AUSTRIAN COMPANY LAW

I. GENERAL REMARKS

At all times, commercial relations have extended beyond national and local borders. This fact has necessitated a unification of law, above all in the field of mercantile law. Company law as a part of it has followed this trend. For reasons of history, Austria had very close connections with the legal development in the German states, particularly in the sphere of commercial law.

The "Entwurf eines allgemeinen deutschen Handelsgesetzes" (draft relating to a General German Commercial Code) was enacted in the different German states during the years 1861—1870. The first four books of this code were enacted in Austria in 1863 as the "Allgemeines Handelsgesetzbuch" (AHGB, *i.e.,* General Commercial Code). The company law regulated in this code was modified several times in the German Empire. Thus, the development of company law in Austria and Germany went along different lines. Nevertheless, most parts remained identical until 1897: in that year, a new codification of mercantile law was undertaken in Germany. The new "Handelsgesetzbuch" (HGB, *i.e.,* Commercial Code) was in force only in the German Empire; in Austria, the AHGB remained valid. Meanwhile, in 1892, the German legislator had created a new type of trading corporation: the "Gesellschaft mit beschränkter Haftung" (G.m.b.H., *i.e.,* company with limited liability). Austria followed in 1906 with the "Gesetz über Gesellschaften mit beschränkter Haftung" (Act relating to companies with limited liability).[1]

In 1937 the law of stock corporations was codified in a special Act in Germany, the "Gesetz über Aktiengesellschaften und Kommanditgesellschaften auf Aktien" ("Aktiengesetz" — Stock Corporations Act).[2] During the German occupation, the new commercial code (HGB) and the "Aktiengesetz" were introduced in Austria. Both were adapted to Austrian civil law by special introductory decrees. Still in force, they have created a far-reaching conformity of German and Austrian company law. Minor deviations have been caused by the introductory decrees and the modification of some details after World War II. Only the Austrian

1. Published sub. RGBL. No. 58/1906.
2. Published sub. RGBL. 1937, I, page 107.

"G.m.b.H.-Gesetz" *(i.e.,* Act relating to companies with limited liability) has not been cancelled and has been continually in force since 1906.

On account of these circumstances, German legal literature may be used for all types of trading companies except for the G.m.b.H.; it is advisable, however, to use an Austrian edition of the above-mentioned laws)[3] which takes into account the discrepancies between Germany and Austria. The following description of Austrian company law deals only with these discrepancies in order to avoid repetitions.

II. "STILLE GESELLSCHAFT" (DORMANT PARTNERSHIP)

The "Stille Gesellschaft" is a trading company which does not act as a company in relation to third persons. It has legal effects only between the partners. The legal prescriptions[4] are limited to the regulations of the inner relationship. In Austria, they are amended by Art. 7, No. 22 — 25, of the "Vierte Verordnung zur Einführung handelsrechtlicher Vorschriften im Lande Oesterreich"[5] *i.e.,* "the 4th Decree introducing provisions of mercantile law in the country of Austria".

III. PERSONENHANDELSGESELLSCHAFTEN

(Trading companies with personal liability)

"Personenhandelsgesellschaften" are companies which also in relation to third persons act as an entity, but which are not juristic persons (common opinion: they are "treated like juristic persons"). There are two types: the "Offene Handelsgesellschaft" and the "Kommanditgesellschaft".

(1) *"Offene Handelsgesellschaft" (OHG; Partnership):*

The OHG is a company with personal liability of *all* the partners; there are no special partners. This type is regulated in §§ 105 —160 HGB, which in Austria are supplemented by Art. 7, No. 1 — 20 of the 4. Einf. VO.

(2) *"Kommanditgesellschaft" (KG; Limited Partnership):*

The KG is a trading company with general partners ("Komplementaere") and limited partners ("Kommanditisten"), the latter being excluded from the business management. Only the "Komplementaere"

3. *e.g.,* Demelius, *Handelsgesetzbuch,* 25th edition, Vienna 1957.

4. §§ 335-342 HGB.

5. Abbreviated: 4 Einf. VO. or 4th Introductory Decree.

(general partners) are managers. The provisions of the HGB relating to the OHG are analogously applied to the KG; they are supplemented by the §§ 161 —177 HGB and Art. 7, No. 21, 4. Einf. VO., as a special amendment for Austria.

IV. KAPITALHANDELSGESELLSCHAFTEN

(Trading companies without personal liability)

The so-called "Kapitalhandelsgesellschaften" are trading companies which are juristic persons. "Kapitalhandelsgesellschaften" comprise the following types of trading companies:

(1) Aktiengesellschaft (A.G.)

(2) Kommanditgesellschaft auf Aktien (KGaA)

(3) Gesellschaft mit beschränkter Haftung (G.m.b.H.)

The G.m.b.H. will be described in Chap. V. This chapter only deals with type 1 and 2.

(1) *Aktiengesellschaft (AG.; Stock Corporation):*

The shareholders (Aktionaere) have no personal liability. In general, the membership is established by securities ("Aktien", *i.e.,* stock certificates). In addition to the "Aktiengesetz" (Stock Corporations Act), notice must be taken of the following acts and decrees:[6]

Erste und Dritte Durchführungsverordnung zum Aktiengesetz, 1938
(1st and 3rd Executive Decree relating to the Stock Corporations Act, 1937)

Zweite und Vierte Verordnung zur Einführung handelsrechtlicher Vorschriften im Lande Oesterreich, 1938
(2nd and 4th Einf. VO. — Second and Fourth Decree introducing mercantile law provisions in the country of Austria, 2nd and 4th Introductory Decree)

Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit, 1898
(Law concerning the jurisdiction relating to unlitigated matters; modified and put into force for Austria by the 4th Introductory Decree, 1938)

Gesetz über die Auflösung und Löschung von Gesellschaften und Genossenschaften, 1934
(Act relating to the liquidation of companies and co-operative societies; put into force for Austria by the 4th Introductory Decree, 1938)

Verordnung über Masznahmen auf dem Gebiete des Rechts der Handelsgesellschaften und der Erwerbs — und Wirtschaftsgenossenschaften, 1939
(Decree concerning measures for commercial companies and co-operative societies)

6. All of them to be found in *Demelius,* l.c.

Verordnung über den Kapitalverkehr mit Durchführungsverordnungen, 1941
(Decree relating to capital transactions with rules and regulations)

Bundesgesetz über die Aufstellung von Schillingeröffnungsbilanzen und über die Umstellung (Schillingeröffnungsbilanzengesetz SEBG), 1954
(A Federal Act which deals with the adjustment of assets' and debts' values in trade balances to post-war standards).

In Austria, attempts are now being made to secure the enactment of a new Austrian Stock Corporations Act, which is to be modelled upon the presently valid (German) Stock Corporations Act.

(2) *"Kommanditgesellschaft auf Aktien" (KGaA):*

The KGaA is a commercial company with general ("Komplementaere") and limited ("Kommanditaktionaere") partners, the capital stock of the latter being divided into shares transferable as shares of an ordinary stock corporation. The general partners are the managers of the company. The KGaA is regulated in the "Aktiengesetz" (Stock Corporations Act), but Austrian practice hardly makes use of them. The pending Stock Corporations Bill will probably not contain this unusual type.

V. GESELLSCHAFT MIT BESCHRANKTER HAFTUNG
(G.m.b.H., Company with limited liability)

The Austrian Act relating to companies with limited liability (G.m.b.H.-Act) differs in many details from the German G.m.b.H. Act. On account of this fact, the following description of this type of trading company will not give a mere characterization, but full and detailed information.

(1) *Legal provisions and literature:*

Besides the

Gesetz über Gesellschaften mit beschränkter Haftung, RGB1. No. 58/1906 (G.m.b.H. Act),

the

Federal Acts No. 577/1921 and 246/1924

are of importance; they modify some provisions of the G.m.b.H. Act. During German occupation, the G.m.b.H. Act was further modified and supplemented by the following laws and decrees:

Zweite und Vierte Verordnung zur Einführung handelsrechtlicher Vorschriften im Lande Oesterreich, 1938

(2nd and 4th Einf. VO. — Second and Fourth Decree introducing mercantile law provisions in the country of Austria, 2nd and 4th Introductory Decree)

Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit, 1898
(Act concerning the jurisdiction relating to unlitigated matters; modified and put into force for Austria by the 4th Introductory Decree, 1938)

Gesetz über die Auflösung und Löschung von Gesellschaften und Genossenschaften, 1934
(Act relating to the liquidation of companies and co-operative societies put into force for Austria by the 4th Introductory Decree, 1938)

Verordnung über Masznahmen auf dem Gebiete des Rechtes der Handelsgesellschaften und der Erwerbs — und Wirtschaftsgenossenschaften, 1939
(Decree concerning measures for commercial companies and co-operative societies)

Verordnung über den Kapitalverkehr mit Durchführungsverordnungen, 1941
(Decree relating to capital transactions with rules and regulations)

Bundesgesetz über die Aufstellung von Schillingeröffnungsbilanzen und über die Umstellung (Schillingeröffnungsbilanzengesetz SEBG), 1954
(A Federal Act which deals with the adjustment of assets' and debts' values in Trade Balances to post-war standards).

During German occupation, the provisions of the G.m.b.H. Act which related to the transformation of a G.m.b.H into another form of corporation were also abolished. For such transformations, the Stock Corporations Act, the Mining Act[7] and the Transformation Act[8] are in force now.

After World War II the above-mentioned SEBG 1954 caused further modifications.

The G.m.b.H. is, above all, described in older literature:[9]

7. Berggesetz. BGB1. No. 73/1954.

8. "Umwandlungsgesetz" — Bundesgesetz vom. 7. Juli 1954 über die Umwandlung von Handelsgesellschaften, BGB1. No. 187 —Federal Act of July 7th, 1954, relating to the transformation of commercial companies.

9. Stross, *Die österreichische G.m.b.H.,* 1906; Quandt-Wagner-Grünberg-Löw, *Formularienbuch zum G.m.b.H. — Gesetz,* 3rd Edition, 1918; Grünhut, *Die G.m.b.H. nach österreichischem Recht,* 2nd Edition, 1913; Editions of the G.m.b.H. Act by Kornfeld-Scheu, 1906, Ofner-Thorsch, 1907, Skerlj, 1909, and the 5th chapter in Pisko, *Lehrbuch des österreichischen Handelsrecktes,* 1923.

   Modern textbooks and commentaries are:

   Haemmerle, *Grundrisz des Handelsrechts,* 2nd Edition, 1948;

   Graschopf, *Die Gesellschaft mit besehränkter Haftung,* 1956;

   Gellis, *Kommentar zum G.m.b.H.-Gesetz,* 1960.

For some questions, the German literature may be used additionally. This description of the G.m.b.H. follows PISKO:

(2) *The essence of the G.m.b.H.:*

The G.m.b.H. is a type of trading company similar to the stock corporations as well as to the partnership. The legislator intended to create a company, the associates of which being limited partners contributing not only assets, but also personal work (the latter not necessarily). The G.m.b.H. was shaped to meet the demand for smaller enterprises; it became very popular among tradesmen, because some provisions of the G.m.b.H. are less severe than those of the Stock Corporations Act, the latter, e.g., asking for publication of trade balances and profit and loss statements, whereas this obligation does not apply to companies with limited liability.[10] It is for this reason that huge enterprises use the legal form of G.m.b.H. nowadays, although the form of the stock corporation would seem to be the most appropriate type. On account of the relatively small amount of capital needed for the G.m.b.H. this form of company is widely used as a holding or syndicate company, or in order to give departments of the enterprise legal entity *(e.g.,* selling or purchasing companies).

The G.m.b.H. is a trading company with legal entity.[11] The liability of the partners is limited to full payment of the face value of their contributions as stipulated in the articles of partnership. The issue of negotiable or bearer certificates is forbidden by the G.m.b.H. Act. Any transfer of shares is made difficult, because it needs a notarial document.[12]

The G.m.b.H. may be founded in pursuance of any legally admissible purpose (with the exception of activity as an insurance company or political association). Thus, the G.m.b.H. may be founded for scientific, charitable or other non-commercial purposes. Without regard to the subject of the enterprise, the G.m.b.H. has the full qualifications of a merchant in terms of mercantile law.

Companies engaged in railway, airway, bank, or emigration business need a state licence for their formation.[13]

10. Except banks, *v.* § 22, sect. 5 of the G.m.b.H. Act.

11. In Austria, juristic persons may legally relevantly act without being bound by the "ultra-vires doctrine" (except actions, of course, which demand human quality of the acting person, *e.g.,* marrying or entering into other domestic relations).

12. The most solemn legal form (more than a plain notarial certification).

13. § 3, sect. 2 of the G.m.b.H. Act.

(3) *The foundation of the G.m.b.H.:*

The G.m.b.H. Act does not prescribe a minimum number of foundation partners. The necessary basis of every company, however, is a partnership agreement; consequently, two founders are necessary, but they suffice. The articles of partnership must contain partnership declarations of *all* associates (no promotion successively step by step), and at least the following terms:[14]

(a) *Principal place of business and trade name of company*

The firm must bear the name of at least one partner, or it must indicate the subject of the enterprise. The name of the firm must also contain the denomination "Gesellschaft mit beschränkter Haftung", without any abbreviation of the word "Gesellschaft", *i.e.,* company. The principal place of business can only be situated in this country.[15]

(b) *Subject of the enterprise*

(c) *Amount of the capital stock*

At least AS100,000. – –, *i.e.,* approximately US-$4,000.00[16]

(d) *Amount of contributions*

These need not be equal, but the minimum amount of each of them must be AS500.– –, *i.e.,* approx. US-$20.00.

The partnership agreement is to be certified by a public notary's act. Contributions in kind must be fully contributed, cash contributions are to be paid with at least 25 per cent of their nominal value.[17] Managers are legally bound to declare expressly that they have received these assets for their free disposal. Managers can be held liable with all their property for the correctness of this statement. False statements are prosecuted by criminal law.[18]

Further prerequisites of registration are the nomination of the business managers and, if a state licence is necessary the proof of this licence.

14. § 4.

15. § 5 of the G.m.b.H. Act.

16. The minimum capital stock of stock corporations is AS1,000.000,– –, *i.e.,* approximately US-$40,000.

17. Minimum payment AS250., *i.e.,* approximately US-$10.00.

18. §§ 122, 124, the penalties ranging from arrest of one week up to one year, additional amercement up to AS150,000.– –, *i.e.,* about US-$6,000 not being excluded.

If these conditions are fulfilled, the registry court is obliged to register the company, which becomes a juristic person by the registration. Before the entry, the company cannot be made liable; persons acting on behalf of a non-registered company will be personally made liable for their actions.

According to the rules and regulations of the decree for capital transactions, a licence of the Federal Ministry of Finance is needed, if the capital stock amounts to AS500,000. – –(*i.e.,* about US-$20,000) or more. Promotions without licence are subject to penalties, but legally valid.

The "Finanzprokuratur"[19] is entitled to appeal against illegal registrations. The court has to cancel the registration ex officio if the partnership agreement has not notarially been certified or if the above-mentioned essential terms of the contract are incomplete or contrary to the G.m.b.H. Act.[20]

(4) *Organization and representation of the G.m.b.H.:*

Statutory agents of the G.m.b.H. are their

(a) *Geschaftsfuhrer* (business manager)[21]

The nomination of juristic persons as managers is not possible, only natural persons can act as business managers. Their authorization is unlimited and cannot be restricted in relation to third parties. In internal relationship, they are obliged to comply with the partnership agreement and with the resolutions of the general meeting. If several managers are nominated, they are collectively authorized; the articles of partnership may, however, provide individual authorization. In this case, each manager may contradict measures of any other manager (unless the partnership agreement expressly contains opposite stipulations).

The managers are nominated by the general meeting; the first managers may be determined by the partnership agreement, if they are partners of the corporation. It is a peculiarity of the Austrian G.m.b.H. Act that the partnership agreement can stipulate the nomination of managers by the state or another public corporation.

The managers are not allowed to carry on business which may be competitive to the activities of their company; they must neither be

19. The "Finanzprokuratur" is an official authority acting as an attorney-at-law of the state ("advocatus fisci").

20. § 144 of the Act concerning the jurisdiction relating to unlitigated matters, Austrian version.

21. §§ 15-28.

general partners nor managers of another company, the subject of which being in the same line of business.

Austrian citizenship is not necessary. (The Trade Code, however, concedes admission of foreigners only in case of formal reciprocity, otherwise formal admission by the political authority is required).

(b) *Aufsichtsrat* (Supervisory Board)[22]

A supervisory board consisting of at least three members may be stipulated by the articles of partnership. It is compulsory only if the capital stock exceeds AS200,000.– –(*i.e.,* about US-$8,000), *and* if the G.m.b.H. consists of more than fifty partners.

The supervisory board has to control the management; the preliminary dismissal of managers and employees, the summoning of the general meeting and the representation of the company in actions against the management also fall into the competence of the supervisory board.

The supervisory board is nominated by the general meeting, during liquidation and under certain circumstances also by the courts.[23] Only natural persons may be nominated, foreigners are not excluded by the law. Managers, their substitutes and relatives cannot be nominated.

(c) *Common provisions for managers and members of the supervisory board*

Managers can be nominated for a time certain or *sine die,* but members of the supervisory board may "be in office" for a three years' period at the most. Managers as well as members of the supervisory board may be re-elected any time, without regard to the duration of their nomination. The mere fact of dismissal, however, does not affect their claim as stipulated in their employment contracts.

Managers and members of the supervisory board have to observe the "diligence of an orderly merchant" ("die Sorgalt eines ordentlichen Kaufmannes"). They are liable for any damage caused by the infringement of this duty. The period of prescription for claims of the company is five years. The company cannot renounce these claims if they have to be used for the compensation of creditors. The infringement of important provisions pertaining to managers and members of the supervisory board is punishable.[24]

22. §§ 29-33 of the G.m.b.H. Act.

23. §§ 94 of the G.m.b.H. Act.

24. §§ 121-126.

(d) *Generalversammlung (General Meeting)*[25]

The partners' resolutions are passed in the general meeting; a vote in writing (if a general meeting is not being held) is admitted, provided that agreement on the proposed resolutions is reached unanimously, or if *all* partners agree in advance to vote in writing on a special issue. Written voting can not be stipulated in the partnership agreement as general means of passing resolutions.

The general meeting is, by cogent legal provision, competent for several matters; for other matters the law provides competence, if the articles of partnership do not stipulate otherwise.

The general meeting must be summoned at least once a year, and moreover, as soon as the interests of the company necessitate a meeting. Partners whose shares make up 10% of the stock, are also entitled to demand a general meeting. The general meeting is summoned by the management, by the supervisory board or by the above-mentioned minority. The general meeting is to be summoned by registered letters (the partnership agreement may fix another modus as well), at least eight days in advance.

The law provides one vote for every AS100.– – (*i.e.,* US-$4.00) of the shares. The ratio between votes and shares may be settled by the partnership agreement in a different way, each share, however, must have at least one vote. Voting by proxy is admitted, the mandatories must submit a written power of attorney. The resolutions have to be registered in a minute book.

A simple majority is regularly considered sufficient. Modifications of the partnership agreement require a three-quarter majority; if they relate to a change of the subject of the enterprise[26] or to an amalgamation[27] unanimity of votes is necessary. Resolutions modifying the partnership agreement need notarial certification and registration at court.

A resolution infringing laws or by-laws can be rescinded by an action for annulment. Any partner is entitled to sue, if he has objected the resolution and demanded that this contradiction be entered into the minutes; furthermore, if he had not been admitted to the general meeting or in case he had not been able to participate on account of some defects in summoning the meeting. The right of action is also granted to the management *(i.e.,* all the managers as an entity) and to

25. §§ 34-44.

26. § 50.

27. § 96.

the supervisory board, and, finally, to each manager and member of the supervisory board personally, if execution of the resolution would make them liable or indictable. The action is limited to a period of one month after the resolution has been entered into the minute book.

The judgment has legal force, not only *inter partes,* but for and against all partners. The plaintiffs are liable for damages caused by unjustified action; therefore securities can be demanded by the company.

A resolution infringing cogent legal provisions may be cancelled by the court ex officio if the annulment is called for by public interest.[28]

(5) *Legal status of the partners*

The right of partnership in the G.m.b.H. is called "Geschäftsanteil" (*i.e.,* share).[29] Certificates of the shares can neither be negotiable nor have the bearer clause. Such certificates are null and void; the issue is punishable.[30] The shares are heritable; they can be pledged and transferred *inter vivos.* The articles of partnership may determine that the assignment is subject to the consent of the company (including hereditary transfer!). Courts can substitute this consent in case a refusal is not based on important reasons. The transfer (not the pledging) of shares has to be done by notarial document, otherwise being null and void. The managers have to keep a book of shares.

In the stage of founding the company, each partner can acquire only *one* share. After the promotion, further shares may be purchased (they "accrue"). If all shares are held by one partner, the company is not dissolved. The one-man company is admitted by courts and doctrine. The company must not purchase its own shares (an exception is the acquisition of shares by the management in pursuance of an action against one of the partners).

The shares may be divided into amounts of at least AS500. — (about US-$30.00), if the partnership agreement permits the cession of parts of shares.

The partners are obliged to contribute their *"Stammeinlagen"* (contribution).[31] Contributions in kind must be enumerated and described in the articles of partnership. These stipulations are published by the registry court. Cash contributions must be paid — compensation with

28. § 144, Law concerning the jurisdiction relating to unlitigated matters, Austrian version.

29. §§ 75-83.

30. §§ 121, 124.

31. §§ 63-74.

claims is not permitted. The managers must expressly declare before court that the performed contributions are at their free disposal. If cash contributions are not fully paid, the rest has to be paid according to the resolutions of the partners. Each demand of further payment has to be notified to and published by the registry court. The managers are liable to creditors suffering damages from the infringement of these provisions. The action is limited to five years.

If contributions are not paid in due time, payment must be demanded by the registered letter. If payments are not effected, the partner is excluded from the G.m.b.H. and his predecessors (back to five years) are liable for the still unpaid rest. If there are no predecessors, or if payment cannot be collected, the share is sold. If the procedure as described does not result in full payment for the share, the remaining partners are liable in relation to their shares, but as joint debtors. These provisions are obligatory, renunciations are not possible.

The partnership agreement may fix periodical acts of non-pecuniary performance, e.g. the delivery of sugar-beet by the partners to a company which refines sugar. If this is the case, the assignment of shares must be subject to the permission of the company.

The partnership agreement may determine *"Nachschuesse"* ("subsequent contribution"),[32] which must be fixed in a (fractional or manifold) relation to the "Stammeinlage" (the "original" contribution which is the basis of the share). Another stipulation is null and void. Such "subsequent" contributions must be demanded from *all* partners. Only predecessors, not other partners, are liable for payment (other stipulations being permitted). Reimbursement of the "Nachschuesse" is admitted within a three months' period after the publication of the payment, whereas the "Stammeinlage" can be repaid only in case of a stock reduction. Repayment is not permitted, if the "Nachschuesse" are necessary to cover losses.

(6) *Preservation of the company assets:*

The partners may only receive payments covered entirely by the profits, profits being the surplus by which the assets exceed the sum of capital and liabilities. Detailed provisions of valuation are meant to prevent fictitious profits. The contributions ("Stammeinlage") must not be repaid, not even from profits (with certain exceptions for companies losing their assets by carrying on their business). Return of contributions is admitted only in case of capital reduction, which will be described later.

32. §§ 72-74.

Partners having received illegal payments are obliged to reimburse them, unless they were taken bona fide as profit payment.

(7) *Rights of the partners:*

Primarily, the partners have pecuniary claims, *viz.,* the annual profit and the proceeds of liquidation. The apportionment of the profit is decided upon by the general meeting. The articles of partnership may entitle the partners to use certain facilities of the company (railway, library, etc.). In the general meeting (or by written voting) the partners participate in the administration of the company. Moreover, there are some rights of the minority. A minority of 10 per cent may demand

(*a*) summoning of the general meeting[33]

(*b*) inclusion of certain items on the agenda[34]

(c) nomination or recalling of liquidators[35]

(*d*) nomination of auditors by the registry court[36]

(*e*) prosecution of claims against managers or members of the supervisory board.[37]

For the exercise of rights as mentioned sub (a) — (c), the partnership agreement may determine a minority of less than 10 per cent. In case the rights as mentioned sub (*d*) and (*e*) are exercised, the partners concerned can only transfer their shares with permission of the company.

Each partner is entitled to receive written information about balances of account and resolutions of the general meeting. Two weeks in advance of the general meeting, which is to decide about the balance of accounts, each partner may inspect the books and papers of the company. This right may be excluded by the partnership agreement, if a supervisory board is stipulated. A deprivation of *individual* rights as fixed by the partnership agreement is admissible only with the consent of the partners concerned.

33. § 37.

34. § 38.

35. § 89.

36. §§ 45-47.

37. § 48.

(8) *Modification of the partnership agreement,*[38] *increase and reduction of capital stock:*[39]

The by-laws as part of the partnership agreement may be modified by a resolution of the general meeting. This resolution must be notarially certified and registered by the court. Generally, a three-quarter majority is required. The stipulation of a supervisory board and the reduction of the remuneration for managers and directors need only a simple majority. A unanimous resolution is necessary for an amalgamation[40] or in case the subject of the enterprise is to be modified.[41]

A resolution on account of which capital stock is increased or reduced is considered as a modification of the partnership agreement and must, therefore, meet the above-mentioned conditions. If the stock is to be increased, the provisions concerning contributions of the partners have to be applied. Should all these new contributions amount to AS500,000– – (approximately US-$20,000) or more, a licence of the Federal Ministry of Finance is needed according to the Decree relating to capital transactions with rules and regulations. If third persons are going to participate, they have to declare their access to the partnership agreement.

A reduction of capital stock, if it is not combined with a simultaneous increase, must not decrease to a lower level than the minimum stock of AS100,000.– – (*i.e.,* about US-$4,000). By reducing the capital, assets are free for payments to the partners. Therefore, damages to creditors must be prevented by special provisions: the reduction as intended must be notified to the registry court. After the registration having been effected, the intention to reduce the capital has to be published together with a statement that all creditors may demand satisfaction or securities within a three months' period. Creditors who are known to the company must be informed personally. Creditors not applying for satisfaction or securities are considered as approving the reduction. After three months, the reduction may be registered, if all demands of the creditors have been satisfied. The managers are personally liable for false statements. After the registration, payments to the partners may be made.

38. §§ 49; 51.

39. §§ 52-58.

40. § 96.

41. § 50.

(9) *Liquidation of the company:*

The company is dissolved by lapse of time, if the partnership agreement stipulates a certain duration of the company, by resolution of the general meeting, by amalgamation, in case of bankruptcy or by decree of political authority. The company may be liquidated by decree of the registry court if the registration had been illegal[42] or if the company has lost all its assets.[43] The amalgamation of all shares *(i.e.,* one-man company) does not constitute a cause for the liquidation. The partnership agreement may determine other reasons of liquidation *(e.g.,* death of a partner). The liquidation during which the company keeps its legal entity is to be notified to the registry court.

The procedure of liquidation according to the legal provisions is "stricti juris". The managers, as a rule, act as liquidators, the partnership agreement or a resolution of the partners, however, can nominate other persons, too. The registry court may nominate liquidators if the managers did not duly notify the liquidation, or if the liquidation is ordered by the political authority, or if the board of directors or a 10 per cent minority demanded nomination by the court.

The provisions concerning the legal status of managers are also to be applied analogously to liquidators (competition, however, is not prohibited).

It is the task of the liquidators to finish current transactions and to convert the assets into cash. The liquidation is to be notified to known creditors personally, to others by publication. After satisfaction of the creditors, at the earliest after a three months' period, however, the rest of the assets are free for the partners. The rest is to be apportioned according to the partnership agreement, unless it contains any other stipulation in the ratio of the shares.

After the liquidation has been completed, the firm is to be cancelled in the registry. A liquidation is not needed in case of bankruptcy, amalgamation, or if the company is taken over by the state, a province or a community.

VI. NATIONALIZED ENTERPRISES

After World War II, Parliament, urged by political and economic reasons, nationalized seventy Austrian enterprises, comprising the heavy industry, the most important banks as well as nearly the whole of the electric plants. Thus, about a quarter to a third of the Austrian economy

42. § 144 of the Act concerning jurisdiction relating to unlitigated matters.

43. Act relating to the liquidation of companies and co-operative societies.

is owned by the state (the indirect influence caused by credits and holdings of the nationalized banks is much greater). For sale of shares of these nationalized companies, permission of Parliament is necessary. Thus, shares of the two biggest nationalized banks were partly sold in 1956.

For these enterprises, special provisions were enacted to secure the influence of the political parties and to prevent a too far-reaching influence of the competent minister. At the time being, the so-called "Competence Act",[44] (*i.e.,* Competence of the Federal Government) is in force. According to §§ 3 and 5 of this law, resolutions of the general meetings of nationalized stock corporations and companies with limited liability need approval by the Federal government, as far as they concern:

(*a*) amalgamation or transformation of companies,

(*b*) decision and modification of by-laws,

(*c*) nomination and recalling of managers and members of the supervisory board and

(*d*) establishment, dissolution or sale of daughter companies.

It ought to be noticed that all nationalized G.m.b.H.'s have a supervisory board although it is not required by the G.m.b.H. Act.

Very important is § 6 of the "Competence Act" which determines that management and supervisory board must be nominated according to proposals of the political parties and in relation to the number of their M.P. (correctly, to the number of their representatives in the main committee of parliament; thus, only large political parties — at the moment, two of them — can take influence on nationalized industries).

Profits of these enterprises are not at the free disposal of the Ministry of Finance. Three quarters of all profits are put into an Investment Fund for nationalized enterprises.[45]

With the exception of two banks, the total of the shares of all nationalized companies are held by the State. Many reasons for the prohibition of one-man companies are known; these reasons are valid even if the State is the sole "partner". And considerable danger is caused by the fact that economic power is combined with political power, a fact which the Austrian Constitution did undoubtedly not foresee. Although this power had not been misused during the last years, it becomes more and more the key problem, which must be solved by Austrian jurists.

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44. BGB1. 173/1959.

45. § 4 of the Competence Act.