Journal of Korean Law | Vol. 19, 31-46, February 2020

Inquiry on Unexpected Development of Bestellung v. Anstellung in Korea*

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Abstract

The distinction between an organizational act and a contractual relationship among players has been well established in corporate law doctrines. The organizational Bestellung v. contractual Anstellung is one such example. Recently, the Korean Supreme Court reversed the legal doctrine related to Bestellung and Anstellung, and held that Anstellung is not required for a person appointed as director by shareholders' meeting to have status of the company. This conclusion is arguably convincing, but surprisingly, the majority of Korean legal academia does not agree with it. This paper argues that such a majority view misunderstood the relationship between the Bestellung and Anstellung in German corporate law and, furthermore, between organizational act and contractual relationship in general. As a matter of fact, the German court or legal academia is very unlikely to have such a concern for this issue, since the supervisory board is bestowed with the power of conducting both Bestellung and Anstellung, which is not the case in Korea. In that sense, this recent court decision also shed light on the different legal structures of corporate management between Germany and Korea.

KEY WORDS: Appointment of Directors, Corporate Contract, Bestellung, Anstellung

Manuscript received: Nov. 25, 2019; review completed: Dec. 23, 2019; accepted: Jan. 23, 2020.

* This paper was presented at the 7th Freiburg-SNU Law Faculties Symposium, held on 25th to 26th September 2019, in SNU School of Law, Seoul. I would like to thank Prof. Jan Lieder and Hanno Merkt for the helpful comments on the German system. This article is supported by the research program 2019 of the Asia-Pacific Law Institute (Seoul National University) funded by the SNU Law Foundation.

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Introduction

The distinction between organizational act and contractual relationship has been well established in corporate law doctrines. The Bestellung v. Anstellung is one such example in German and Korean corporate law. The Bestellung, or "appointment," is the organizational act to appoint a person as a director, conducted by a supervisory board (in Germany)[1] or a shareholders' meeting (in Korea).[2] The Anstellung contract, or "employment contract,"[3] is the contract between a director and the company to specify the terms and conditions associated with the director position. In Germany, the Anstellung contract is normally a service contract (Diensvertrag),[4] which exists and is terminated independently from the organizational appointment and removal as a director.[5] In Korea, however, the contract shall be a mandate contract (Auftragsvertrag).[6]

Since the Bestellung and the Anstellung are recognized independently from each other, it is theoretically plausible for only one to exist without the other. Such a situation always raises several interesting doctrinal and policy questions. The recent decision rendered by the Korean Supreme Court dealt with this issue at the appointment stage. In this case, a representative director of a listed company refused to sign the Anstellung contract with a person already appointed as a director by the shareholders' meeting. Thus, the appointee-plaintiff claimed to the court he or she should be bestowed with the director's power, regardless of a representative director's signing the Anstellung contract. The trial court and appellate court were divided on

1) German Stock Corporation Act (hereinafter "AktG") § 84 Abs. 1 Satz 1. The citation of German legal sources in this article will follow the German citation rule. The "AktG" is the abbreviation of "Aktiengesetz," or "Stock Corporation Act." § 84 Abs. 1 Satz 1 means the Article 84 Section 1 Sentence 1.

2) Korean Commercial Code (hereinafter "KCC") § 382 Sec. 1.

3) The term of "Bestellung" and "Anstellung" has a special meaning in this article, and thus the original German terms are used throughout the article.

4) German Civil Code § 611 ff.

5) *See, e.g.*, Windbichler, Gesellschaftsrecht (24 Aufl. 2017), § 27 Rn. 12.

6) KCC § 382 Sec. 2. Such difference comes from different statutory provisions of each jurisdiction.

the issue. Finally, the Korean Supreme Court upheld the plaintiff, deciding the Anstellung is not required for a person appointed as director by a shareholders' meeting to have director of the company status.[7)]

Surprisingly, however, this conclusion opposes the dominant view of this issue. Most commentators have argued signing an Anstellung contract—mandate contract under the Korean Commercial Code—is a necessary condition for a person to have full power as director.[8)] Even in Japan, where the relevant provisions originated, the majority view requires such a contract. However, this interpretation does not seem to be convincing. From a doctrinal standpoint, the dominant view is inconsistent with the fundamental distinction between an organizational act and a contractual relationship in corporate law, since the directorship in question refers to the powers and obligations as a corporate organ derived only from the Bestellung. From a policy standpoint, requiring an Anstellung contract reaches a seemingly unreasonable conclusion in a control contest setting. The incumbent management can protect their control simply by refusing to sign the Anstellung contract, substantially infringing on the power of shareholders to change the management.

It is not evident whether the German judiciary will reach the same conclusion. Commentators generally describe the autonomy of the Anstellung contract, but the scope of this contract is limited to the personal or contractual relationship with the company (e.g., compensations, fringe benefits, and working conditions). The power and obligation as a corporate organ, such as company representation and management, shall be grounded only on the Bestellung by the supervisory board, even though such items are usually included in the Anstellung contract. Thus, the Korean Supreme Court's ruling of the Anstellung being redundant regarding organizational rights may be applied similarly in Germany.

However, German commentators don't need to think about a situation where the incumbent management protects themselves by declining the Anstellung contract, since the supervisory board is authorized to conduct both the Bestellung and Anstellung. The supervisory board, which already conducted the Bestellung, or appointed a person as a director, has no

7) Korean Supreme Court Decision rendered on 23 Mar. 2017, 2016Da251215 (en banc).

8) *See infra* Part I.3.

reason to refuse the Anstellung contract. The above problem in Korea happened because the decision rights belonged to separate organs—Bestellung to the shareholders' meeting and Anstellung to the representative director—whose interests are not necessarily aligned. Arguably, this divergence under Korean corporate law creates unnecessary confusion and reaches a conclusion unsupported by convincing policy arguments. Maybe legislators shall fix this problem, but for now, the Korean Supreme Court made the right decision.

This paper is organized as follows. Part I describes the recent Korean Supreme Court decision, including academic debates relating to this decision. Since the decision opposes the majority, it is worth noting why legal academia leans the other direction. Part II is a comparative analysis, exploring the legal consequences of missing the Anstellung contract under German corporate law more deeply. I will discuss the different organizational structures of German and Korean corporations, and seek the source of the problem. The final part presents concluding remarks.

I. Recent Change of Korean Case Law

1. Korean Commercial Code

Since the current debate on the Bestellung v. Anstellung stems from statutory grounds, it is worth briefly describing the relevant provisions in the Korean Commercial Code before examining the case law and academic discussions. The relevant part of Article 382 stipulates as follows.

> § 382 Appointment of Directors. . .
> (1) The directors are elected at the shareholders' meeting.
> (2) The provisions regarding the mandate contract (Auftragsvertrag) in the Civil Code shall be applied *mutatis mutandis* to the relationship between the company and directors.

A few important legal consequences resulted from Article 382 Section 2. For instance, according to this provision, directors under Korean corporate law owe a duty of care to the company. With no mention under the

Commercial Code, the Civil Code requires "a duty of care as a faithful manager" in the mandate contract.[9] Thus, directors owe such a duty to the company. Requiring an Anstellung contract is also based on this provision. Commentators argue that, although Bestellung is conducted by the shareholders' meeting according to Section 1, the contract shall be made between the director and the company since their relationship is defined as a mandate contract under Section 2.[10]

2. Supreme Court Decision in 2017

1) Facts

This is a typical case of contested control. A listed company was managed by a group of defendant-directors X—joint representative directors—supported by current controlling shareholders. The plaintiff-shareholders Y started competing for corporate control,[11] and Y requested to call a special shareholders' meeting to the court.[12] Y succeeded in obtaining an order. This strategy is commonly used in Korea to remove incumbent management by exercising shareholder governance power. As expected, the shareholders' meeting was in turmoil. Current controlling shareholders were prevented—as argued in trial and appellate courts but failed—from entering the meeting room. Y succeeded in removing X and electing Z as director. Nearly all attending shareholders voted in Z's favor.

The representative directors X refused to sign an Anstellung contract with Z, arguing the shareholders' meeting violated the law. The plaintiff-shareholders Y filed a suit to confirm Z was bestowed a legitimate director's status by the shareholders' meeting, and thus had full power as company director regardless of the Anstellung contract's existence.

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9) Korean Civil Code § 681. In Germany, there is no such supplementary provision in the Stock Corporation Act, and the duty of care of a director is provided directly by AktG § 93 Abs. 1.

10) To be sure, it can be argued that the relationship as a mandate contract is applied by law, and thus the parties don't have to create such relationship. *See infra* Part I.4.

11) They succeeded to acquire more than 11% of shares before commencing the contest.

12) KCC § 366 Abs. 2.

2) Trial Court & Appellate Court Decision

The trial court upheld the plaintiff-shareholders Y.[13] An Anstellung contract between the company and a person elected director by shareholders' meeting is not required for him to have legitimate company director status. The court's arguments are straightforward. The power of a shareholders' meeting to elect a director under Article 382, Section 1 of the Commercial Code is non-assignable. Therefore, if a representative director can prevent a person from obtaining a directorship by refusing an Anstellung contract, this is equivalent to assigning the ultimate power of a director's election to the representative director, ultimately violating Article 382, Section 1. It would also be unreasonable for a shareholders' meeting loser to defeat the winner simply by not signing a contract.

However, the appellate court went in the opposite direction.[14] The court denied that Z obtained director's status, simply because the Anstellung contract was not concluded. This decision presumed there should be a certain contract between a director and a company, since their relationship is governed by the mandate contract according to Article 382, Section 2 of the Commercial Code. The collective decision of a shareholders' meeting is an internal decision process, and cannot be categorized as a declaration of intention (Willenserklärung), which is necessary to constitute a legal act (Rechtgeschäft). In other words, a representative director needs to make an offer, which was not found in this case.

3) Supreme Court Decision

The Korean Supreme Court has had several opportunities to decide whether the Anstellung contract is necessary to obtain legal director's status. The answer has been positive. Through several decades, the decision of a shareholders' meeting has been held as merely an internal decision process. Therefore, it is only when an offer made by a representative organ is accepted by a director that he or she obtains legal company director's status.[15] More

13) Suwon District Court Decision rendered on 20 Nov. 2015, 2015GaHap62664.

14) Seoul High Court Decision rendered on 18 Aug. 2016, 2016Na2071120.

15) Korean Supreme Court Decision rendered on 28 Feb. 1995, 94Da31440; Korean Supreme Court Decision rendered on 8 Nov. 2005, 2005Ma541; Korean Supreme Court Decision rendered on 15 Jan. 2009, 2998Do9410.

than 20 trial court decisions have adhered to this position,[16] constituting a case law. In fact, as stated above, the appellate court simply followed this case law, and surprisingly, the trial court rejected the established doctrine.

In 2017, however, the Supreme Court made a decision rendered by all the judges sitting on a court (a decision en banc), which is required to change the precedent.[17] The Supreme Court changed the case law. First, a shareholders' meeting was given the *exclusive power* of Bestellung of a director under Article 382, Section 1 of the Commercial Code. A representative director—or any organ with the power to bind a company to a contract—does not have such power. Thus, the law enabling a representative director to reverse a shareholders' meeting decision on a director's election violates Article 382, Section 1. These arguments were already proposed by the trial court. The Supreme Court, however, added another important perspective. A company director's status—bundle of management powers, voting rights, and fiduciary duties—can be found at the organization level, which can only be derived *from the Bestellung*. The Court relied on the fundamental dichotomy of organizational act and contractual relationship in corporate law.

3. Dominance of Contractarian View in Legal Academia

1) Korea

The recent Supreme Court decision returned to corporate law principles. For several decades since the enactment of the Korean Commercial Code in 1962,[18] however, the contractarian view—a contract between a company and a board member is required—has dominated legal academia. Most corporate law commentators argued signing an Anstellung contract is a necessary condition to have full directorial power.[19] It was argued that a

16) As least 23 cases are found as of March 2017, and only in 2 trial court cases the legal status as a director was recognized when a decision at a shareholders' meeting was made (and no mandate contract was made). These 2 cases were in fact reversed by the Supreme Court decision mentioned at footnote 15 (94Da31440).

17) Korean Supreme Court Decision rendered on 23 Mar. 2017, 2016Da251215 (en banc).

18) The Article 382 has never been changed since its original adoption in 1962.

19) *See, e.g.*, Kee-Bum Kwon, Modern Corporate Law 809 (7th, 2017) [in Korean]; Chan-Hyung Jung, Commercial Law I 954 (22th, 2019) [in Korean].

director is located outside the company. The only way to legally integrate this person into the company is a contract. Under Article 382, Section 2, the contract shall be a mandate contract (Auftragsvertrag). For such a contract to bind a company, the contract should be concluded by a representative director with a company's representation power.

This argument is very straightforward. With a contract needed to establish a directorship, such a conclusion seems inevitable. In fact, a minority view suggested after the Supreme Court decision that a shareholders' meeting's decision could be deemed a mandate contract *offer*. Thus a director's acceptance establishes such a contractual relationship. It is still doubtful, however, that this attempt was successful. This minority view attempted to explain the Supreme Court decision under a contractarian model's framework but could not convincingly demonstrate why a shareholders' meeting's decision constituted an offer outside directorial appointments. In other cases of a shareholders' meeting being involved in a corporate contract, e.g., a company merger, a business transfer, etc., a representative organ's action is needed to bind the company to the contract.

2) Japan

The contractarian view has a long history in Japan beyond the Korean Commercial Code's enactment. Japan had a similar provision in the Corporation Code in 2005.[20] This provision was originally adopted by the Japanese Commercial Code in 1911,[21] a few years after Japan enacted the Code. Japanese commentators asked whether a mandate contract is necessary to appoint a director. From the beginning, the contractarian approach has been, and remains, a dominant view in Japanese corporate law academia.[22]

The contractarian approach in Japan also presumed a mandate contract

20) Japanese Corporation Code § 329 Sec. 1 (election of a director at a shareholders' meeting) and § 330 (application of the mandate contract in the Civil Code).

21) Japanese Commercial Code in 1911 § 164 Sec. 1 (election of a director at a shareholders' meeting) & Sec. 2 (application of the mandate contract in the Civil Code). Such provisions was maintained unchanged in § 254 Secs. 1 & 3, until they moved to the new Corporation Code in 2005.

22) Kenjiro Egashira, Laws of Stock Corporations 396 (7th, 2017) [in Japanese].

is required for several reasons.[23] From theoretical perspective, for instance, it is impossible to impose directorial obligations on an individual without his or her implicit consent. Thus, there should be something he or she agrees upon. Since a shareholders' meeting is merely an internal process to reach a corporate decision, it could not create this "something." This must be done by the representative organ. Practically, however, there are many items, such as compensation packages, fringe benefits, and working conditions, which should be negotiated in a specific contract between a company and a board member. In other words, a person cannot start working as a director unless a contract is concluded.

Despite this dominant view, a few commentators argue an actual mandate contract is not necessarily required to create a director's legal status. First, current dominant interpretation cannot find a reasonable solution for a representative organ refusing to make a mandate contract. Moreover, the statutory provision also supports this minority view. Article 329, Section 1 of the Japanese Corporation Code stipulates, "a director shall be elected by a decision of a shareholders' meeting"—like "Vorstands-mitglieder bestellt der Aufsichtsrats" (supervisor board appoints executive board member) in Article 84, Section 1 of the German Stock Corporation Act—rather than "a shareholders' meeting shall approve election" or "a shareholders' meeting shall decide in relation to election."[24] Bestellung has its own effect of director's election and status without a mandate contract's assistance. This view states Bestellung by a shareholders' meeting is a unilateral act and directorial consent is a condition precedent.

4. Why the Contractarian View Fails

Although the contractarian view has been dominant in Korea and Japan since the beginning, it is not very convincing. First, the contractarian view argues a mandate contract is needed, since Article 382, Section 2 of the Korean Commercial Code—and its Japanese equivalent, Article 330 of the Japanese Corporation Code—regards the relationship of the company and directors as a mandate contract. They ignore, however, that this provision

23) *Id*.

24) Wataru Tanaka, Corporate Law (2nd, 2018), at 208 [in Japanese].

does not demand the company create contractual relationship. Rather, the plain meaning of the sentence seems that, "unless otherwise agreed," the provisions of the mandate contract in the Civil Code are applied *mutatis mutandis*. Article 382, Section 2 could assume an actual mandate contract may not be concluded. Provisions like Article 84, Section 1, Sentence 5 or Section 3, Sentence 5 in the German Stock Corporation Act, explicitly assuming an Anstellung contract's existence, are not found in the Korean Commercial Code. Thus, the dominant view lacks statutory grounds.

Second, as stated above, there are other rationales for requiring a contract. A contract, for instance, is arguably the only way to legally integrate a director originally located outside the company to the nexus of company law. Similarly, it has been argued that there should be something a director agrees upon, meaning a contract. A director should only be able to enter the nexus of company law relationship with his or her consent. It does not necessarily mean, however, that the vehicle must be a contract. One theoretically plausible framework is treating a shareholders' meeting's decision as a unilateral act with a director's consent as a condition precedent, as found in the above Japanese minority view.

Third, and most importantly, the dominant view is inconsistent with the conceptual distinction between an organizational act and a contractual relationship in corporate law. To illustrate, take the dichotomy of Bestellung v. Anstellung in the German Stock Corporation Act. German commentators always emphasize that these are strictly distinguished.[25] Bestellung is an organizational act. Thus, organizational rights and directorial obligations—such as representation power, management of the company, and duty of care—are derived from Bestellung.[26] Anstellung only determines personal rights and obligations to the company, mostly relating to a director's compensations and benefits.[27] The distinction between an organizational act and a contractual relationship has been emphasized in Korean corporate

25) *See, e.g.*, Windbichler, Gesellschaftsrecht (24 Aufl. 2017), § 27 Rn. 12; Spindler/Stilz, AktG (4 Aufl. 2019), § 84 Rn. 7; Hüffer/Koch, Aktiengesetz (13 Aufl. 2018), § 84 Rn. 2.

26) K. Schmidt/Lutter, AktG (3 Aufl. 2015), § 84 Rn. 19. Such distinction was also confirmed by Prof. Jan Lieder and Prof. Hanno Merkt, who participated in the 7th Freiburg-SNU Law Faculties Symposium.

27) *Id.* § 84 Rn. 29 ff.

law jurisprudence. Directorial appointment should be approached accordingly. A director may not be eligible for compensation unless he or she signed a contract, while his or her power and obligation to the company should be recognized regardless of a contract's existence.

Finally, as emphasized in the recent Korean Supreme Court decision, requiring a mandate contract may result in a seemingly unreasonable conclusion in a control contest setting. The incumbent management—unless he or she is removed—can protect their control simply by refusing to sign the mandate contract, infringing on the shareholders' ultimate power to change management. Since defenses against hostile takeovers are strictly prohibited in Korea, such unexpected consequences can hardly be justified.

In conclusion, the Korean Supreme Court is right. Even if the representative director refuses to make a mandate contract, it should have no effect on legitimately recognizing the status as a director in corporate law. However, the German corporate law, from which the Korean law originated, requires an Anstellung contract in appointing executive directors. This system supports the majority view, requiring a mandate contract. This is, however, a misunderstanding of Anstellung. Part II examines the German system.

II. Comparative Analysis with German Corporate Law

1. History

A researcher looking at the current provisions of the German Stock Corporation Act is prone to reach a hasty conclusion that the theoretical debates examined in Part I were influenced by Anstellung contracts in German law. The German Stock Corporation Act recognizes an Anstellung contract shall be made independently—at least conceptually—from Bestellung.[28] Bestellung is the organizational decision to elect an executive director made by the supervisory board, while Anstellung is a contract between this director and the company. Thus, a researcher tends to regard a

28) AktG § 84 Abs. 1 Satz 5 & Abs. 3 Satz 5.

mandate contract discussed above as a Korean equivalent of the German Anstellung contract.

This assumption is too hasty. The current debate, which has lasted for several decades, was not influenced by Anstellung contracts. Anstellung was introduced in the German Stock Corporation Act in 1965. The provisions being discussed were instituted in 1962 in Korea, and in 1911 in Japan. Through several decades of the early 20th century, Japanese scholars, with no reference to German law, asked whether a mandate contract should be required. This debate was transplanted into Korean legal academia. Germany's introducing Anstellung contracts did not trigger the theoretical debate in Korean and Japan.

However, the theoretical development in German legal academia concerning Anstellung may shed light on the above debate. Before 1965, the German Stock Corporation Act did not have Anstellung.[29] The statute only stipulated executive board members were elected by the supervisory board. There were no provisions implying the legal relationship between a board member and a company. This does not mean the parties were prohibited from making a contract, but such a contract was at best a general one, without significant meaning in the legal relationship between a board member and a company. Thus, integration theory (Einheitstheorie) was dominant in German legal academia.[30] According to this theory, Bestellung creates a single integrated legal relationship between a director and a company, from which specific rights and obligations—including a director's personal rights to compensation—are derived. A director's organizational powers and personal rights are mixed and thus theoretically confused, but a simpler solution was provided: a specific formal contract was not required to create this relationship.

Integration theory should be seriously considered in understanding the mandate contract in Korean corporate law. If it can be agreed that Article 382, Section 2 of the Korean Commercial Code—the mandate contract in Civil Code is applied *mutatis mutandis*—does not demand making such a

29) Ernest C. Steefel & Bernhard von Falkenhausen, *The New German Stock Corporation Law*, 52 Cornell L. Rev. 518, 528 (1967).

30) Godin/Wilhelmi, Aktiengesetz (2 Aufl. 1950), at 318.

contract,[31] the statutory structure of Korean law resembles the German Stock Corporation Act before 1965.

The notion of Anstellung was introduced in 1965. A director's personal rights were separated from the organizational power, both with separate statutory grounds. Such legislative intention was clearly stated in the government's amendment draft of 1960.[32] Since then, separation theory (Trennungstheorie) has been a dominant view.[33] According to this theory, Anstellung should be conceptually distinguished from Bestellung.

This amendment and theoretical development seems to support the dominant view in Korea examined above, that there should be a separate contact in addition to Bestellung. From a comparative perspective, however, an interesting research question is whether Anstellung is legally or functionally equivalent to the mandate contract discussed above by the Korean Supreme Court. This paper argues it is *not*. Thus, using separation theory does explain Korea's structure.

2. Anstellung Contract in Germany

1) Autonomy

Why is transplanting separation theory inadequate (Trennungstheorie) for Korea? It is basically because Anstellung is autonomous (it exists and is terminated independently from Bestellung) while the mandate contract arguably required in the Korean law is closely linked to the Bestellung. The autonomy of Anstellung in Germany can be analyzed from the following two perspectives.

First, an Anstellung contract exists and is terminated independently from Bestellung in Germany. It is inevitable for the Anstellung contract's specific contents (e.g., terms, limitations of management power, organizational duties) overlap with Bestellung's details. Anstellung tends to specify the Bestellung regarding organizational powers and duties.[34]

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31) *See supra* Part I.4 (first account).

32) Begründung zum Regierungsentwurf zu § 84 AktG (1960), at 106.

33) Spindler/Stilz, AktG (4 Aufl. 2019), § 84 Rn. 7; Hüffer/Koch, Aktiengesetz (13 Aufl. 2018), § 84 Rn. 2.

34) Windbichler, Gesellschaftsrecht (24 Aufl. 2017), § 27 Rn. 13.

Conceptually, however, they should be strictly distinguished.[35] This conceptual distinction can be highlighted when a director is removed. In Germany, a director can be removed only when there are justifiable causes.[36] Sometimes, however, such causes cannot justify the service contract's termination (Diensvertrag) under the Civil Code. In this case, Anstellung survives the director's removal, and he or she is still eligible for the compensation provided by the Anstellung contract.[37] This is not the case in Korea. A director can be removed without cause and is no longer eligible for the mandate contract's negotiated compensation.[38] A mandate contract in Korea is closely linked to Bestellung in both contents and legal effects.

Anstellung is also distinguished from Bestellung in the German director's rights and obligations. Representation and management are powers grounded on Bestellung, while compensation and benefits are derived from Anstellung.[39] This reflects the distinction between organizational power and a contractual relationship. In Korea, however, the dominant view argues that failure to make a mandate contract deprives an appointed director of powers related to managing the company. The mandate contract is completely integrated with Bestellung.

Germany's Anstellung cannot be viewed as a legal or functional equivalent to the Korean dominant view's mandate contract. Thus, the analogy of separation theory cannot adequately explain the relationship between Bestellung and the mandate contract in Korea.

2) Effect of the Lack of Anstellung Contract

Does the autonomy of Anstellung mean Bestellung can exist and come into force even if an Anstellung contract was never made? What do we expect if the German judiciaries or legal scholars come across the same fact pattern the Korean Supreme Court has dealt with? German literature is

35) *Id*. § 27 Rn. 12.

36) AktG § 84 Abs. 3.

37) Windbichler, Gesellschaftsrecht (24 Aufl. 2017), § 27 Rn. 12.

38) Instead, the company should pay damages if there is no cause for removal and the term is not expired. KCC § 385 Abs. 1.

39) K. Schmidt/Lutter, AktG (3 Aufl. 2015), § 84 Rn. 19 & 29.

unlikely to discuss the situation where only Bestellung is in place—normally in the appointment stage—while most textbooks and commentaries offer unanimous accounts for a director's removals, where only Anstellung survives. Thus, it is not evident whether German law will reach the same conclusion as the Korean Supreme Court.

As Bestellung and Anstellung are strictly distinguished, it is expected that German law would agree with the Korean Supreme Court. The corporate organ's powers and obligations, such as company representation and management are grounded only on Bestellung. Anstellung has nothing to do with organizational powers and obligations. It may be concluded that a person obtains legal director's status when the supervisory board's decision is made, regardless of whether an Anstellung contract is made.[40] Even according to separation theory, requiring a mandate contract as a prerequisite of directorship does not seem justified.

3. Why Does the Anstellung Matter in Korea?

Finally, why are German commentators silent on this issue? Since Bestellung and Anstellung are independent from each other, it is theoretically plausible for one to exist without the other, but German law does not care about a situation where only Bestellung was made at the appointment stage. The answer might lie in the fact of the authorized organ being different in both countries.

In Germany, for instance, it is impossible for incumbent management to protect themselves by declining the Anstellung contract, since the supervisory board is authorized to conduct both Bestellung and Anstellung.[41] The supervisory board, which already decided the Bestellung, has no reason to refuse the Anstellung contract. In Korea, however, the representative organ is authorized for Anstellung, while a shareholders' meeting is authorized for Bestellung. The representative organ does not always serve the shareholders' interests. Thus, the real source of the mandate contract

40) I would like to thank to Prof. Jan Lieder and Prof. Hanno Merkt, who kindly explained the autonomy of Germany's Bestellung and Anstellung, and agreed to this conclusion.

41) AktG § 84 Abs. 1 Satz 1.

problem in Korea is the decision right of Bestellung and Anstellung belongs to separate organs with interests that are not necessarily aligned.

Maybe legislators shall fix this problem. One plausible proposal is authorizing a shareholders' meeting to make an Anstellung or mandate contract. However, this proposal is not much different from the minority view—treating the shareholders' meeting's decision as a unilateral act with a director's consent as a condition precedent. Again, the dominant view does not find policy grounds.

Concluding Remarks

Recently, the Korean Supreme Court tackled this long debated problem and reversed the legal doctrine concerning the necessity of a mandate contract in appointing a board member and held that such a contract is not required for an appointed director to have that status in a company. This conclusion is arguably convincing, and this paper argues why the Korean majority view, opposing the Supreme Court decision, does not make sense. Germany also adopted the distinction between Bestellung and Anstellung, but careful examination reveals Anstellung in Germany does not correspond with the disputed Korean mandate contract. Integration theory of the German Stock Corporation Act before 1965 may suggest a better theoretical background for understanding a mandate contract's necessity.