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A New Era of Financial Futures Trading in Germany: Sweeping Changes in the Legal and Business Environment

Friedrich E.F. Hey*

I. INTRODUCTION

Trading in futures has increased dramatically in recent years. This is especially true for financial futures. The two main reasons for this phenomenon are: (1) there is a greater need for hedging against price fluctuations; and (2) financial futures trading provides speculators with the opportunity to transform favorable price developments into quick and large profits.

Futures exchanges now operate in many countries. In Europe, the most notable exchange is the London International Financial Futures Exchange ("LIFFE"), but the trend towards opening new exchanges continues. For example, the "Soffex" opened in Zurich in May 1988, and Dublin opened its own exchange in May 1989.

In the Federal Republic of Germany, the evolution of a futures exchange was prevented for many years by extremely restrictive legislation dating back to the beginning of the twentieth century. In order to strengthen the position of Frankfurt as one of the world's financial centers, and to reclaim some of the business that has moved to London over the years, the German parliament enacted new legislation in June 1989 which substantially changed the legal situation with respect to futures trading. In the wake of this more lenient legislation, a German futures exchange, the Deutsche Terminbörse ("DTB"), began trading in January 1990.

This Article examines the recently enacted legislation governing fu-

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tures trading in the Federal Republic of Germany, distinguishes the new law from the old, and analyzes the impact the new legislation will have on the functioning of the new German futures exchange.

II. FINANCIAL FUTURES AND THEIR ECONOMIC IMPORTANCE

Many types of financial futures currently are traded on the world's futures exchanges. The most important types, in terms of contracts and public demand, are interest rate futures, stock index futures, bond futures, and currency futures. The increase in the economic importance of financial futures trading is underscored by the trading volume of these futures. Total futures trading volume increased more than tenfold between 1970 and 1985, with financial futures accounting for 60% of the total trading.

The principal economic role of a financial future is to protect against fluctuations in the prices of the underlying financial instrument. In so doing, financial futures satisfy an important need for enterprises desiring to lock in prices. This function has become even more important in light of the enormous volatility experienced in financial markets in recent years. Futures contracts on currencies, or "forward transactions," have long been used to protect against fluctuations in certain currencies. Unlike the newer currency futures, these forward contracts are not based on standardized terms.

Other types of financial futures have emerged more recently. In 1982, the first stock index futures were introduced. These futures have been enormously successful, as is demonstrated by the continually increasing number of varieties that are available. Interest rate futures, another important financial instrument, were first traded on the Chicago Board of Trade in October 1975.

As previously stated, the basic economic purpose of financial futures is to secure against price fluctuations in the underlying financial instrument. This function will become even more important in the future as institutional investors, namely pension funds and life insurance companies, seek to secure the value of their enormous portfolios against drastic

1 For a detailed description of the various types of futures, see M. POWERS & D. VOGEL, INSIDE THE FINANCIAL FUTURES MARKETS (2d ed. 1984) [hereinafter M. POWERS & D. VOGEL].


5 M. POWERS & D. VOGEL, supra note 1, at 13.
plunges in the financial markets. The October 1987 crash resolved any remaining doubts as to the necessity of such behavior. Thus, financial futures will continue to play an important economic function by alleviating the consequences of such price plunges.

III. THE EMERGING GERMAN FINANCIAL FUTURES EXCHANGE

The new German financial futures exchange known as the DTB is located in Frankfurt, the German financial center. It will soon offer contracts on a German stock index ("DAX") and on a German federal government bond. Currently, only stock options like those traded in the United States are offered. The DTB works on a fully computerized basis, which means that trading is conducted via computer terminals which are linked to the central computer of the DTB.

The Soffex in Zurich (one of Frankfurt’s chief competitors for financial services business) operates in a similar fashion. Allegedly, the Soffex has had great success thus far. In addition to the Soffex in Zurich and the LIFFE in London (Frankfurt’s other major European competitor for financial services business), Paris operates its own exchange known as the “MATIF.” The MATIF began trading in February 1986 with success that exceeded the expectations of its promoters. The MATIF’s trading volume expanded from 1.6 million contracts in 1986 to 12.0 million contracts in 1987, thus making it the most successful new exchange in 1987. This success continued in 1988 and 1989, generally speaking, given the MATIF’s trading volume for those years.

As to the position of foreign banks at the DTB, there has been no apparent disadvantageous treatment accorded them thus far. Indeed, foreign banks may actively participate in the DTB. A definitive answer

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6 For a good overview of the uses of financial futures by institutional investors, see S. FIGLEWSKI, J. KOSE, & J. MERRICK, HEDGING WITH FINANCIAL FUTURES FOR INSTITUTIONAL INVESTORS: FROM THEORY TO PRACTICE (1986); von Rosen, Terminkontrakte sind Überfällig, 1989 KREDITWESEN 308, 312 [hereinafter von Rosen].

7 For further information regarding the DAX, see von Rosen, Der DAX und die Deutsche Terminbörse DTB, 1988 KREDITWESEN 743.

8 For a detailed description of these products, see Kindermann, Rechtliche Strukturen der Deutschen Terminbörse, WERTPAPIERMITTEILUNGEN [hereinafter WM], Sonderbeilage 2 1989, at 6 [hereinafter Kindermann].

9 Id. at 9.

10 Forstmoser & Pulver, Der Optionshandel in der Schweiz, WM, SONDERBEILAGE 6 1988, at 3.

11 Id. at 14.


13 FUTURES, No. 13, 1988, at 125.

14 This was the response to a questionnaire sent out by this author in March 1989 to the Association of Foreign Banks in Germany (Verband der Auslandsbanken in Deutschland, Frankfurt).
as to treatment of foreign banks, however, cannot be given yet. One must watch the further developments at the DTB in order to ascertain the actual position these banks will occupy.

The establishment of a German financial futures exchange was, without doubt, an economic necessity. First, there is enormous profit potential associated with the operation of the exchange. Second, and perhaps even more importantly, an exchange in Frankfurt is necessary if the city wants to maintain its status as one of the world's leading financial centers. A financial center without a facility for futures trading simply is incomplete in today's world, and the lack of such trading opportunities would seriously jeopardize Frankfurt's position. Specifically, Frankfurt's current customers might take their business elsewhere. The professional portfolio managers of large international investors, such as pension and investment funds and life insurers, tend to concentrate their activity in locations where the entire scope of financial services and instruments is available.

The trend towards globalization of financial markets and financial services leads to international competition. It is against this global background that one must consider Frankfurt's efforts to establish a financial futures exchange.

IV. LEGAL TREATMENT OF FINANCIAL FUTURES TRADING IN GERMANY: THE SITUATION PRIOR TO 1989

A. Legislative History Regarding Futures Trading

The trading of both financial futures and commodities futures is subject to complex legal treatment in Germany, with various, partly intertwined laws affecting these activities. From the beginning of the twentieth century, German law severely restricted futures trading. Moreover, a great number of court decisions fortified these restrictions, and in so doing, clearly exceeded the original scope of the legislation as intended by the framers. This is particularly true in various decisions pertaining to transactions by German citizens on foreign exchanges.

In describing the legal treatment of futures trading prior to the changes enacted in 1989, it is necessary to take a brief look at the legislative history. This will provide the necessary background against which the new legislation may be evaluated.

15 The trend towards globalization requires hedging opportunities. Kindermann, supra note 8, at 4.
16 Id.; von Rosen, supra note 6, at 308.
18 Note that the prior legal scheme still applies to commodities trading.
Two statutes affect the trading of financial futures in Germany: Civil Code section 764 (in conjunction with section 762), and the forward trading provisions of the German law governing exchanges—the Börsengesetz. Since these provisions were designed to complement each other, their legislative history can be considered together.

At the time the above laws were enacted, transactions in which no physical execution was intended—and in which the difference in value became payable at the conclusion of the transaction—were viewed by legislators as a form of speculation. Driven by the desire to protect people from such speculation, the legislature passed laws that made such a contract non-binding—i.e., unenforceable.

There is a long and widespread tradition in European legislation to prohibit transactions that are based on speculation. Such legislation often was induced by times of “wild speculation.” Various Prussian rulings from 1836, 1840, and 1844 were particularly directed against the trading of futures of financial instruments because this form of trading was concerned with only the difference between the present and the future prices, thus making it very suspect as speculation.

The foregoing measures had rather adverse effects. First, these laws did not stop speculation. Moreover, while most people considered it a matter of honor to fulfill their obligations, less honorable people sought to benefit from the unenforceability of these contracts. Consequently, the laws barring futures trading were repealed in 1860. Thus, speculation in this form was no longer limited, and as a result, traders and speculators had nearly unlimited freedom.

An enormous surge in trading followed, and many of the new speculators had neither adequate experience nor adequate financial resources to support their losses. This resulted in the financial collapse of a great number of people. In view of this, public opinion demanded restrictions. It was against this background that the courts sought to interpret the laws so as to limit this type of speculation, and the legislators

19 BÜRGERLICHES GESETZBUCH [BGB] §§ 762, 764 (W. Ger).
20 BÖRSENGESETZ [BöRSG] §§ 50-60 (W. Ger).
22 Id. at 2.
23 Id. at 3.
26 Id. at 4.
finally enacted restrictive rules pertaining to futures trading by the end of the nineteenth century.

With the enactment of the rules of the Börsengesetz, the legislature pursued two objectives: (1) to protect ordinary people from the risks of speculation, and (2) to leave businesspeople who were aware of the risks and needed to trade in futures for hedging purposes unaffected. This legislative intent has not always been given the necessary consideration by courts. It should be noted, however, that the legislature clearly intended to bar only unexperienced, private individuals from futures transactions, whereas business participants were to enjoy total liberty in futures trading.

B. The Statutory Framework

1. Generally

As stated above, the legal treatment of futures trading in Germany is very complex because two interrelated statutes are involved. Both of these statutes govern the area (although they are not totally congruent), and both of these statutes can affect the "validity" of a transaction. These statutes affect the validity of a futures transaction by denying the enforceability of futures contracts. If, however, a party has actually performed its duties under a futures contract, that party cannot reclaim what it has already transferred.

Considering the legal situation prior to the 1989 changes is not a superfluous task. The new legislation changed the old scheme only in part. The doctrinal structure that governs the validity of futures transaction will remain the same. For example, section 764 of the German Civil Code will not be changed at all. Moreover, most of the former principles will continue to govern commodity futures since they have been excluded from the new liberal legislation. Given that the German courts also claim jurisdiction over transactions that Germans conduct on foreign exchanges, which has caused furor particularly in the United States, foreign financial institutions will continue to face the restrictive laws when they enter into a commodity futures contract with German

28 Its scope, however, will be indirectly affected by the new section 58 in the Börsengesetz.
29 BörsG § 53(3) (W. Ger.).
30 See infra text accompanying notes 44-81.
2. Section 764

a. General principles

Before turning to the practically more important provisions in the Börsengesetz, this section will consider Civil Code section 764. One should notice that section 764 is of particular importance in hedging transactions. Section 764 (referring to Civil Code section 762) provides that a contract shall be treated as non-binding if the parties do not intend to actually perform their respective duties, but rather intend to "pay off" only the difference between the price as specified in the contract and the price on the day of delivery. The same legal consequence holds true if only one party has the aforementioned intention and the other party could have known this.

Moreover, it is settled law that the scope of section 764 covers all transactions whose economic effect equals "paying off," as is the case when the parties engage in reciprocal transactions. Aside from the foregoing intentions, section 764 has no further requirements. Thus, its scope is quite broad, and it obviously affects a great number of futures transactions. Why is it, then, that section 764 has less practical importance than the provisions pertaining to futures trading in the Börsengesetz? Basically, there are three reasons. First, section 58 of the Börsengesetz bars the application of section 764 under specific circumstances which will be discussed later in this Article. Second, because it is often difficult to prove "intent" as section 764 requires, a violation under the Börsengesetz can be proven much more easily, and the result (unenforceability of the contract) is the same. The third reason is described in the following section.

b. Hedging Transactions

Historically, section 764 has been very important in financial futures

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32 For a description of the probable impact of the new § 61 of the Börsengesetz, see infra text accompanying notes 125-33.


34 Pecher, supra note 33, § 764, remark 7. Section 764 literally affects only transactions in "goods" ("Waren") and "negotiable instruments" ("Wertpapiere"). The question whether financial futures are covered will be discussed infra text accompanying note 97.

35 Id.
transactions conducted for hedging purposes. As will be discussed in more detail below, section 58 of the Börsengesetz, which barred section 764 under certain circumstances, was not applicable to transactions on foreign exchanges. Since there was no financial futures trading on German exchanges (aside from the usual forward transactions in currencies), all parties—even businesspeople—who engaged in such transactions were subject to the provisions of section 764.

Fairly soon after section 764 was enacted, the courts had to consider the applicability of section 764 to hedging transactions. As noted in the above discussion of legislative history, the objective of section 764 was to prevent speculation. While futures transactions conducted by businesspeople for hedging purposes seemed to fulfill all the requirements of section 764, they were anything but speculative, given their objective. To the contrary, hedging transactions are designed to protect against future price fluctuations.

In the leading case addressing this issue, a New York broker sued a German cotton manufacturer for payment resulting out of various cotton futures transactions. The lower courts dismissed the claim on the ground that section 764 made the contracts unenforceable. The Reichsgericht (then the highest German court in civil matters) reversed. It found that although hedging transactions fell within the literal meaning of section 764, they were beyond its intended scope of regulation. Thus, enforcement of the futures contracts was granted. According to the Reichsgericht, the characteristics of a hedging transaction are that it is (economically) connected with an underlying “main transaction,” and its purpose is to secure against the risks of price fluctuations. Thus, it would contradict legislative intent to apply section 764 under these circumstances, since the law was never designed to bar sensible economic business behavior.

The literature widely approves of this interpretation, and subsequent court decisions followed it as well. The Bundesgerichtshof (currently the highest German court in civil matters) has indicated in dicta that it would adhere to the principles enunciated by the Reichsgericht.

Following its leading decision on the hedge doctrine, the Reichsgericht tried to clarify it. In so doing, the court developed various indicia which would establish presumptions against or in favor of speculative

37 Häuser in Soergel, supra note 33, § 764, remark 7; Pecher, supra note 33, § 764, remark 19; Canaris in 3 Handelsgesetzbuch—Grosskommentar (pt. 3), remark 1877 (3d ed. 1981) [hereinafter Canaris]; Kümper, supra note 33, at 1326.
38 WM, 1972, at 178, 179; and more recently in WM, 1988, at 1717, 1718 (also dicta).
objectives. The most important of these is whether or not the transaction belongs to the ordinary course of business. This doubtless was the case in the cotton futures case discussed previously. In another case, however, where a mortgage and insurance broker engaged in currency futures without establishing a particular business reason for it, the Reichsgericht denied that there was a hedge transaction.

Another indicium is whether the size and frequency of the alleged hedge transactions are in line with the size of the business—that is to say, whether they reflect business exigencies.

If the foregoing tests are met, there is a presumption against speculation. That presumption, however, can be rebutted.


a. Application and Scope

In order to evoke the relevant provisions of the Börsengesetz, a transaction must be a "Börsentermingeschäft." The critical question, therefore, is what sort of transactions are considered to be "Börsentermingeschäfte." The Bundesgerichtshof’s definition of a Börsentermingeschäft is a contract: (1) on negotiable instruments ("Wertpapiere"), goods, or currencies; (2) under standardized terms; (3) the contractual obligations of which need not be fulfilled immediately but rather in the future, and (4) which is related to a futures market, meaning that it must be possible to engage any time in a reciprocal transaction (this is the reason for requiring standardized terms). Generally, this futures mar-

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41 Judgment of June 15, 1927, Reichsgericht, 117 RGZ 267, 270.
42 Judgment of April 6, 1923, Reichswirtschaftsgericht, JW 1923, 964, 965.
43 Judgment of December 8, 1934, Reichsgericht, 146 RGZ 190, 193; Pecher, supra note 33, at § 764, remark 19.
44 BörsG § 53 (W. Ger.).
45 The rationale for this is that the former requires cash, thus making these transactions less eligible for speculation. ZIP, 1988, at 358, 359 (including criteria to distinguish one type of transaction from the other). The transaction might fall under Civil Code § 764. See Pecher, supra note 33, § 764, remark 20.) The BGH has also concluded that it need not be a transaction with a firm date of performance within the meaning of BGB § 361. See WM, 1984, at 1598, 1599.
46 Note that the mere possibility suffices. The law partially establishes an abstract (and thus nonrebuttable) presumption of speculation under these circumstances. See Kümpel, Zum Termin- und Differenzienwand bei Zinsterminkontrakten und Zinswaggeschäften, WM, 1986, at 661, 662 (arguing for certain modifications) [hereinafter Kümpel].
47 See WM 1984, 1598, 1599; WM 1965, 766; Kümpel, supra note 46, at 662.
ket will be an exchange, but this is not a prerequisite.48

This definition is very broad. Generally speaking, any futures trans-
action where the parties do not have to perform their duties immediately
qualify under this definition. If such a Börsentermingeschäft is present,
the Börsengesetz denies the enforceability of the contract unless both parties
had the "legal capacity to conclude a Börsentermingeschäft in a
binding way."49 Section 53 of the Börsengesetz prescribes when such
capacity would exist.50

Unlike Civil Code section 764, though, it is immaterial to the appli-
cability of the Börsengesetz provisions whether or not a transaction was
entered into for hedging purposes.51 If a party has deliberately fulfilled
its contractual duties, however, it may not reclaim what it has
transferred.52

Thus, the consequences under the Börsengesetz very much resemble
those of section 764. This comes as no surprise since both statutes
sought to protect the inexperienced investor against speculation. Notice,
however, that section 53 of the Börsengesetz requires that both parties
have the capacity to conclude a binding futures contract. This means
that if only one party to a transaction did not meet this requirement, and
that party gained in the transaction, the other party could not be forced
to pay even though it had the requisite capacity to conclude the con-
tract.53 Typically, the rules affected financial institutions by denying
them the right to recover the loss from a transaction from the investor.
On the other side, a reputable institution would not have been able to
refuse payment to the investor because of its reputation.

Given the above definition, it seems that, by and large, the futures

48 Schwark, BÖRSENGESETZ (Commentary, 1976), Einleitung § 50-70, remark 2(c) [hereinafter
Schwark].
49 BörsG §§ 53, 58 (W. Ger.).
50 See infra text accompanying notes 110-33.
51 WM, 1988, at 1717, 1719; Häuser in SOERGEL, supra note 33, at § 764, remark 12; Häuser &
Welter, Nationale Gestaltungsschranken bei ausländischen Börsentermingeschäften, WM, Sonderbei-
lage 8 1985, at 7 [hereinafter Häuser & Welter]. This result does not seem correct, given that both
statutes are aimed at forestalling speculation. The reasons given by the BGH are not very convinc-
ing. See Hellwig & de Lousanoff, Die Verbindlichkeit sogenannter Hedge-Geschäfte, in Festschrift
für E. STIEFEL ZUM 80 Geburtstag 325, 333-37 [hereinafter Hellwig & de Lousanoff]. Notice
that the BGH decision is not superseded by the new law.
52 BörsG § 55 (W. Ger.). For a comprehensive description of section 55, see Häuser, Der
Rückforderungsausschluss nach § 55 BörsG bei unverbindlichen Börsentermingeschäften, WM, 1988,
at 1285.
53 Notice, moreover, that the courts are extremely reluctant to override the results under BörsG
§ 53 on the ground that the other party has acted maliciously. See, e.g., WM, 1980, at 768, 770
(court did not deny a broker the right to refuse to pay an investor what he had gained in a futures
transaction). For further examples, see Bundschuh, Die Rechtsprechung des Bundesgerichtshofs zum
Börsenterminhandel, WM, 1986, at 725, 730 [hereinafter Bundschuh].
that are traded in today’s world are covered by the Börsengesetz provisions. Yet the Bundesgerichtshof has made it clear that the foregoing definition is not all inclusive, stating expressly that the court would also qualify other transactions as “Börsentermingeschäfte” if they served the same economic purpose.54

b. Structure

If a certain transaction qualifies as a “Börsentermingeschäft,” this is not the end of the investigation. In order to ascertain the legal treatment of a particular transaction, one must distinguish further between three kinds of “Börsentermingeschäfte”—official, unofficial, and prohibited. For the purposes of this Article, it is sufficient to note that the vast majority of financial futures transactions other than forward contracts on foreign currencies are considered “unofficial” transactions. This comes as no surprise if one takes into account that the only futures that qualify as “official” are those that are traded on a German exchange under the rules of the respective exchange.55 Until recently, however, hardly any financial futures had been traded on a German exchange. It is exactly this situation that the new German financial futures exchange will change. In particular, one should note that financial futures traded on foreign exchanges have been considered “unofficial” by the courts.56

In order to understand fully the legal consequences that arise out of these classifications, one must keep in mind that the courts and most legal scholars regard the rules of the Börsengesetz and Civil Code section 764 as standing independently from each other.57 Their respective scopes are largely overlapping but not congruent. Section 764, for instance, is not applicable to hedging transactions, whereas this factor seems to be immaterial under the Börsengesetz provisions. It is merely for practical reasons that the Börsengesetz is most often applied. If the Börsengesetz rules do not apply to a particular transaction, however, a party may still be successful in challenging a transaction under section 764. Thus, there are two statutory “hurdles” on the way to enforceability whose provisions need to be checked separately.

With this in mind we can now consider the treatment of the various kinds of “Börsentermingeschäfte.” First, as to prohibited transactions,

54 WM, 1984, at 1598, 1599 (decision concerning stock options).
55 Pecher, supra note 33, § 764, remark 9; Baumbach, Duden, & Hopt, HANDELSGESETZBUCH (commentary) (27th ed. 1987), vor 50 BörsG, remark 3(B) [hereinafter Baumbach, Duden, & Hopt].
56 WM, 1981, at 711; Bundschuh, supra note 53, at 727.
57 WM, 1988, at 1717, 1718; WM, 1985, at 477, 478; Canaris, supra note 37, at remark 1874; Pecher, supra note 33, at § 764, remark 7; Baumbach, Duden, & Hopt, supra note 55, at § 53, remark 4; Hellwig & de Lousanoff, supra note 51, at 328.
such contracts are not enforced even if both parties have the "legal capacity to conclude a binding Börsentermingeschäft."\(^{58}\)

Second, official Börsentermingeschäfte are considered fully valid provided that both parties have the "legal capacity to conclude a binding Börsentermingeschäft."\(^{59}\) Under these circumstances, neither party can claim that the contract is unenforceable. Moreover, section 58 bars the application of Civil Code section 764 to such transactions. If, however, either party lacks the aforementioned capacity, the rules of the Börsengesetz, as well as section 764, would apply, thus denying enforceability.

Unofficial Börsentermingeschäfte are treated like official ones with regard to their enforceability under the Börsengesetz.\(^{60}\) This means that the crucial question is whether both parties have the legal capacity to conclude a binding Börsentermingeschäft. There is one difference, however, distinguishing unofficial from official Börsentermingeschäfte which is of great practical importance. Section 58 of the Börsengesetz does not bar the applicability of Civil Code section 764 to these transactions. Thus, even if both parties have the capacity under section 53, the futures contract will not be enforced pursuant to section 764, provided that the transaction fulfilled its requirements.\(^{61}\) It is from this situation that section 764 derives most of its practical importance since the Börsengesetz does not also deny enforceability. Section 764 is particularly important for futures transactions on foreign exchanges.\(^{62}\)

Table 1 attempts to summarize these rules, visualizing them for better understanding.

c. Legal Capacity to Conclude a Binding Futures Contract

The number of people that the Börsengesetz empowered to conclude binding futures contracts was quite limited.\(^{63}\) Section 53 of the Börsengesetz covered only business persons (regardless of whether incorporated or not), provided they were registered in the so-called Commercial Register ("Handelsregister").\(^{64}\) The general result of this provision was that only people who were engaged in a trade or business which exceeded

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\(^{58}\) BörsG § 64 (W. Ger.); See also Pecher, supra note 33, § 764, remark 12.

\(^{59}\) BörsG § 53 (W. Ger.).

\(^{60}\) Canaris, supra note 37 remark 1877.

\(^{61}\) Id.; Baumbach, Duden, & Hopt, supra note 55, vor § 50 BörsG, remark 3(C).

\(^{62}\) See infra text accompanying notes 63-81.

\(^{63}\) See B. Grunewald, Die Börsentermingeschäftsfähigkeit, WM 1988, 1077 for the legislative history specifically with regard to this requirement.

\(^{64}\) Registration is not a great matter—only employees or professionals engaged in trade or business need to be registered. See Handelsgesetzbuch (HGB) § 1.
Table 1: Domestic Financial Futures Transactions (Old Law)

<table>
<thead>
<tr>
<th>BÖRSETERMINGESCHÄFTE</th>
<th>prohibited</th>
<th>official</th>
<th>unofficial</th>
</tr>
</thead>
<tbody>
<tr>
<td>both parties had the § 53 capacity</td>
<td>§ 764 (+)</td>
<td>§ 764 (−)</td>
<td>§ 764 (+)</td>
</tr>
<tr>
<td></td>
<td>§§ 52, 53 (+)</td>
<td>§§ 52, 53 (−)</td>
<td>§§ 52, 53 (−)</td>
</tr>
<tr>
<td>not both parties had the above capacity</td>
<td>§ 764 (+)</td>
<td>§ 764 (+)</td>
<td>§ 764 (+)</td>
</tr>
<tr>
<td></td>
<td>§§ 52, 53 (+)</td>
<td>§§ 52, 53 (+)</td>
<td>§§ 52, 53 (+)</td>
</tr>
</tbody>
</table>

Explanation of signs: A (+) means that the futures contract was not enforced under that section; a (−) means it was not affected by that respective section.

a de minimis level along with all corporations were covered by the statute. Therefore, persons professionally ("berufsmassig") engaged in exchange transactions—namely banks, their employees, professionals (e.g., lawyers and accountants), and large private investors, no matter how experienced they were—did not fall within section 53 of the Börsengesetz. This statute, however, did empower people and institutions who did not have a residence or a branch in Germany, the reason being that the law did not consider it necessary to protect foreign citizens from the risks of speculation.

d. Intermediate Summary

Summarizing, there were two chief reason why financial futures trading in Germany was hampered. First, private investors lacked the capacity to conclude binding futures contracts due to section 53 of the Börsengesetz. Second, a sufficient variety of official financial futures did not exist. The recent legislation attempts to address the first issue, while the establishment of a German financial futures exchange, backed by this legislation, attempts to cope with the second. Whether these are sufficient measures will be discussed later in this Article.

4. Treatment of Transactions on Foreign Futures Exchanges

Because few financial futures were traded in Germany under the old statutes, the treatment of foreign transactions in financial futures which involved a German party became a very important issue. This is illustrated by the number of court decisions on the subject. Generally, the old law greatly restricted such transactions.

These restrictions were based on the two statutory rules which de-

65 Cf. WM 1981, 711 regarding a "GmbH."
terminated the enforceability of "Börsentermingeschäfte:" sections 52 and 53 of the Börsengesetz, and Civil Code section 764. Section 61 of the Börsengesetz specifically mandated that sections 52 to 60 of the Börsengesetz applied to foreign futures transactions. Thus, both parties to a foreign futures transaction had to have the capacity to conclude a binding futures contract or else such contracts were unenforceable under sections 52 and 53 of the Börsengesetz. However, if both parties had this capacity, then sections 52 and 53 of the Börsengesetz did not hinder the contract's enforcement.

This leaves the restrictions of Civil Code 764. As mentioned earlier, section 58 of the Börsengesetz generally barred the application of Civil Code section 764 in this situation. However, the futures transaction in question had to be "official" for section 58 of the Börsengesetz to apply. The courts constantly held that only a transaction on a German exchange which had been admitted for trading qualifies under section 58 of the Börsengesetz. This was held even when the foreign exchange used had equal or similar standards regarding the protection of investors. Therefore, under this strict interpretation of section 58 of the Börsengesetz, the restrictions of Civil Code section 764 often were held to apply.

These decisions evoked harsh criticism from scholars who argued that the courts' interpretation discriminated against foreign exchanges. This criticism, however, was in vain. Later decisions continued to adhere to the restrictive holdings.

The consequences of the above statutes and court holdings was that one could not enter into a binding futures contract with a German party unless both parties met the capacity requirement of section 53 of the Börsengesetz and the transaction was entered into for hedging purposes as required by Civil Code section 764. Therefore, one could not conclude a binding contract with a German party for a speculative futures transaction.

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66 Cf. Hadding & Wagner, Börsentermingeschäfte an ausländischen Börsen und in ausländischen Wertpapieren, WM 1976, 310, 314 [hereinafter Hadding & Wagner]. In addition, BGB § 764 would normally apply.
67 WM 1972, 178, affirming the Reichsgericht decisions RGZ 76, 371, 372; and 79, 381, 384; more recent judgments are BGH WM 1987, 1153, 1154; and WM 1981, 758.
68 BGH WM 1981, 711.
70 Cf. BGH WM 1981, 711, 712.
71 See supra text accompanying notes 33-66.
72 This is an important exception applied to forward transactions in foreign currencies, which
(1) suing the German party in the United States and seeking subsequent enforcement in Germany, (2) including choice of law clauses in the contract, (3) including forum selection clauses in the contract, or (4) requiring arbitration.

None of these measures, however, was a successful means of enforcing a contract in Germany. The German courts asserted that regardless of what law the parties' contract specified, section 61 of the Börsengesetz required the application of sections 52 and 53 of the Börsengesetz to foreign transactions. They further held that Civil Code section 764 was part of the German *ordre public* as an expression of national social policy and could not be avoided. This designation of Civil Code 764 as part of the *ordre public* has been held not to violate articles 59 and 60 of the EEC treaty.

The result of these court holdings was that, aside from the case of forward contracts in currencies, a German party who did not have foreign assets which a foreign court could seize was fully protected against losses unless he or she had the capacity to conclude binding “Börsentermingschäfte” pursuant to section 53 of the Börsengesetz and the transaction was entered into for hedging purposes. The German courts were at least consistent in their holdings by denying enforceability when German investors gained from foreign futures transactions.

A German investor however, could still bring a suit against a foreign party in that party's national courts and recover any gains. Thus, a German transaction BörsG § 96(3) treated as “official Börsentermingschäfte” regardless of where the transaction was conducted. BGH WM 1987, 1153, 1155; Schwark, *supra* note 48, § 96, remark 5.

As to measure (1), see BGH 1975, 676; WM 1984, 1245, 1246; Samtleben, *RECHT DER INERNATIONALEN WIRTSCHAFT* (RIW) 1975, 501, 502. As to measure (2), see BGH WM 1987, 1153, 1154; WM 1981, 758; WM 1981, 711; WM 1980, 768, 769; WM 1978, 1203. As to measure (3), see BGH WM 1984, 1245. As to measure (4), see BGH WM 1987, 11153 if the arbitration leads to a non-application of BGB § 764 or BörsG §§ 52-53 (for nonrecognition of arbitration clauses in domestic cases, see BörsG § 28).

As this seems to be generally accepted. Cf. Hadding & Wagner, *supra* note 66, at 315; Samtleben, *supra* note 73, at 502.

See supra note 77.


BGH WM 1980, 768.
man could collect gains under foreign law and avoid paying losses under German law. This meant that there was the opportunity for speculation without risk if one found a foreign broker willing to engage in a transaction and willing to rely on the mere promise of the investor to fulfill a possible obligation.\textsuperscript{81} While this paradise-like situation was significantly changed under the new law with respect to financial futures, commodity futures are still covered.

Table 2 gives an overview of the situation under the old law concerning foreign transactions.

<table>
<thead>
<tr>
<th>BÖRSENTERMINGESCHÄFTE</th>
<th>Recognition of</th>
</tr>
</thead>
<tbody>
<tr>
<td>both parties had the § 53 capacity</td>
<td>§ 764 (+)</td>
</tr>
<tr>
<td></td>
<td>§§ 52, 53 (−)</td>
</tr>
<tr>
<td>not both parties had the above capacity</td>
<td>§ 764 (+)</td>
</tr>
<tr>
<td></td>
<td>§§ 52, 53 (+)</td>
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<tr>
<td>foreign judgments</td>
<td>No</td>
</tr>
<tr>
<td>choice of (foreign) law clause</td>
<td>No</td>
</tr>
<tr>
<td>forum selection clause</td>
<td>No</td>
</tr>
<tr>
<td>arbitration clause</td>
<td>No</td>
</tr>
</tbody>
</table>

* Other than foreign currency futures

Explanation of signs: A (+) means that the futures contract was not enforced under that section; a (−) means it was not affected by that respective section.

C. Legal Treatment of Financial Futures Trading Under the New Legislation

1. The Strategic Thrust of the New Legislation

In June 1989, the German parliament passed a new law to govern financial futures trading in Germany. The official reasoning which accompanies this legislation makes it obvious that the legislation has a global thrust. The federal government stressed this global objective by stating in the official reasons that the changes in the law are meant to

\textsuperscript{81} Hellwig & de Lousanoff, \textit{supra} note 51, at 311.
strengthen "the financial center Germany as a whole." This global objective is connected to two pivotal developments which affect Frankfurt’s status as an international financial center. The first is the technological developments which are influencing trading on exchanges, and the second is the creation of the European barrier-free market in 1992.

a. Effect of the Globalization of the Financial Markets

Computerized trading and modern forms of communication have caused an ever-increasing globalization of financial trading. Investors no longer need to use domestic facilities to engage in trading. Accordingly, financial institutions do not have to be located near their customers. For example, German banks have established branches in places with less restrictive legislation—such as London or Luxembourg—in order to offer their German clients a full range of services. This trend also implies that Germany’s new legislation is probably not a question of vital importance for German financial institutions, at least not for the larger ones. Regardless of the changes in the financial markets, these institutions will always find ways to transact their business.

The globalization of the financial markets, however, presents a vital challenge to Germany’s future role in the field of financial services. If the German market does not offer a full range of financial investments, then investors will turn to foreign markets, and German institutions will lose this profitable area. In addition, given the trend of globalization, it seems probable that frustrated investors will transfer their financial transactions to a foreign market where their investment needs are met and where all their financial matters are handled by one financial institution. It was this long-term threat that motivated the German financial institutions to push the government towards more liberal legislation.

On the other hand, globalization also offers Germany many opportunities. The Frankfurt financial markets have traditionally been well-equipped with highly skilled staff, and bolstered by a strong domestic economy and the relative wealth of German citizens. Both of these characteristics should create sufficient domestic demand for financial futures, and an active Frankfurt market may attract foreign investors who want to take advantage of the market’s opportunities.

The federal government enacted the new legislation in response to the challenges and opportunities presented by the emergence of com-

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83 von Rosen, supra note 6, at 308; Kindermann, supra note 8, at 4.
puterization and more efficient communication. Thus, the government changed the old statutes which hindered German exchanges so that the exchanges could react to these developments. Physical presence is no longer necessary for transactions on the exchange. Instead, transactions can now be executed via computer. As mentioned above, the DTB plans to have all transactions occur via computer terminals that are linked to the central computer of the DTB.

In addition to the above reforms, the new law will also enact a second measure designed to address the trend towards globalization. The new legislation will allow the determination of the respective value of financial instruments in a foreign currency or in an artificial unit. Allowing the valuation of an instrument in an artificial unit is necessary for index futures.

As the official reasons state, these amendments to the law are meant to address the needs arising out of the globalization of the financial marketplace. The federal government, however, also adds that equal opportunities exist at other major exchanges which are necessary for Frankfurt to be competitive. The government’s ultimate goal, though, is to “strengthen Germany as a financial center.”

b. Europe 1992

The second objective which the new legislation addresses is the changes caused by Europe 1992. The German government points out that the freedom to provide services encompassed in articles 59 and 60 of the EEC Convention includes the freedom to engage in financial futures contracts anywhere in the EC free from legal obstacles. The freedom to provide services, however, does not only affect the freedom of investors to engage in transactions. Although the federal government does not say so, the new legislation may actually be concerned with a different aspect of the freedom to provide services. Viewed from the perspective of the exchanges, the freedom to provide services also includes the freedom to

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84 See Official Reasons, supra note 82, § A.II.3.
85 Kindermann, supra note 8, at 9.
86 The DTB views this as a critical issue. Cf. von Rosen, supra note 8, at 308.
87 Official Reasons, supra note 82, B. zu No 11 (Sec. 29) Buchstabe b).
88 Id.; see also von Rosen, supra note 8, at 308.
89 Official Reasons, supra note 82, B. zu No 11 (Sec. 29) Buchstabe b).
90 Official Reasons, supra note 82, § A.II.1. & § B. zu No 11 (Sec. 29) Buchstabe b).
91 Some doubts regarding this assertion can be raised since the decision in Société Générale Alsacienne de Banque S.A. v. Koestler, 1978 E. Comm. Ct. J. Rep. 1971. In that case, the European Court of Justice held that German court decisions finding section 764 to be part of the ordre public do not violate articles 59 and 60 of the EEC Convention.

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offer financial futures transactions to citizens anywhere in the EC without being hindered by legal obstacles.

When conducting transactions within Germany, however, Germany’s financial institutions would of course be limited by the old statutes. Thus, in order to put German institutions on an equal footing with their foreign competitors, it was necessary to remove these legal restrictions. In addition, the modification of the legal requirements governing who can conclude a binding financial futures contract combined with the possible development of computerized trading and the valuation of financial instruments in foreign currencies or artificial units will enable the German institutions to seize the new opportunities offered by Europe 1992.

Given the free flow of financial services in 1992 and the fact that powerful financial centers already exist which could easily meet the entire EEC demand for financial futures, one might question whether there is a real need for Germany to have its own financial futures exchange. The German government has not commented on this issue and has referred only to the goal of strengthening Germany’s position as a financial center with regard to 1992. Nevertheless, some speculation on this issue may be productive.

There is surely a certain amount of patriotism involved. It is frequently overlooked in the United States that the EEC is not a homogeneous group. Being a financial center or “the financial center” of the EEC is of major importance because of the growing role which financial instruments and the financial industry play in modern business.

There are, however, more “rational” reasons. The financial services industry offers a great number of challenging, highly paid jobs that might either be lost or gained depending on how the financial center prospers. More importantly, past experience proves that within a given area, the financial industry tends to gravitate to a single location. If this is true, then great risks and opportunities are at stake in Europe 1992. Frankfurt as a financial center might perish or it might ascend to new heights if it prevails over its European competitors.

This has to be viewed against the following background. A nation’s financial industry is of critical importance to its economy. The federal government of Germany has underscored this fact in particular with regard to the financial futures market. One result of a Europe without

\[92\] There is already a futures on German Federal Government bonds traded on the LIFFE Futures, Exchanges—Trading, Facts and Figures, No. 13, 1988, at 120.

\[93\] WORLD FIN. MARKETS, Sept. 1988, at 12 (published by Morgan Guaranty Trust Co.).

\[94\] Official Reasons, supra note 82, § A.II.1.
Barriers is that the country in which Europe’s financial center is located can establish the regulatory framework for this pivotal exchange and thus influence exchanges throughout the entire Community.\(^9\) In light of this fact, the remarks by the federal government about the need to strengthen not only Frankfurt but all of Germany as a financial center have even greater implications.\(^9\)

Evaluating the emergence of a German financial futures exchange in a more globalized world means that the reforms of Germany’s restrictive statutes are even more important. The following describes the pertinent changes that will take place.

2. Changes in the Provisions Relating to Financial Futures Transactions

The drafted legislation changes a variety of provisions relating to futures (“Börsentermingeschäfte”). The following comments focus on the significant changes only.

a. Broadening of the Scope of Section 50 of the Börsengesetz

Previously, section 50(1) of the Börsengesetz mentioned only transactions in negotiable instruments (“Wertpapiere”) and goods (“Waren”).\(^9\) Many of the modern forms of financial instruments, namely index futures, would not literally fall under this section. The courts have always interpreted the term “Börsentermingeschäft” in a flexible way, which might indicate that the aforementioned modern forms of financial instruments would be subject to the provisions of section 50. Despite these indications,\(^9\) the federal government chose to repeal the limiting language in order to insure that section 50 embraces modern forms of financial instruments.

The legislature refrained from defining what constitutes a “Börsentermingeschäft.” This was done for the same reasons as in the past: to give the judiciary the flexibility that is necessary to cope with newly emerging forms of financial futures.\(^9\)

In sum, one could conclude that there will be no material changes, but only clarifications, as to which transactions will be qualified as “Börsentermingeschäfte.” Thus, the current definition and the criteria that

\(^9\) This of course reflects what was previously said concerning the financial center of the Community as a source of national pride.

\(^9\) Cf. Official Reasons, supra note 82, § A.II.1. & B. zu No 11 (Sec. 29) zu Buchstabe b).

\(^9\) For today’s scope, see supra text accompanying note 34.

\(^9\) The federal government apparently believes this to be a material change. Cf. Official Reasons, supra note 82, B. zu No 20 (Sec. 50) zu Buchstabe a).

\(^9\) Id.
constitute a "Börsentermingeschäft" as described above will continue to be applied.

b. Expansion of the Legal Capacity to Conclude Binding Financial Futures Contracts

The new law adheres to the basic principles that have governed financial futures in the past. Thus, only certain persons are granted the legal capacity to conclude binding financial futures contracts. If either of the parties fails to meet the requirements set forth in section 53, the courts will not enforce any obligation in connection with a financial futures contract between the parties. A party to such a contract, however, cannot claim restitution for performance in purported fulfillment of its contractual obligation.100

As in the past, the statutory determination regarding the capacity to make binding futures contracts is based primarily on whether the parties to the contract (including partnerships and corporations) are merchants registered in the Commercial Register ("Handelsregister").101 If a party is a registered merchant, it can conclude binding futures contracts regardless of whether such contracts are business-related. 102 On the other hand, if a party does not fall within the scope of section 53, such a party cannot engage in binding futures contracts even when that party enters into the transaction solely for hedging purposes.103

The statute requires registration because registration provides substantial legal certainty.104 The other party need not be concerned about the specific circumstances or reasons for the transaction. The fact that the merchant is registered suffices.105 It is for this reason that, unlike the old law, the new law treats as a registered merchant any merchant who is registered but does not actually fulfill the legal requirements of registration. Such a merchant will be unable to claim the non-binding character of the contract.106

While the general intent of the new law is to lessen restrictions, it expands the protective scope of section 53 in some respects. For example, expanded protection is evident with regard to nonresidents. Cur-

100 See supra text accompanying notes 34-37.
101 Cf. supra text accompanying note 34.
102 Official Reasons, supra note 82, B. zu No 22 (Sec. 53).
103 BGH WM 1988, 1717.
104 Official Reasons, supra note 82, B. zu No 22 (Sec. 53).
105 The merchant's registration can be easily checked because the Commercial Register is open to the public.
106 Official Reasons, supra note 82, B. zu No 22 (Sec. 53).
rently, nonresidents do not fall within section 53. The government, however, thought it unjustifiable to exclude nonresidents from the protection that section 53 purports to grant. They will now be subject to the same rules as residents. The new regulations mean that foreign merchants can conclude binding financial futures contracts, but only if they satisfy the same registration requirements as are imposed on German merchants.

The following is the centerpiece of the new legislation that will substantially increase the number of people who can engage in financial futures transactions, thus bolstering the market position of the German financial futures exchange. Under the new section 53(2) of the Börsengesetz, private individuals would be able to engage in any form of financial futures transactions if the other party informed them about the risks inherent in such transactions. This will be true regardless of whether the transaction serves speculative purposes. It should be noted, however, that transactions in commodities are expressly excluded from this treatment. The current principles will continue to govern these transactions.

The federal government gives several reasons for the drastic change in the scope of protection. It mentions that citizens do not need official supervision when they are given proper information on which they can base intelligent decisions. Furthermore, a viable German financial futures exchange would require a strong base of potential customers in order to compete successfully with other international financial centers. With regard to the general thrust of the legislation, the latter point seems to be the principal reason for this nearly diametrical change in a situation that remained unaffected for roughly a century.

As the most important aspect of the new law, the legal capacity to conclude binding financial futures contracts by virtue of information will be the subject of the following detailed analysis.

One party to the contract must be a person with "normal" power to engage in futures transactions—generally speaking, a financial institution or a registered merchant—provided that such a merchant is subject to supervision by the regulatory agencies for banks or exchange members. The other party (hereafter "the individual") must be informed before the conclusion of the contract. It is not necessary that there be a specific

107 See supra note 104.
108 Official Reasons, supra note 82, B. zu No 22 (Sec. 53).
109 Id.
110 See Rogers & Markham, supra note 31, at 237 (harshly criticizing these principles).
111 Official Reasons, supra note 82, B. zu No 22 (Sec. 53).
112 Cf. text accompanying note 82.
time period between when the individual is informed and the conclusion of the contract. It suffices that the individual be informed "at the time of the conclusion of the financial futures contract."113 Once the individual has been properly informed, he/she need not be informed again for three years. A minor exception to this rule exists insofar as the individual must be informed again one year after the initial information transfer. Thereafter, the individual must be informed after each three-year period in order to refresh the individual's memory with regard to the risks.114

The new law appears to require that each party who enters into a financial futures contract with an individual inform the individual. In other words, it is immaterial that the individual has already been informed about the risks of financial futures transactions by another person. The three-year period during which a previous party need not re-inform the individual does not benefit a new person wishing to contract with the individual. Given the standardized information on the risks of financial futures that the statute requires, this does not seem justified. In terms of risks, the identity of the contractual partner is immaterial. The statute is fairly clear in this respect, however, referring to "the" contractual partner who must inform the individual.115

The information must be provided in writing, in a document which is separate from the financial futures contract, and which contains only the risk-oriented information. The individual must sign the document.

Regarding the kind of information that must be provided, the new law details the specific risks about which the individual must be informed and also provides for the manner in which the individual must be informed. The statute prescribes a standardized form of information which covers the entire field of financial futures transactions regardless of the particular risks involved in the specific form that a transaction takes.116 The standardized form enumerates the risks about which the individual must be informed or warned. All of this is true regardless of whether the contract concerns financial futures transactions on a domestic or a foreign market.117 Thus, a party will best avoid liability if he or she adheres to the provisions set forth in the statute. The official reasons expressly consider it sufficient that the document of information confines itself to the statutory design.118

Now, what kind of information does that statute require? The indi-

113 See Official Reasons, supra note 82, B. zu No 22 (Sec. 53).
114 Id.
115 See also the last sentence of BÖRSG § 53 (2) (W. Ger.).
116 Official Reasons, supra note 82, B. zu No 22 (Sec. 53).
117 Id.
118 Id.
individual must be informed that any rights acquired under the financial futures contract may lose all or part of their value. Furthermore, the individual must be informed that the risk of a potential loss is not determinable and may exceed any collateral that the individual may have provided. The individual must also be told that it is possible that reciprocal transactions, which are intended to limit or exclude potential risks, either cannot be conducted at all or can be conducted only at a loss. Finally, the individual must be informed that the risk of a loss increases if the individual finances the contract through a credit or if any obligations or claims arising out of the contract would be computed on the basis of a foreign currency or an artificial unit.

c. Effect of the Changes on the Enforceability of Financial Futures Contracts

The enforceability of a financial futures contract continues to depend on whether both parties have the legal capacity to conclude a binding financial futures contract under section 53 of the Börsengesetz. In this regard, there is no change in the legal structure. Given the vast expansion of people who potentially qualify under the new section 53, enforceability will be the rule rather than the exception in the future. On the other hand, the lack of capacity under section 53 will result in an unenforceable contract, as is currently the case. Generally, this will affect situations which are of little concern. In 1988, however, the Bundesgerichtshof decided that section 53, unlike section 764 of the Bürgerliches Gesetzbuch, also applies to hedge transactions. This led to the very dissatisfying result of unenforceability, because the merchant, being in the start-up period of his newly opened business, was not yet registered in the Commercial Register at the time he entered into the hedge transaction. This type of result will continue under the new law!

In the more frequent case, in which both parties have the capacity under section 53 to conclude binding financial futures contracts, the Börsengesetz will not affect the enforceability of the contract. Section 764 of the Bürgerliches Gesetzbuch, however, presents a different case. As mentioned, section 764 is an additional hurdle that must be overcome on the way to the enforcement of the contract. Section 58 of the Börsengesetz bars the application of section 764 in cases in which both par-

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119 This applies only for financial futures. Commodities futures are excluded from the preferential treatment. See BörsG § 53(3) (W. Ger.).

120 Namely, it will affect situations in which individuals have not been informed about the risks.

121 BGH WM 1988, 1717; see supra text accompanying notes 34-37.

122 See supra text accompanying notes 28-43; see also Table 1.
ties have the capacity to conclude binding futures contracts.\textsuperscript{123} Under the old law, however, section 58 of the Börsengesetz barred section 764 of the Bürgerliches Gesetzbuch only in the case of futures that were "officially" traded on a German exchange.\textsuperscript{124} The new law does away with the distinction between official and unofficial futures, and both types will enjoy equal treatment.

Table 3 gives an overview of the legal treatment under the new law.

Table 3: Domestic Financial Futures Transactions Under the New Law

<table>
<thead>
<tr>
<th>BÖRSENTERMINGESCHÄFTE</th>
<th>prohibited*</th>
<th>(all) other</th>
</tr>
</thead>
<tbody>
<tr>
<td>both parties have the § 53 capacity</td>
<td>§ 764 (+)</td>
<td>§ 764 (-)</td>
</tr>
<tr>
<td></td>
<td>§§ 52, 53 (+)</td>
<td>§§ 52, 53 (-)</td>
</tr>
<tr>
<td>not both parties have the above capacity</td>
<td>§ 764 (+)</td>
<td>§ 764 (+)</td>
</tr>
<tr>
<td></td>
<td>§§ 52, 53 (+)</td>
<td>§§ 52, 53 (+)</td>
</tr>
</tbody>
</table>

* No real practical importance

Explanation of signs: A (+) means that the futures contract will not be enforced under that section; a (−) means it will not be affected by that respective section.

d. Treatment of Transactions on Foreign Futures Exchanges

This question will continue to be important, given the globalization of the financial markets. Under the current law, which treats foreign futures transactions as "unofficial," most speculative transactions are unenforceable.\textsuperscript{125} Under the new law, financial futures transactions will be given equal treatment no matter where they take place.\textsuperscript{126}

Nevertheless, the question arises as to what will happen if the German law conflicts with the law of a foreign jurisdiction. Under the old law, the German statute would prevail regardless of the provisions of the contract.\textsuperscript{127} The new law makes some changes that, along with the aforementioned change, will result in a much more liberal treatment of foreign transactions.\textsuperscript{128} The pertinent section, section 61 of the Börsengesetz, has been changed entirely.

\textsuperscript{123} Supra text accompanying notes 36-43.

\textsuperscript{124} Supra text accompanying notes 36-43. Table 1 shows the effect of this distinction between official and unofficial futures transactions.

\textsuperscript{125} For details, see supra text accompanying notes 49-54; see also Table 2.

\textsuperscript{126} Cf. Official Reasons, supra note 82, B. zur No 26 (Sec. 58).

\textsuperscript{127} See supra text accompanying notes 44-54; see also Table 2.

\textsuperscript{128} Official Reasons, supra note 82, B. zur No 27 (Sec. 61).
In the future, Germany will generally respect the application of foreign law. There is one exception to this rule. Section 61 requires German law to be applied if the following cumulative requirements are fulfilled: (1) the person against claims are brought does not have the capacity to conclude a binding contract under section 53;\(^{129}\) and (2) such person, at the time the transaction was entered into, was a resident of Germany; and (3) such person entered into the contract in German territory.

Only the people who meet the above requirements will enjoy the protection of the German laws.\(^{130}\) If foreign law should grant more protection in a particular case, the application of such law will not be barred.\(^{131}\)

With the changes in the law relating to foreign transactions, the basis for the Bundesgerichtshof's decisions on the nonrecognition of foreign judgments\(^ {132}\) was lost. The Bundesgerichtshof based all of its decisions in this field on the ground that the law on which the parties had agreed did not have rules equivalent to sections 52 and 53 of the Börsengesetz or section 764 of the Bürgerliches Gesetzbuch. Those decisions expressed the concern that the protection provided under German law must not be evaded simply by subjecting the contract to another source of law.\(^ {133}\) Of course, it is speculative to predict how the court will decide. To the extent that the new German law will respect the application of foreign law, the reasonings of the cases decided prior to adoption of the new law no longer apply. Consequently, the courts should grant recognition and enforcement to foreign judgments, forum selection clauses, and clauses calling for arbitration. Such clauses could be disregarded only if the aforementioned exception applies under which section 61 of the Börsengesetz does not respect a foreign law that grants less protection than the German rules. As mentioned above, this will often be the case in commodity transactions. To that extent, the criticism of the German court decisions continues to be true.\(^ {134}\)

Table 4 attempts to summarize the aforementioned.

\(^{129}\) Furthermore, that person cannot have the capacity by virtue of information.

\(^{130}\) In particular, commodity transactions will be affected by this exception because the "information model" does not apply to them under BörsG § 53(3).

\(^{131}\) Official Reasons, supra note 82, B. zu No 27 (Sec. 61).

\(^{132}\) Supra text accompanying notes 44-54; see also Table 2.

\(^{133}\) Cf. supra text accompanying notes 45-57.

\(^{134}\) For a detailed and harsh criticism with particular regard to commodity futures, see Rogers & Markham, supra note 31.
Table 4: Foreign Financial Futures Transactions Under the New Law

<table>
<thead>
<tr>
<th>BÖRSENTER-MINGSCHÄFTE</th>
<th>Recognition of If § 61 exception does not apply</th>
<th>If § 61 exception applies</th>
</tr>
</thead>
<tbody>
<tr>
<td>both parties have the 53 capacity</td>
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<td>Yes No</td>
</tr>
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</table>

Explanation of signs: A (+) means that the futures contract will not be enforced under that section; a (−) means it will not be affected by that respective section.

V. CONCLUSION

Very restrictive laws together with even stricter decisions by the courts have prevented an active trading of financial futures in Germany until recently. This situation put Frankfurt at a significant disadvantage as compared with other major financial centers. Both Europe 1992—entailing the freedom of financial services—and the trend towards globalization in the financial markets called for measures to bolster Frankfurt’s position in this regard.

The new legislation does exactly this. It removes most of the legal obstacles that previously hindered financial futures trading in Germany.
Concurrently, it substantially improves the atmosphere of foreign financial futures transactions—transactions which have often been affected by the restrictive laws. Basically, what remains in terms of restrictions is that the private investor has to be informed of the risks inherent in financial futures transactions. That is not overly burdensome because the law itself spells out the specific risks of which the individual must be informed, thus providing for sufficient legal certainty.

The financial industry in Germany is determined to take advantage of this new situation. The plans for a fully computerized German financial futures exchange are complete and the exchange started with its first product on January 26, 1990. One can be optimistic regarding the prospective economic success of a German financial futures exchange. Given Germany's domestic economic strength, the German financial futures exchange will be able to generate a sufficiently high trading volume to make it a success. In fact, so far the trading has been very active.