¹ Generally speaking, of course, the influence and importance of any body like a works council depend in large measure upon how smoothly the council functions. Polarization of the sides could render the council less effective.

Members of the works council are also responsible for facilitating employees' efforts to exercise various rights that are granted them under the Works Council Act. Among these rights are the right to inspect one's personnel file,⁶² the right to lodge complaints⁶³ and the right to demand an explanation of how the employee is remunerated.⁶⁴ Works council members assist individual employees by accompanying them to meetings and on inspection trips, much as union representatives do in this country. The Works Council Act also requires the works council to assist employees generally. Nonfrivolous complaints received from employees must be investigated by the works council, and the members of the council must attempt to prevail upon the employer to remedy the causes of the complaint, if justified.⁶⁵ If employer and works council cannot agree, the works council must appeal the grievance to the conciliation board.⁶⁶

In addition to these specific provisions giving the works council a direct role over particular issues that arise on a case-by-case basis, the Works Council Act also lists a number of substantive areas in which

59. Works Council Act § 76(2).

60. *Id.* § 77(1).

61. *Id.* § 76(1).

62. *Id.* § 83.

63. *Id.* § 84.

64. *Id.* § 82(2).

65. *Id.* § 84.

66. *Id.* § 85.

the works councils have been granted extensive and concrete co-determination rights. These co-determination rights are so extensive that they deserve specific mention. They involve the following matters:

1. questions concerning the order of the enterprise and the behavior of employees in that enterprise;
2. the beginning and end of daily working periods, including breaks, as well as spreading the working period over individual days of the week;
3. temporary reduction or increase of the working period normal in the enterprise;
4. the time, place and method of payment of remuneration;
5. establishment of general vacation principles and the vacation schedule as well as the timing of vacation of individual employees if employer and employees cannot agree;
6. introduction and application of devices designed to monitor behavior and efficiency of employees;
7. rules on the prevention of work-connected accidents and occupational diseases as well as rules on health protection within the scope of statutory provisions or rules on accident prevention;
8. the form, arrangement and administration of social benefits whose range is restricted to the enterprise, organization or the affiliated group of companies;
9. allocation of housing leased to employees on account of existing employment contracts, termination of leases as well as the fixing of general lease conditions;
10. questions involving the enterprise's remuneration system, particularly the establishment of principles for remuneration and the introduction and application of new methods of remuneration, as well as changes therein;
11. establishment of piece-rates and premiums and comparable pay based on efficiency, including the money factor;
12. principles of the enterprise's suggestion system.⁶⁷

Very little imagination is necessary to realize the far-reaching extent of these co-determination rights. Although they primarily pertain to very modest areas of corporate administration, these areas are of direct and immediate concern to most employees.

The importance of these provisions, however, fades into relative insignificance as one considers the impact of a more important co-determination right. The employer of an enterprise must inform the works council when planning changes in the:

1. alteration, expansion and new construction of manufacturing, administrative and other operational areas;
2. technical facilities;
3. working procedure and routine; or

67. *Id.* § 87.

4. jobs.⁶⁸

The Act requires the employer to consult with the works council regarding the impact of these planned changes on employees.⁶⁹ Both employer and works council shall give "due consideration to scientifically established principles of human engineering concerning a fair organization of work."⁷⁰ Although the specific meaning of the phrase "scientifically established principles of human engineering" is not immediately clear, the term, at a minimum, serves the purpose of forcing the employer and works council to attempt to articulate external and objective justifications for the decisions they reach. Political horse-trading and logrolling ostensibly will not suffice to justify works council decisions regarding important changes in the structure of a work place.

In addition to these general provisions regarding the alteration of working conditions, the Works Council Act gives employees protection from arbitrary employer action. A works council must examine any alteration in operations or the work environment that causes employees to be "especially burdened" and are contrary to the "scientifically established principles" in order to alleviate, if possible, these burdens.⁷¹ As always, the failure of the works council and employer to reach an agreement leads to the conciliation board's intervention.⁷²

"Alterations" in employment as used in section 90 may include everything from special work arrangements and shifts to plant expansions and plant closings. Indeed, a vast range of corporate changes fall within this section. Employees thus are ensured of some notice and formalized input into major alteration decisions. But the greatest protection for employees from major structural changes in the enterprise appears in section 111 of the Works Council Act that requires employers, within a reasonable time, to inform the works council "in detail about planned structural changes in the enterprise which may result in considerable disadvantages for the work force, or significant part of the work force"⁷³ One is hard pressed to imagine a clearer obligation. "Structural changes" include all of the following:

1. reduction and shutdown of the entire enterprise or significant part of the enterprise;
2. relocation of the entire enterprise or significant part of the enterprise;

68. *Id.* § 90.

69. *Id.*

70. *Id.*

71. *Id.* § 91.

72. *Id.*

73. *Id.* § 111.

3. merger with other enterprises;
4. fundamental changes in the organization of the enterprise, the purpose of the enterprise or facilities of the enterprises;
5. introduction of fundamentally new working and production methods.⁷⁴

Although management's power to force changes like these remains unfettered, workers now receive notice and some input. The Works Council Act also encourages employers and workers to negotiate agreements pertaining to the planned structural changes in the enterprises and to agree to a "social plan" that outlines these agreements.⁷⁵ Another section imposes various sanctions, including the award of damages, that employees may invoke should an employer fail to comply with a negotiated social plan.⁷⁶

A variety of corporate decisions can have a "special burden" on the employees of a specific plant. In one of the more traumatic examples, the complete shutdown of a plant utilizing obsolete technology, a works council might be expected to oppose vigorously the shutdown. While no evidence exists at this point to indicate that a works council has successfully blocked a plant shutdown, enterprises probably have paid new attention to the social consequences of what had previously been regarded as purely economic corporate decisions. A concrete example occurred when Volkswagen was planning to open up its American production facility presently located in New Stanton, Pennsylvania. This new development, of course, resulted in the exportation of West German production jobs to American workers. The German workers, through the works council at Volkswagen, minimized the impact of the German loss of jobs by delaying the construction of the new plant for two years. Volkswagen also agreed to minimize the impact of this alteration on its German workforce by limiting its American plant to final production only while continuing to produce all parts at German plants for shipment to the American facility.⁷⁷

The Works Council Act also delegates to the works councils a specific role in personnel and employment policies, down to the level of intervening in individual personnel decisions. Essentially, the Act gives the works council the right to receive notification before certain personnel actions are taken, as well as the right to oppose actively the proposed actions. The works council must be given notice of personnel

74. *Id.*

75. *Id.* § 112.

76. *Id.* § 113.

77. *See supra*, Gruson & Meilicke, note 6, pp. 572-73.

planning,⁷⁸ the classification, reclassification and transfer of employees,⁷⁹ tentative personnel matters,⁸⁰ and dismissals.⁸¹ In the majority of these specific instances, the works council may object to the proposed personnel decisions, with the possibility that it will invoke conciliation board procedures if compromises cannot be reached with the employer. In addition, works councils will consult with employers in matters of work safety,⁸² the development of job application forms,⁸³ and providing vocational training.⁸⁴

Among the most important provisions of the Works Council Act are those affecting so-called economic matters. These provisions⁸⁵ have had the effect of introducing worker participation into several areas formally reserved for the employer only. For example, an economic committee is established in all concerns hiring more than one hundred employees.⁸⁶ This committee is composed of three to seven members, including a works council member.⁸⁷ As a reflection of the particular and specialized importance of this committee, its members should possess "the professional and personal qualifications required for the performance of their duties."⁸⁸ This specific requirement is not found elsewhere in the Works Council Act. The economic committee is intended to be a committee of professionals. And well it should be. Employers are required to inform the economic committees, with necessary and adequate documentation, of all the following matters:

1. the economic and financial situation of the enterprise;
2. the production and sales situation;
3. the production and investment program;
4. planned rationalization measures;
5. production and working methods, particularly the introduction of new working methods;
6. the reduction or shutdown of enterprises or parts of enterprises;
7. the relocation of enterprises or parts of enterprises;
8. the merger of enterprises;
9. changes in the organization or purpose of the enterprise; as well as
10. other actions or plans which vitally may affect the interests of

78. Works Council Act § 92(1).

79. *Id.* § 99.

80. *Id.* § 100.

81. *Id.* § 102.

82. *Id.* § 89.

83. *Id.* § 94.

84. *Id.* § 96.

85. *Id.* §§ 106-113.

86. *Id.* § 106(1).

87. *Id.* § 107.

88. *Id.*

the employees of the enterprise.⁸⁹

Unlike the managerial subcommittees of an *Aufsichtsrat*, the economic committee has no independent policymaking role. Its most important function is to disseminate technical information, educate and advise the works council. Apparently, in recognition of the probability that employees will lack the requisite backgrounds to make informed choices regarding the major economic decisions facing the enterprise, the German legislature created the special technical committees and endowed them with sufficient authority to compel from the employer the disclosure of necessary, but critical technical and economic information. With technical assistance such as this and its broad legislative mandate, the works council can potentially wield great influence over industrial concerns.

CO-DETERMINATION IN CHANGING ECONOMIC CONDITIONS

In the last few years definite signs have appeared that the West German post-war *Wirtschaftswunder*, or economic miracle, has begun to diminish. Economic growth rates of close to 12% per annum have fallen to 4%.⁹⁰ Although the German economy consistently has outperformed its European Common Market partners in the last decade, the spirit of cooperation and common sense (*Vernunft*) that has characterized German industrial relations during this period has deteriorated. The positions of management and labor in many instances have polarized, leading to strikes or plant shutdowns. A few concrete examples of recent labor industrial disputes and developments may illustrate the pressures to which co-determination in Germany has been subjected in an increasingly troubled economy.

As an initial indication, fewer West German firms than expected have actually fallen subject to the new Co-Determination Law. Of the expected 650 firms, almost one-third altered their corporate structures or operations (often through the establishment of subsidiaries or holding companies), creating ostensibly autonomous divisions that employ fewer than 2,000 employees, the threshold level established by the Co-Determination Law. Only 450 West German corporations have fallen within the ambit of the Co-Determination Law.⁹¹ That so many firms have attempted to evade the new law manifests the corporations' fundamental mistrust of the extension of the *Mitbestimmungs* principle.

89. *Id.* § 106(3).

90. *ECONOMIST*, Nov. 8, 1980, at 40.

91. *DUN'S REV.*, July, 1979, at 53.

These attempts to escape the provisions of the Co-Determination Law by changes in corporate structure have not gone unchallenged, however. Labor has initiated a court challenge to these efforts.⁹²

Although the Co-Determination Law has been anathema to some, to other corporations it actually represents a rare opportunity. The corporations that must comply with the more restrictive *Montan* form of parity co-determination have displayed a unique interest in the new act. For example, Mannesman, a West German steel pipe and industrial equipment manufacturer, proposed a plan to realign its corporate structure by merging its steelmaking division into its pipe making subsidiary. If successful, the parent corporation would no longer be subject to the strictest parity form of co-determination since the majority of the parent division's sales would not derive specifically from steel production. The new subsidiary (combined steel and pipe making) would, of course, be large enough to be subject to the Co-Determination Law, but the pipe making component would predominate over steel production so that *Montan* parity co-determination would not be required.⁹³ The goal of this plan is thus to diminish employee *Aufsichtsrat* representation by "trading in" *Montan* co-determination for less restrictive co-determination.

Of particular interest is the role played by the labor representatives on Mannesman's board during these maneuvers. Although holding absolute parity on the Mannesman board, the labor representatives have been impotent to prevent the change. Mannesman's chairman of the board forced the union representatives to accede to the proposed transfer by threatening to seek shareholder approval of the restructuring plan,⁹⁴ thus circumventing the *Aufsichtsrat*. If such a maneuver is widely resorted to, there seems little doubt that the interests of capital will in most instances continue to predominate. Fundamental policy disputes between shareholder interests and labor interests may always be resolved in favor of shareholders. Labor's interests probably can best be served by avoiding divisive votes and by seeking compromises. Ultimately, evasions of parity co-determination like this could be limited only by a legislative prohibition. Such legislation was introduced by the union-backed Social Democratic Party and the business-oriented Free Democrats to prohibit such transformations, but only for a period of six years.⁹⁵

92. *Id.*

93. *Bus. Wk.*, Nov. 24, 1980, at 58.

94. *Id.*

95. *Bus. Wk.*, March 9, 1981, at 68.

Certainly, business attempts to escape parity co-determination clash directly with labor's desire to extend parity co-determination across the entire spectrum of the German economy.⁹⁶ Labor has understandably been less than enthused about the limitations on its ability to select the chairman of the *Aufsichtsrat*. On the other hand, labor itself has been criticized for its increased proclivity for bloc voting in those firms subject to co-determination.⁹⁷

In another situation, the labor directors of Hoesch, a German steel manufacturer subject to parity co-determination, agreed to the loss of almost 4,200 jobs at Dortmund in connection with the construction of a new, technologically efficient oxygen steel plant that would have replaced a nineteenth century facility. But when the EEC cartel imposed production cuts upon European steelmakers, Hoesch was forced to cancel the new facility, even though the remaining Hoesch workers actively supported the facility and the opportunity to learn more advanced methods of steel production:

The gloomy logic of all this angers 25,000 Dortmund steelworkers. They had already agreed to the loss of 4,200 jobs with the building of the more modern plant. Now they fear that a further 5,000 will go as Dortmund becomes just a roller of steel cast on the Rhine . . .⁹⁸

Employee representation on a supervisory board undoubtedly does help employees obtain some access to and provide input into a corporation's decisionmaking. Such representation does not necessarily ensure, as the Hoesch example illustrates, that ultimately workers' interests will be zealously guarded. Indeed, the lesson of the Hoesch situation is that even parity co-determination cannot ensure the preservation of important worker interests like job security and the introduction of advanced production methods.

Any attempt now to evaluate conclusively the new Co-Determination Law's impact upon West Germany's ongoing experiment with co-determination would be premature. Although several years have already passed since the Law was passed, its full impact cannot yet be fully assessed, except to note instances such as those cited above in which the interests of capital have tended to outweigh employee interests. In a view that has been reiterated by many West German political figures, "*Mitbestimmung* is at the heart of German social peace and industrial progress."⁹⁹ The central issue is whether *Mitbestimmung* will

96. *Id.* at 73.

97. *Id.*

98. *Thunder over the Ruhr after EEC steel storm*, *ECONOMIST*, February 28, 1977, at 26.

99. *Concerned Action*, *ECONOMIST*, February 28, 1977, at 26.

continue to be the key for social harmony. In a declining economy, the danger is very strong that the promise of co-determination will become the shoals on which the expectations of German labor flounders. Labor must be mindful of the limits inherent to the *Aufsichtsrat*; no *Aufsichtsrat* is likely to endorse policies that will dissipate or diminish capital. Perhaps a more realistic attitude for labor is to maximize worker input into everyday operations as opposed to the continued emphasis on attempts to increase labor's control over capital. Other, possibly hidden, dangers exist. For example:

The [co-determination] system could also alienate workers who, with good reason, fail to understand it, for the suspicion may grow that behind all the complexities [of the new act] a new power block, made up of managers, shareholders and a worker's elite will be created. It is often said with pride that the distinction between white and blue collar workers is on the way out. But that may also mean a new inequality less immediately apparent—between those who can make their way forward in an established, conformist system and those who either cannot or who remain outside it.¹⁰⁰

The resolution of these and other issues may ultimately disappoint the expectations of many of the interests who have long supported the concept of co-determination. But even as the bulk of attention will be directed to the question of co-determination in corporate governance, the most lasting impact of workers over corporate governance may well occur through the mechanisms of the Works Council Act. Thus, the influence of the Works Council Act ultimately deserves the closest observation in this country.

CONCLUSION

Employee participation in corporate governance is encouraged by both the Co-Determination Law and the Works Council Act. As stated earlier, each of these acts has increased worker input into the productive process but has proven inadequate to fully protect employees' interests during periods of economic difficulty. American observers will differ on the viability of adopting variations of these German innovations in the American workplace. Although individual variations might be adopted on a trial basis, it seems clear that no panaceas will be found.

American observers must also be careful to examine the possible influence of these German innovations upon other worker participation developments. For example, a union director or works council may be

unnecessary in a corporation in which the employees already own a sizable, if not significant proportion, of the common stock gained through a profit sharing or stock option plan. In any event, the field for innovative experimentation in expanding the participation of American workers seems wide open.