HERBERT
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FOR FOREIGN INVESTORS

INVESTING IN GERMANY

LEGAL GUIDE
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CONTENTS

INTRODUCTION

We hope that you will find this Guide useful in understanding the key legal issues affecting your planned or existing investment in Germany. It aims to clarify those legal areas which are, in our experience, most relevant for an overseas investor. It also serves as a glossary or step-by-step guide for the reader. It is intended to be an introduction to the subject and not to be a comprehensive guide to all legal issues.

Of course, German law, like all legal systems, is subject to regular change. What you read in this Guide reflects the law as at the date of publication. We intend to update the Guide periodically, but please be careful to check with us, before relying upon it, that the law as stated herein is still in force. Although we have prepared this guide carefully it should not be regarded as legal advice and we have to disclaim any liability for its contents.

We would welcome the opportunity to discuss any part of this Guide with you. Please feel free to get in touch with any one of the lawyers named in the German team section.

With thanks to the entire team of partners, associates and professional support lawyers who have made this publication possible.

Herbert Smith Freehills Germany LLP
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1. INTRODUCTION TO THE GERMAN LEGAL SYSTEM

LEGAL SYSTEM AND SOURCES OF LAW

Germany is a federal republic consisting of 16 federal states (*Bundesländer*). Therefore, the legal system is characterised by federal laws (*Bundesgesetze*) and state laws (*Landesgesetze*). The federal laws are adopted by the federal parliament (*Bundestag*), in many cases also in co-operation with the federal council (*Bundesrat*), which is made up of 69 representatives of the 16 federal states.

The members of the *Bundestag* are elected every four years by popular vote. The members of the *Bundestag* elect the federal chancellor (*Bundeskanzler*), the head of the Federal government.

German business law is governed by the principles of the freedom of contract and the freedom of economy. This means that parties are entitled to freely negotiate their contracts, within the boundaries of law and morale, and that business activities do not generally require a specific permit or license, unless otherwise expressly prescribed by law. Moreover, German law makes, in principle, no distinction between German and non-German nationals regarding investments or the establishment of a business.

Civil law system

Germany's legal system is a civil law system whose highest source of law is the Basic Law (*Grundgesetz – GG*) for the Federal Republic of Germany which essentially serves as Germany's constitution. It sets the standards for the modern judiciary system. The law adjudicated in court is based on formal laws, the codes. The court system adjudicates (1) public law (*Öffentliches Recht*), ie, administrative law (civil-government litigation or litigation between two government bodies) and criminal law, and (2) private law (*Privatrecht*).

German law is not impregnated with legal positivism to the extent of Napoleonic legal systems, so Germany's judiciary is not subordinated to the legislature, the Basic Law directly vests supreme judicial power in the Constitutional Court as well as other federal courts and the courts of the federal states. It is the intention that the judiciary adjudicates reliably and uniformly across all courts and the entire country. Therefore, while there are no precedents within the strict meaning as in common law systems the judgments of higher courts are used as a very important source in the interpretation of codified law.

Administrative system

In contrast to many other European countries, the Federal Government in Germany possesses a local administrative machinery of its own only in very few fields. As a rule, the federal states and the local authorities are responsible for the administrative system. The Basic Law lays down that exercising governmental powers and the discharge of governmental functions is incumbent on the federal states except as otherwise provided or permitted by the Basic Law.

European law

Germany is a member state of the European Union. As such European law is also an important source of German law and the European Court of Justice plays an important role in the interpretation of German laws.

JUDICIAL SYSTEM

The judiciary's independence and extensive responsibilities are a part of the central concept of the constitutional state (*Rechtsstaat*), a government based on the Rule of Law, in which citizens are guaranteed equality and in which government decisions can be put to judicial review in independent courts. Federal law delineates the structure of the judiciary, but the administration of most courts is regulated by state law. The federal states are responsible for the lower levels of the court system; only the highest appellate courts operate at the federal level. This division of work between the federal and the state levels allows the federation to ensure that laws are enforced equally throughout the country, whereas the central role of the federal states in administering the courts safeguards the independence of the judicial system from the federal government.

Principles of Roman law and, to a lesser extent, Germanic law form the basis of the German judicial system and define a system of justice that differs fundamentally from a common law system. While in common law systems courts rely on precedents from prior cases, in Germany courts look to a comprehensive system of codified laws, the legal codes. The codes delineate abstract legal principles, and judges decide specific cases on the basis of those principles. Given the importance of complex legal codes, judges must be particularly well trained. In practice, judges are not usually chosen from the field of practicing lawyers. Rather, they follow a distinct career path. At the end of their legal education at university, law students must pass a state examination before they can continue on to an apprenticeship that provides them with broad training in the legal profession over several years. They then must pass a second state examination that qualifies them to practice law. At that point, the individual will usually choose either to be a lawyer in private practice or to enter the judiciary.

The judicial system comprises three types of courts. Ordinary courts, dealing with criminal and most civil cases, are the most numerous by far. Specialised courts hear cases related to administrative, labour, social, fiscal (tax), and patent law; each of these courts also has specialised higher and highest courts. Constitutional courts focus on judicial review and constitutional interpretation. The Federal Constitutional Court (*Bundesverfassungsgericht*) is the highest court and has played a vital role through its interpretative rulings on the Basic Law.

1. INTRODUCTION TO THE GERMAN LEGAL SYSTEM

Sixteen judges make up the Federal Constitutional Court, Germany's highest and most important judicial body. They are selected to serve twelve-year, non-renewable terms and can only be removed from office for abuse of their position and then only by a motion of the court itself. The *Bundestag* and the *Bundesrat* each elect half of the court's members. Thus, partisan politics can play a role. However, compromise is built into the system because any court ruling requires a two-thirds majority among the participating judges. The court is divided into two senates, each consisting of a panel of eight judges with its own chief justice. The first senate hears cases concerning the basic rights (*Grundrechte*), which incorporate basic human rights into German law, and which are guaranteed in Articles 1 through 19 of the Basic Law, and concerning judicial review of legislation. The second senate is responsible for deciding constitutional disputes among government agencies and how the political process should be regulated.

Unlike the United States Supreme Court, the Federal Constitutional Court does not hear final appeals. This function belongs to the Federal Court of Justice (*Bundesgerichtshof*) in civil law suits and criminal law cases as well as the respective highest federal courts in administrative, labour, social, fiscal (tax), and patent law. The Basic Law explicitly confines the jurisdiction of the Federal Constitutional Court to constitutional issues. By the late 1980s, the majority of the articles in the Basic Law had been subjected to judicial review, and the constitutionality of federal and state legislation had been considered in hundreds of court cases.

2. FOREIGN INVESTMENT INCENTIVES AND RESTRICTIONS

LEGAL FRAMEWORK FOR FOREIGN INVESTMENT

The principle of freedom of economy stipulates that foreign investments into Germany are generally not limited, and are protected against expropriation by the government. However, foreign investments can be subject to examination by the German authorities under the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz – AWG*) and the Foreign Trade and Payments Regulation (*Außenwirtschaftsverordnung – AWV*). Both regulations seek to ensure that acquisitions of companies established in the economic territory of Germany by investors from outside the European Union (EU) or the European Free Trade Association (EFTA) can be examined and prohibited or restricted. The review process is carried out by the Federal Ministry of Economics and Energy (*Bundesministerium für Wirtschaft und Technologie, – BMWi*). According to the BMWi only a very limited number of transactions have actually been formally examined, and only a handful of transactions were restricted and/or even prohibited so far. The approval procedure is set forth below in more detail.

RESTRICTIONS

Two types of restrictions

The regulations of the AWG and AWV empower the BMWi only to examine two types of foreign acquisitions of German companies:

- German companies which manufacture or develop war weapons, particular types of defence equipment or cryptosystems, or which operate high-grade remote sensing systems, or
- German companies essential to safeguard the public policy or public security of the Federal Republic of Germany.

The relevant acquisition can be any direct or indirect acquisition by a non-EU/EFTA entity of 25% or more of the voting rights in a German resident enterprise in any industrial branch or trade sector. It may be possible for an investor to avoid going through this process if the transaction is carried out through one of its existing subsidiaries located in the EU or the EFTA. This requires, however, that the foreign investor owns a running business in Europe. In other words, it is not possible to assert this exception by using a shelf company.

If the potential acquisition falls within the scope of one of the two alternatives listed above, it does not mean that the acquisition will be prohibited or restricted. It allows the BMWi merely to carry out an examination and the approval process described in more detail below.

Please note that in most cases it is not necessary to start the approval process because it is clear that the target company is not in the weapon or defence business and has no essential role with regard to public security in Germany. It is considered that the latter alternative is meant to comprise important business activities related to public infrastructure (eg, the supply with energy or water or important telecommunication systems).

Approval process

If the potential target company falls within the regime of the AWG and AWV, the BMWi will conduct a preliminary examination, ie, it will investigate upon request of the potential acquirer whether the intended acquisition could create a risk to the public order or security of Germany and whether it wishes to conduct a more detailed investigation of the acquisition. Such preliminary examination must be carried out within three months of the signing (not the completion) of the agreement pursuant to which the voting rights are acquired.

Should the BMWi decide to examine the acquisition in more depth, the investor must present the complete documentation on the acquisition. The BMWi must decide within a timeframe of two months after receipt of the complete acquisition documentation whether it wants to restrict or prohibit the acquisition. Otherwise it grants its consent. A restriction or prohibition order requires the additional consent of the federal government.

Please note that we maintain a good relationship with the BMWi which allows us to pre-discuss the potential acquisition with the BMWi and prepare the requested information in satisfactory written form. This allows us to obtain the consent of the BMWi in most cases within a period of two weeks. Due to the quick turnaround it can be advantageous for a foreign investor to go through the approval process with the BMWi although there is only a low risk that the potential acquisition falls within the scope set of the two alternatives set forth above. This is in particular the case if the acquisition requires merger control clearances because the Federal Cartel Office (*Bundeskartellamt*) is obliged to inform the BMWi of the potential acquisition. If the BMWi starts then to carry out the examination on its own, it becomes more difficult for the foreign investor to "control" the approval process, in particular its timing.

PROTECTION OF FOREIGN INVESTMENT

Investments in Germany are very well protected from governmental influence. Fundamental German and European law sets a very high protection standard that secures property and ownership located in Germany. In the unlikely case that an investment is appropriated or expropriated, German law requires that the relevant owner/investor is adequately compensated.

Changes in tax law as well as more generally of any public law do in general have no retroactive effect and will only be applicable for a future period of time. Furthermore, investors can generally prepare themselves for any change of law because the law-making process in Germany is public and rather slow. Changes in jurisprudence, in particular in civil law, can more quickly demand a reaction from the investor. Therefore, it is advisable to make use of legal support to stay up-to-date on current legal developments.

2. FOREIGN INVESTMENT INCENTIVES AND RESTRICTIONS (CONTINUED)

INCENTIVES

Germany offers numerous incentives to investors. The various programs can be grouped into two overall packages: (i) the investment incentive package which includes different measures and programs to reimburse investment costs, and (ii) the operational incentives package containing programs to subsidise costs once the location-based investment has been realised. The exact amounts of incentive payments vary as they are decided on an individual case basis.

If a foreign investor acquires an existing business in Germany, the target company usually already uses the various incentive programs available to it. Throughout an acquisition of this target company it is important to preserve its status so that it will continue to be eligible for the incentives after the transaction has been completed.

Should a foreign investor decide to establish a new business in Germany, relevant incentive programs would have to be applied for by the investor or the target, as applicable. Generally, such incentives provide for tax savings, subsidies and/or assistance (eg, for regulatory matters). The award of the incentives is usually linked to the achievement of certain milestones (eg, employment of a certain number of employees, reach of a certain business size or continuous running operation for a few years). Furthermore, special incentives can be granted if the foreign investor establishes a new business in economically weaker regions (eg, the eastern part of Germany).

As a rule, incentives have to be notified in a formal procedure to the relevant agency, eg, the European Commission (EC).

3. ESTABLISHING A LEGAL PRESENCE

BRANCH OFFICE

A branch office is a separate subdivision of a company headquartered in another location. A branch can perform all the functions of a company. However, a branch will not be appropriate in all circumstances and will not be an option if the business requires licenses because licenses are generally only granted to German or EU entities. Only few foreign investors register branch offices as their base for a direct investment.

COMPANIES

In the following we introduce briefly the three most commonly used corporate vehicles for foreign direct investments, the limited liability company (*Gesellschaft mit beschränkter Haftung – GmbH*), the stock corporation (*Aktiengesellschaft – AG*) and the limited partnership (*Kommanditgesellschaft – KG*). Other types of German companies exist but are used less frequently by foreign investors.

Limited liability company (*GmbH*)

Most foreign investors incorporate limited liability companies.

The GmbH has a minimum share capital of €25,000. It does not provide for different classes of shares but the articles of association can be tailored to the specific requirements of the shareholders. New shares can be issued through a change of the articles of association and then distributed to current or new shareholders in the discretion of the shareholders.

German statutory law for the GmbH provides for strict rules prescribing that the share capital must, at all times, be maintained at the registered share capital level to anticipate any risk of insolvency. It is not permitted to make distributions to shareholders if the remaining assets (at book value) do not at least equal the entire share capital and all liabilities.

The shares of a GmbH can be transferred by signing a sale and transfer agreement. This agreement must be notarised and the change of the shareholders registered with the commercial register.

The GmbH is managed by one or more managing directors who are appointed and dismissed by the shareholders' meeting. In general, the managing directors are responsible for the day-to-day management. For certain, more fundamental transactions, the managing directors need to obtain the shareholders' consent. Usually, such business transactions are described in detail in the articles of association or in the rules of procedure (*Geschäftsordnung*) for the management.

Stock corporation (*Aktiengesellschaft*)

Should the foreign investor choose to finance its transaction through the stock exchange or should the aim be to list the company later on at a stock exchange, a German stock corporation (*Aktiengesellschaft – AG*) is the right choice. The shares can be traded on the stock exchange.

The legal framework for an AG is stricter and less flexible than for a GmbH, in particular with respect to its corporate governance.

Like the GmbH, an AG also enjoys the limitation of its liability to its assets, with a minimum share capital of €50,000. The minimum nominal amount per share is €1.00. The shareholders' meeting may approve in advance to authorise the management board to issue new shares (authorised or contingent capital) if certain conditions are satisfied.

As a rule, the sale and transfer of shares in an AG do not require a specific form as this is the case for shares in a GmbH. The articles of association may prescribe that transferring registered shares – as opposed to bearer shares – may be subject to the consent of the company. Shareholders must comply with certain notification requirements for shareholdings in both listed and non-listed companies. A violation of these rules results in a suspension of the respective shareholders' rights, in particular the right to vote at the shareholders' meeting.

An AG may issue several classes of shares, eg, personalised, anonymous shares with or without voting rights or special dividend payments attached to it. The shareholders' meeting must approve issuing new shares.

Rules on the maintenance of the share capital are even stricter than for the GmbH to ensure that all shareholders are treated in the same way, in particular with regard to dividend payments (except for shareholders with special dividend arrangements).

The transfer of shares is simple because a change of shareholders needs not be registered with the commercial register and no notarisation is necessary.

The three mandatory corporate bodies of an AG are the management board, the supervisory board and the shareholders' meeting (see chapter 5 below for more detail on the corporate governance rules).

Limited partnership (*Kommanditgesellschaft*)

Sometimes foreign investors use limited partnerships (*Kommanditgesellschaft – KG*). A KG must have at least one general partner (*Komplementär*) and at least one limited partner (*Kommanditist*). The general partner is personally and without limitation liable for the KG's liabilities but has usually no interest in the capital of the KG. The general partner is managing and representing the KG within and outside of courts. The limited partners are not liable for the partnership's liabilities once they have paid their subscribed capital contributions committed to be registered with the commercial register.

It is legally permissible and very common to use a GmbH as the sole general partner of a KG which in practice avoids personal and unlimited liability (*GmbH & Co. KG*).

3. ESTABLISHING A LEGAL PRESENCE (CONTINUED)

Using a KG for an investment can be an advantage because it is transparent for corporate income tax purposes. This means that the profits are not subject to tax on the level of the KG but profits are directly attributed to its shareholders/partners.

A limited partnership has no shares but is divided in partnership interests. Statutory law does not provide for many rules for limited partnerships so that its partners are generally free to design the partnership agreement or any other internal rules in their free discretion. Therefore, partners are free to decide on how the issue of new partnership interests shall be dealt with and which rules shall apply to the maintenance of the liable capital. The partnership interests can be freely transferred to third parties but new partners will have to register with the commercial register to benefit from any limitation of liability to an amount that has to be agreed among the partners.

Registration formalities

The incorporation of a new GmbH or an AG typically takes about two to three weeks. This time can be substantially longer if the articles of association are complex. Alternatively, an investor can acquire a shelf company from a service provider. Such acquisition can be completed within one day and is therefore often preferred by foreign investors.

In general, all changes in the constitutional documents (eg, articles of association), in the share capital or a change of the members of the management board or of the managing directors must be registered with the local commercial register.

All applications to the commercial register concerning the aforementioned measures must be signed before a German notary. In some events, the entire documentation needs to be notarised. The notary will also provide for the filing with the commercial register.

Constitutional documents

The constitutional documents of the GmbH and the AG are called articles of association, while the constitutional document of the KG is called partnership agreement. A GmbH must keep a list of all of its shareholders. The same can be true for the AG if it has issued registered shares. Otherwise, the AG will only register the numbers of the shares in its share register.

Apart from the aforementioned documents the companies can chose to provide for further non-public rules in internal governance rules for the management and/or the members of the supervisory board.

TYPICAL INVESTMENT VEHICLES

In general, the investment by an onshore entity has multiple advantages. First of all, conducting business in Germany with a German entity is easier because it provides customers and suppliers with a customary and trusted counterparty. In principle the business name can be chosen freely and adapted to the German market.

Formalities with the German authorities are generally easier to handle with a German entity. In addition, shares of German entities can generally be easily transferred to third parties, so that a disposal is possible at any time.

For offshore entities, one has to differentiate between entities incorporated in the EU and those incorporated outside of the EU. The reason for this differentiation is that corporate entities seated in one EU country may not be discriminated in other EU countries compared to national entities of the respective EU country. For example, the Foreign Trade and Payments Regulation (see chapter 2 above) does not apply to EU based companies. In contrast, companies based outside the EU have often to deal with more administrative regulations and more formalities. German agencies will often request corporate or commercial information related to the company conducting business in Germany. The translation and the often required explanation of the foreign documentation can be time consuming.

Many foreign investors choose to incorporate a German company to carry out their business in Germany or to manage their German investments. The choice of the business is very often tax driven. Most foreign investors incorporate limited liability companies. The main advantage of using a GmbH is that it provides for a limitation of the liability of the investor that is limited to the statutory (minimum) share capital of €25,000. Furthermore, a GmbH is a well-recognised type of company for carrying out business in Germany.

JOINT VENTURES

Some investors in Germany seek to harness the expertise of an established participant in the market by forming a joint venture (JV). The external investor benefits from its partner's existing relationships and experience of the market and the key market players, thus avoiding some of the potential downside associated with other investment structures.

The typical JV structure involves holding the German investment by acquiring a 50% stake in the German JV company that is either acting as a holding company or performs the business itself. The agreement between the shareholders of the holding company establishes the principles for the operation and management of the JV business.

Pre-conditions

It is essential for the operation of any successful German market-orientated JV that all necessary licences, consents or clearances are obtained before trading commences. Regulatory approvals from German governmental agencies will be necessary for the initiation of business activities and obtaining such approvals can take some time. Approval may also be required for foreign investment (whether direct or indirect) into German companies (see chapter 2 above).

Operation of a JV company

The collaboration of the JV partners is usually laid down in a Joint Venture Agreement (JVA). JVAs usually contain detailed provisions regulating the conduct of the JV and the relationship between the partners, including with respect to:

- dividend policy and the right to dividends;
- whether (and how) the JV should be able to accommodate the withdrawal of current participants and the accepting new ones;
- minority protection provisions, including reserved matters requiring unanimous consent before action can be taken;
- restrictions on the authority of the members of the board of each company in the JV group structure;
- approval of budgets by shareholders;
- funding provisions to cover the manner and method of any future financing that is to be provided to the JV company;
- rights of the shareholders to appoint members of the management board of the JV company and provisions for a quorum;
- non-compete covenants restricting the ability of the JV partners to compete with the JV company or with each other;
- stipulation of the situations in which shares in the JV company may or must be transferred, including any rights of pre-emption and mechanisms for determining the price of shares in such circumstance;
- deadlock provisions;
- default provisions to cover situations where a party to the JVA is affected by a change of control, becomes insolvent or is in material breach of the JVA (such provisions often act as an incentive for the parties to the JVA to comply and may provide for the non-defaulting party to acquire the defaulting party's shares, so far as permitted by the applicable law, at a discount); and
- termination provisions.

Exit

The JVA should address whether the transfer of shares will be subject to any lock-up period and should contain detailed provisions regulating the transfer of shares.

Frequently the non-selling shareholders will be able to exercise a right of pre-emption if one of the shareholders wishes to exit, and may also have a "tag-along" right under which a selling shareholder must procure that the buyer of his shares acquires the shares of the "tagging" shareholder on the same terms.

Particularly where one shareholder holds a substantial stake, the JVA may contain "drag-along" provisions under which that shareholder is able, upon exit, to compel the sale by the other (usually minority) shareholders of their interests to the proposed buyer upon the same terms.

This mechanism is designed to maximise value for the majority shareholder by enabling the buyer to acquire the entire issued share capital of the JV.

4. SHAREHOLDERS – RIGHTS AND OBLIGATIONS

As explained in chapter 3 above, the principal and most frequently used forms of companies for carrying out a business in Germany are the *GmbH*, the *AG*, and, in certain cases, limited partnerships (*KG*). The rights and obligations of the shareholders in these companies are regulated in various codes such as the Limited Liability Companies Act (*Gesetz betreffend die, Gesellschaften mit beschränkter Haftung – GmbHG*), German Stock Corporation Act (*Aktiengesetz – AktG*), the Commercial Code (*Handelsgesetzbuch – HGB*), the Civil Code (*Bürgerliches Gesetzbuch – BGB*) and the company's articles of association (*Gesellschaftsvertrag*).

LEGAL RIGHTS AND OBLIGATIONS OF SHAREHOLDERS

The rights and duties of the shareholders vary depending on the type of the company, the articles of association and further internal procedures that have been established by the shareholders' meeting or the supervisory board. Therefore, the following provides a short overview of some of the most important rights and duties only.

The shareholders' most important rights are the right to vote, to dividends and information rights vis-à-vis the management. Duties of the shareholders can include the participation in capital measures and, more generally, abstaining from measures with an adverse effect on the company or its business.

Shareholder structures and exercise of control rights

In a GmbH and a limited partnership (*KG*) the shareholders can instruct directly the managing directors to perform certain tasks in a certain way or more generally to realise a certain concept. Such instructions are given by the shareholders' meeting. Therefore, it is generally the majority shareholder who can give instructions to the managing directors. This allows the shareholders to control the managing directors directly. In addition, minority shareholders have broad information rights vis-à-vis the managing directors.

In a limited partnership it is up to the partners to prescribe in the partnership agreement what level of control they want to retain over the management.

In an AG (stock corporation) the shareholders cannot give binding instructions to the members of the management board and they can exert their influence basically only in general meetings. In an AG in addition to the management board the supervisory board (*Aufsichtsrat*) whose members are appointed by the general meeting (for more details, see chapter 5 below) have an important role in management and control. The supervisory board may request information from the management board that is required to supervise the decision making process and the current business activities. The intensity of the supervision measures depends largely on the individual situation of the company and the scope of such supervision can vary substantially. In a smaller AG, the supervisory board often meets only two to four times per year so that the extent of its supervision is sometimes limited. In larger companies the supervisory board usually delegates certain functions to sub-committees that monitor the business activities on a continuous basis. In times when a company is in a critical situation, the supervision by the supervisory board may have to be carried out much more stringent.

The shareholders of a GmbH are entitled, but generally not required, to establish a supervisory board. This can be useful if the shareholders want third parties, in particular compliance or business specialists, to control the business activities of the company. Should a GmbH have more than 500 full time employees, the shareholders must establish a supervisory board (see chapter 5 below).

Comparison of company governance structures and models (eg, 100%/single largest/minority)

In general, the majority shareholder of a GmbH (regardless of the type) may direct the respective company. A 50% shareholding plus one vote is generally sufficient for control. This is different in the case of an AG (see above). Specific measures (eg, amending the articles of association or increasing the share capital) may require a higher, qualified majority. Such restrictions protect minority shareholders.

The shareholders can specify the levels of voting rights for specific measures in the articles of association. Therefore, it is up to the shareholders to decide to what extent they want to protect minority interests. However, majority shareholders have to consider, that once certain minority rights have been granted, they require the consent of the minority shareholders if they want to change such minority rights to the detriment of the minority shareholders.

5. CORPORATE GOVERNANCE

TYPES OF CORPORATE ENTITIES

In Germany, the applicable corporate governance rules vary for different corporate entity types. The most frequently used types of corporations are the limited liability company (*Gesellschaft mit beschränkter Haftung – GmbH*) and the stock corporation (*Aktiengesellschaft – AG*, for more details please see chapters 3 and 4). There are currently about one million GmbHs and approximately 18,000 AGs incorporated in Germany. Of the two corporation types, only AGs can be listed and traded on a stock exchange. However, only approximately 900 of the 18,000 AGs are listed, ie, no more than 5%.

CORPORATE GOVERNANCE IN A GMBH

GmbHs are governed pursuant to the Limited Liability Companies Act (*Gesetz betreffend die, Gesellschaften mit beschränkter Haftung – GmbHG*). A GmbH always has two governing bodies, namely:

- the shareholders in the shareholders' meeting (*Gesellschafterversammlung*); and
- the managing director or the board of managing directors (*Geschäftsführer*).

GmbHs with at least 500 employees are required to have a supervisory board (*Aufsichtsrat*) pursuant to mandatory co-determination rules. In this case, the rules for the supervisory board of an AG apply *mutatis mutandis*. A GmbH with less than 500 employees may institute a supervisory board voluntarily; the shareholders can determine its rights and responsibilities in the company's articles of association. The vast majority of GmbHs, however, does not have a supervisory board.

Role of the shareholders' meeting (*Gesellschafterversammlung*)

The shareholders appoint, remove (at will) and supervise the managing director(s). The shareholders are, *inter alia*, also responsible for the:

- amendment of the articles of association;
- approval of annual financial statements and appropriation of earnings;
- discharging the managing director(s) from liability;
- appointment of registered company signatories (*Prokuristen*) and similar;
- representation of the company vis-à-vis managing director(s) and asserting claims of the GmbH against the director(s); and
- decision to dissolve the company.

The shareholders can further directly exert influence on the management by issuing binding instructions to the managing director(s). This means that the managing director(s) must carry out the instructions unless they violate mandatory law or the GmbH's articles of associations.

Unless the articles of association provide otherwise, shareholder resolutions are passed with a simple majority of votes cast; changes to the articles of association require a qualified majority of 75% of the votes cast.

Role of the managing directors (*Geschäftsführer*)

Managing directors are responsible for the day to day business of the company and also represent the company (eg, concluding contracts in the name, and on behalf, of the company and representing the company in court). The managing director's power to represent the company cannot be limited; no *ultra vires*-doctrine, as known in other jurisdictions, exists. If a GmbH has more than one managing director, all managing directors represent the GmbH jointly, unless its articles of association (or a shareholder resolution) provide otherwise. Usually two managing directors have to act jointly to represent and contractually bind the company (so-called "four-eyes-principle"). Managing directors must be natural persons but do not need to be German nationals or residents. Apart from their management duties and their general obligation to always act in the company's best interest and apply the care of a diligent and conscientious manager, managing directors have the following duties:

- maintenance of registered share capital, ie, duty to not repay assets to shareholders required to maintain registered share capital and duty to immediately call a shareholders' meeting if half of the GmbH's registered share capital is lost;
- obligation to initiate insolvency proceedings if the GmbH is either over-indebted (*überschuldet*) or no longer able to pay its debts due to a lack of liquid funds (*zahlungsunfähig*);
- ensuring compliance with statutory obligations to pay social security contributions for employees;
- compliance with shareholder instructions unless such instructions violate mandatory law;
- keeping the shareholder(s) and other managing directors informed; and
- fulfilment of commercial register filing requirements.

CORPORATE GOVERNANCE IN STOCK CORPORATIONS (AG)

The German Stock Corporation Act (*Aktiengesetz – AktG*) contains the rules governing AGs. Generally speaking, the governance rules that apply to the AG are less flexible than those regarding the GmbH. The AG's articles of association may only deviate from the statutory rules where expressly permitted by law (so-called articles-strictness-principle (*Satzungsstrenge*)).

5. CORPORATE GOVERNANCE (CONTINUED)

In addition, there are rules that apply only to listed companies, such as the German Corporate Governance Code (*Deutscher Corporate Governance Kodex*). Rules of co-determination apply to all AGs with at least 500 employees (see chapter 4 above).

All AGs (listed and non-listed) must have a two-tiered board system. This means that there are always three governing bodies, namely:

- the shareholders in the general meeting (*Hauptversammlung*);
- the management board (*Vorstand*); and
- the supervisory board (*Aufsichtsrat*).

The two-tiered board system means in practice, that the members of the management board are appointed and dismissed by the supervisory board and not by the shareholders in the general meeting. Thus, the shareholders' only have an indirect say in the composition of management. It should also be noted, that the management board comprises executives only and the supervisory board comprises non-executives only.

Role of the shareholders' meeting (*Hauptversammlung*)

The shareholders appoint the members of the supervisory board. If co-determination laws apply, either 1/3 or 1/2 of the supervisory board members are appointed by the company's employees and represent the employees' interests. In this case, the shareholders appoint the remaining supervisory board members. The shareholders also decide, *inter alia*, on:

- the appropriation of the balance sheet profit;
- discharging the management and supervisory boards from liability;
- changes to the articles of association;
- measures to increase or reduce the share capital;
- the appointment of auditors;
- the dissolution of the company; and
- other decisions of fundamental significance.

Shareholders can exercise voting, speaking and information rights in shareholder meetings and have the right to challenge resolutions.

Role of the supervisory board (*Aufsichtsrat*)

The supervisory board's main responsibilities are appointing, dismissing, supervising and advising the management board and its members.

The supervisory board appoints the members and the chairman of the management board. It can remove appointed management board members for cause, eg, in case of a gross breach of duty or if the company's shareholders vote to withdraw their confidence in the board member. The supervisory board is also responsible for negotiating management board members' employment contracts on behalf of the company and representing the company in general vis-à-vis individual management board members. The supervisory board is obliged to ensure, that management board members' remuneration is appropriate and can be liable to pay damages to the company if this is not the case.

The supervisory board is responsible for supervising the management of the company. To enable effective supervision, the management board is required to regularly submit reports to the supervisory board regarding important business matters such as: financing, investment and personnel, return on equity, revenue and transactions that may affect the company's profitability or liquidity. The supervisory board and its individual members may also request a report at any time. The supervisory board has the right to access and inspect the company's books, records and assets. Accordingly, supervisory board members have a confidentiality duty. The supervisory board is responsible for assessing the company's annual financial statement, annual report and profit distribution proposal and is required to report to the company's shareholders on its findings. If the company becomes factually insolvent at any time, the supervisory board also has a duty to take steps to ensure that management files for commencement of insolvency proceedings. Especially, the supervisory board has to ensure, that the management does not make certain payments using the company's remaining assets.

The supervisory board is also involved in important individual business decisions. The AG's articles of association will often stipulate that certain types of transactions, decisions or other measures require the supervisory board's consent. The supervisory board itself has the right (and, if the articles of association contain no specification of the above kind, the obligation) to determine (further) significant measures that require its approval. If it does not consent to a relevant measure, the management board may only implement the measure with shareholder approval.

Role of the management board (*Vorstand*)

The management board represents the company in and out of court and manages the company. The members of the management board are carrying out their duties in their own responsibility. This means, that unlike in a GmbH, neither the shareholders, nor the supervisory board can issue binding instructions to the management board – the company's day-to-day business is exclusively the management board's responsibility. The rule of joint representation (four-eyes-principle) explained above for the GmbH, also applies for the AG if its board has more than one member. Members of the management board must be natural persons but do not need to be German nationals or residents. However, they cannot simultaneously be members of the supervisory board. For listed AGs mandatory law requires a "cooling-off period" of two years after leaving the management board before joining the supervisory board of the same company.

The management board has similar duties as the managing director(s) of a GmbH, except that it is not required to follow instructions.

Listed AGs and the German Corporate Governance Code

The German Corporate Governance Code (*Deutscher Corporate Governance Kodex*) applies to listed AGs and contains internationally recognised standards for good and responsible governance. Compliance with its provisions is not mandatory but listed companies are required to make an annual public declaration regarding their compliance and explain non-compliance (principle of "comply or explain").

6. PRIVATE M&A TRANSACTIONS

Private M&A transactions in Germany are either fully negotiated between the parties or the seller is looking for the buyer in a controlled auction process with several interested buyers competing for the business to be sold.

TWO BASIC TYPES OF SALES PROCESSES

Negotiated transaction

In Germany, a fully negotiated transaction usually starts with agreeing on heads of terms or a letter of intent (*LoI*).

These documents are usually intended not to be binding as far as the actual sale and purchase is concerned. In many cases the buyer will try to obtain exclusivity for the negotiations with the seller. This may be contained, as a binding component, in a *LoI* along with agreements about conducting due diligence, timing and confidentiality.

The buyer will then usually conduct due diligence and depending on the results; the parties negotiate a sale and purchase agreement.

Controlled auction

Over the last twenty years, but in particular with the advent of Private Equity investors, a structured sales process has become more and more common in Germany: the controlled auction. Sellers try to leverage the competition created with more than one potential buyer for the business which is to be sold. In principle, these auctions do not differ substantially from those elsewhere. By now best practices have been established along the following steps of an auction process:

- (financial) advisers, typically investment banks, prepare certain basic information about the business to be sold (Teaser) and distribute this to a number of potentially interested parties on a long-list
- potential bidders, if interested, may obtain more detailed information about the business in an information memorandum. Usually, they will have to agree to be bound by a strict confidentiality undertaking to get to this stage of the process
- the potential bidders are requested to make non-binding, indicative offers based on the information contained in the information memorandum
- following the submission of the indicative offers the seller will put a selected number of potential bidders on a short-list, who will then have the opportunity to conduct due diligence, usually in a virtual data room with information on the target company. Part of the due diligence is usually also a structured Q&A process
- as a part of the data room, or separately, the seller will present a draft sale and purchase agreement (SPA) for the business to the potential bidders
- after completing the due diligence, the potential bidders are invited to submit a final offer with a commented SPA in a form of a mark-up satisfactory for the potential buyer
- the seller will evaluate the offers and decide which potential bidders will proceed to the final phase of the process. In this final phase the transaction documents are fully negotiated, often in parallel with several potential buyers, until there is a winner

SHARE DEAL *V* ASSET DEAL

The two basic types of deal structures, share deal v asset deal, also exist in Germany.

Advantages of a share deal

- a share deal is simpler, as there is no need to identify all assets, liabilities and contractual relationships relating to the relevant business
- in an asset deal, the transfer of contractual relationships and liabilities will require the consent of each individual other contractual party or the creditor. On a share deal, no such consent is required, except where a contractual relationship becomes terminable as a result of the change in control and it is therefore necessary to seek the other contractual party's consent for the continuation of the relationship
- in an asset deal, certain permits and concessions may not be transferrable and need to be applied for and obtained anew by the buyer. That is in particular true for permits which are based on the personal reliability of the beneficiary
- taxation of the capital gain, generated from the sale of shares may be more favourable for the seller than the sale of assets

Advantages of an asset deal

- on an asset deal, as a rule, the assets, liabilities and contractual relationships that should become part of the sale can be selected. This is relevant where a seller wishes to dispose part of a business or separate several businesses combined in one entity. It is further relevant, where a buyer wishes to exclude liabilities from the purchase (which is of particular importance in acquisitions out of insolvency, ie, distressed assets)
- from a tax perspective, an asset deal may be favourable for the buyer as the purchased assets are capitalised at their acquisition costs (step-up), which may, depending on the nature and tax treatment of the relevant asset, result in a higher depreciation and amortisation and therefore increased relief for profit taxes

Transfer of liabilities

In a share deal, liabilities are not transferred but remain with the target company. The buyer, as the new shareholder of the target, will commercially also acquire the liabilities of the target. In an asset deal, in principle, no liabilities are transferred except in the following cases, when the asset purchase of an entire business as a going concern may lead to the transfer of or the liability for, debts of the sold going concern:

- employment relationships of the sold business existing at completion of the sale will transfer to the buyer and such employment relationships include the liabilities to the relevant employees;
- if the buyer of the assets continues to trade under the same name as the seller, the buyer will be liable for all debts created in the business prior to the sale, unless the seller and the buyer have agreed otherwise. Such an agreement must be registered in the commercial register and the registration must be published;
- the buyer may be liable for business taxes of the seller (which include value added tax, wage tax and trade tax but exclude corporate income tax), if the relevant taxes have arisen since the beginning of the calendar year prior to completion of the sale and are assessed within one year after registration of the business by the buyer; or
- a buyer of real estate may, purely as a result of being the new owner of the real estate, be liable for environmental liabilities regardless of, whether or not; the relevant environmental issue has been caused by the buyer.

SHARE PURCHASE AGREEMENT

Distinction between sale and purchase agreement and transfer of the share

Another feature of German law is that the sale and purchase agreement on the one hand and the transfer of (title in) shares on the other hand are two strictly separate agreements, although in most cases combined in one document. This is why SPAs are often referred to as 'Sale and Transfer Agreement(s)' or similar. This unique feature of German law makes the distinction of signing and closing/ completion relatively simple. Conditions precedent can be used to restrict only the transfer of the shares being effective while the sale and purchase agreement enters into force immediately upon signing.

Key clauses

A typical sale and purchase agreement comprises the following sections:

- preamble/recitals (with details regarding the seller, buyer and the purchase object);
- sale and assignment of the purchase object (shares and shareholder loans);
- purchase price and purchase price adjustment;
- closing, closing conditions and closing actions;
- representations and warranties;
- remedies in case of breach of representations and warranties and limitations of seller's liability;
- indemnity for tax liabilities;
- indemnity for environmental liabilities (if any);
- indemnities for special issues identified in the due diligence (if any);
- covenants in respect of the conduct of the business between signing and closing;
- non-compete and non-solicitation undertaking;
- confidentiality and press releases; and
- miscellaneous provisions (such as costs, governing law, jurisdiction, severability, assignment etc).

Deal protection: warranties and indemnities

Typical forms of deal protection are warranties and indemnities granted by the seller to the buyer.

Warranties are typically designed to define a state of affairs of the target business of which both the seller and buyer assume that it is generally true. In light of this, the seller will usually disclose any applicable exceptions to such warranties in disclosure schedules attached to the SPA and the buyer will typically be excluded from claiming for a breach of a warranty if it had knowledge of the breach or the underlying factual circumstances. The remedies for a breach of a warranty will usually be further limited by *de minimis* amounts and liability thresholds or baskets.

Indemnities are typically used for items where the parties know or consider it possible, that a liability will arise and the seller's liability will therefore usually not be excluded, if the buyer was aware of an issue. Indemnities are typically used for tax liabilities, environmental liabilities as well as special issues that a buyer has identified in the due diligence.

Time limits for general commercial warranties will usually be between twelve and thirty months to allow the buyer to have the time of up to three annual audits before the warranties expire. Tax warranties will usually be subject to a longer time limit and typically only expire three or six months after a relevant tax assessment has become final. Title warranties will survive usually a much longer period, sometimes of up to ten to thirty years.

6. PRIVATE M&A TRANSACTIONS (CONTINUED)

Common limitations on the extent of warranties include: the exclusion of indirect and consequential damages, internal costs of the buyer, damages arising from changes in law, damages compensated by claims against third parties (including insurances) or tax benefits, failure to mitigate damages, *de minimis* and threshold amounts, overall caps on the seller's liability, disclosure of a relevant issue in the financial statements, knowledge by a buyer of a relevant breach and time limitations.

Under statutory law, the breach of a warranty may entitle a buyer to claim damages, reduction of the purchase price, and rescission of the contract. A typical SPA will exclude the right to reduce the purchase price and rescind the contract. It will provide, that the buyer has be right to be put into the position it would be in had the warranty not be breached or, if impossible, to claim monetary damages and such remedy may be modified in various respects (eg, to exclude the right to claim consequential damages etc.).

Conditions precedent

Clearance under any applicable merger control regimes are the most common conditions precedent and must be included where a merger control regime prohibits completion of the transaction without that clearance has been obtained. Other conditions precedent will depend on the individual circumstances and may include: industry specific approvals (as may be required in the financial institutions and media sector), internal corporate approvals, the absence of a material adverse change, the availability of funding, certain third party approvals (eg, to waive the effects of change of control clauses) and clearance of foreign investment restrictions.

7. PUBLIC TAKEOVERS

In Germany, as in many other countries, the acquisition of a listed entity via a public offer to its shareholders, a so-called public takeover, is regulated by law. Unlike the acquisition of a private enterprise, a public takeover is not a matter of negotiations between buyer and seller but is governed by the regulatory regime provided by the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz – WpÜG*).

TYPES OF TAKEOVERS

Virtually, all potential German targets for public takeover offers are organised as stock corporations (*Aktiengesellschaft – AG*). The Takeover Act distinguishes between three types of public offers:

- Ordinary Offers
- Takeover Offers
- Mandatory Offers

Ordinary Offers are less strictly regulated, while Mandatory Offers are subject to the strictest level of regulation. The main difference between the three types of offers relates to the principle of "acquisition of control". For the purpose of the Takeover Act, acquisition of control occurs if a Bidder acquires at least 30% of the voting rights in a Target Company (Control). For purposes of determining whether Control has been acquired, extensive attribution rules apply.

In Ordinary Offers, no acquisition of Control is intended and does not occur. In these cases the bidder makes an offer to acquire a stake below 30% or already has obtained Control and merely increases the stake. In a Takeover Offer, the acquisition of Control is the goal of the offer, ie, the Bidder intends to acquire Control through or in conjunction with the offer. In a Mandatory Offer, the actual acquisition of Control precedes the offer and triggers an obligation to make the Mandatory Offer.

The bidder in general cannot make offers with conditions precedent. One exception to this rule is that the bidder may define a certain level of minimum acceptance of the offer, eg, 50% or 75%. However, the bidder must not be able to withdraw from the offer at his own discretion. Therefore, conditions are only permitted if the bidder has no direct influence on their fulfilment and if they are so clearly defined that there is no room for interpretation as to whether the conditions are met. The bidder can waive the conditions during the offer period. For example, a bidder may waive the minimum acceptance threshold originally set as a condition precedent.

PROCESS

Bidders have to observe the notification requirements pursuant to the German Securities Trading Act (*Gesetz über den Wertpapierhandel – WpHG*) The WpHG requires each shareholder, who holds a certain percentage of voting rights in a listed company, to disclose their holdings. The notification obligation facilitates the surveillance of share ownership. The building of larger equity stakes (also by several cooperating shareholders) becomes transparent. Anyone who reaches, exceeds or falls below the thresholds of 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75% of voting rights in a listed company is obliged to make a notification to the Federal Agency for Financial Market Supervision (*BaFin*) and the concerned company.

Preparation of the offer

The offer process has to be prepared the latest when the bidder is about to cross the 30% threshold. The bidding process can be divided into four phases:

If a sales process is organised by the Target Company or its main shareholder(s), the Target Company will usually make available a data room and allow a due diligence process. However, before this can happen, the management will have to conclude that the due diligence is in the best interest of the Target Company, so as to comply with the management board's statutory duty of secrecy. The bidder should also be careful and be aware, that any inside information revealed in the course of the due diligence may limit the ability to acquire shares on the stock market or to proceed with the offer before such information has been published by the Target Company.

Prior to getting in touch with the Target Company (or if a hostile takeover is anticipated), the bidder will have to rely on public information. In the case of a listed company, the following information is generally available: (i) website, (ii) public registers, (iii) shareholder structure, (iv) annual documents, (v) articles of association and (vi) the annual report.

Structuring the offer

After gathering preliminary information, the rough structure of the offer can be drafted, ie, selecting the type of offer and reasonable closing conditions, anticipating defence measures and preparing countermeasures (in the case of a hostile offer). As the costs of the offer will be one of the most important aspects, the amount of consideration (cash, or, if applicable, stock) and the financing concept required should also be discussed at this early stage.

In case the bidder has identified major issues of a legal nature, he may decide to contact the BaFin prior to the submission of the offer document (possibly on a no-name basis). The BaFin will usually take a very co-operative and helpful approach in such cases. However, the BaFin will not conduct a preliminary review of the draft offer document or issue a statement that the draft documents meet all the legal requirements.

Pre-offer agreements with major shareholders

An offer to the public is often preceded by (negotiations on) the acquisition of blocks of shares that major shareholders are holding. Which approach is appropriate depends on the number of shares that can be acquired from the major shareholder(s).

7. PUBLIC TAKEOVERS (CONTINUED)

One possible situation is that a major shareholder is willing to sell a controlling stake of more than 30%. In this case, the Bidder and the major shareholder may agree upon a so-called "block acquisition" prior to a public takeover procedure. Once this acquisition of a controlling stake is consummated, the Bidder has acquired Control and triggers the obligation to submit a Mandatory Offer for all remaining shares. However, the acquisition of Control only takes place when the shares are actually acquired (which is usually at the closing of the transaction, rather than the signing). If the Bidder triggers a Mandatory Offer in this manner, the consideration offered has to equal at least either the (highest) consideration paid to the major shareholder(s) or the volume weighted average stock exchange price for the shares in the last three months prior to the acquisition of Control. Therefore, if the transaction becomes public prior to its closing (which will inevitably happen if, for example, merger control clearance is required), the offer price may be increased significantly through market speculation between signing and closing.

However, there are several ways to avoid the risk of an increase in the offer price and the restrictions applying to Mandatory Offers, but to still be able to secure the acquisition of all shares held by major shareholders in advance. In particular, this is of great importance if the major shareholder's stake is not sufficiently large to ensure that all relevant decisions can be taken by the Bidder after the offer. In such cases, the Bidder might only be willing to acquire the block of shares if he is sure that he obtains the intended majority. This is possible by defining an Acceptance Threshold for the public offer (which is, however, not admissible in the course of a Mandatory Offer).

The first possibility to avoid a Mandatory Offer is to make the block acquisition subject to the condition precedent that the subsequent Takeover Offer is successful and results in the desired majority. As a consequence, the block acquisition becomes effective when the Bidder has already acquired Control in the course of the Takeover Offer.

Another possibility is a so-called "Irrevocable Undertaking" by which the major shareholder(s) irrevocably undertakes to tender his/their shares into the Takeover Offer. The main difference from a block acquisition is that the Bidder does not acquire the major shareholder's stake separately but rather in the course of the Takeover Offer.

In addition to agreements with the shareholders of the Target Company, it is also increasingly common that the Bidder concludes a so called "Business Combination Agreement" directly with the Target Company and the selling shareholders. This agreement will stipulate the key facts and the strategy for the future combination process (eg, time schedule, consideration, conditions).

Takeover decision

A significant intermediate step in the preparation phase of a Takeover Offer is the decision of the Bidder to launch an offer (Takeover Decision) or, in the case of a Mandatory Offer, the date of the acquisition of Control.

The Takeover Decision or the acquisition of control have to be published immediately and notified in writing to the management board of the Target Company without undue delay (so-called "*Section 10 Notification*"). If a bidder does not contact the management board of the Target Company prior to a Takeover Offer, the management board will find out about the offer for the first time through the Section 10 Notification. Immediately prior to publication, the Bidder must inform the BaFin and the relevant stock exchanges. The Section 10 Notification is published on the Internet and via an electronically operated information system. Proof of the publication must be sent without undue delay to the BaFin and the stock exchanges as referred to above.

The date of the publication of the Takeover Decision is of great importance as it is the trigger date for the computation of the three-month volume weighted average price, which is one of the elements of the minimum consideration payable in a Takeover or Mandatory Offer. Takeover rumours prior to the publication may lead to speculation and an increase in the Target Company's share price, making the offer far more expensive.

Determining the point in time at which the obligation to publish the Takeover Decision arises can sometimes be difficult, especially in the case of staggered decision-making processes by certain bodies of the Bidder. The Takeover Act specifies that the Takeover Decision cannot be postponed merely because the approval of the Bidder's shareholders' meeting has not already been obtained. A stake building by the Bidder as a component of his takeover strategy may or may not be regarded as a Takeover Decision. Carrying out a due diligence review of the Target Company is usually not regarded as constituting such a clear decision.

In practice, a bidder should initiate the structuring and financing of the offer as soon as possible. In addition, the entire decision making process should be documented in order to avoid later controversy with the BaFin.

The publication of the Section 10 Notification marks the beginning of a four-week deadline for the Bidder to prepare the offer document and to submit it to the BaFin for its review and approval.

The question sometimes arises, whether a bidder can withdraw his offer after the publication of the Section 10 Notification. It is certain that at this point, the shareholders of the Target Company have no enforceable claim against the Bidder to pursue the offer. Furthermore, in case of a Takeover Offer, the BaFin does not have any means to enforce the making of an offer and therefore will usually accept a withdrawal (at least if there is a good reason for it). The withdrawal may, however, be considered an administrative offence, unless justified by specific reasons. After the offer document has been published and the acceptance period has begun, the Bidder can no longer withdraw.

8. ACQUISITION FINANCING

SOURCES OF FINANCE

Financing facilities

The primary sources of financing of M&A transactions are equity and loans. The modalities and forms of financing in Germany are similar to the ones in the UK. Therefore, foreign investors usually combine equity and different types of bank loans to finance their acquisitions in Germany. The use of bonds for financing transactions is still very limited in Germany.

Terms of financing agreements

The terms of financing agreements are similar to the ones generally used in Europe. They mainly include a purpose clause, the drawdown requirements, the repayment conditions, representations and warranties, covenants and default provisions.

SECURITY AND GUARANTEES

Forms of security

Common forms of securities are:

- security assignments of the acquired shares, major assets of the acquirer (or in certain cases also of the target company) or funds available in bank deposits;
- mortgages, in particular in form of equitable mortgages (*Hypotheken*) and land charges (*Grundschuld*); or
- pledges over the acquired shares or any assets belonging to the acquirer or the target company.

Forms of guarantees

The most common form of guarantee (*Bürgschaft*) used in Germany is a bank guarantee (*Bankbürgschaft*). The bank will charge a fee in connection with the guarantee that relates to the risk of non-payment by the acquirer.

If the holding company or an affiliate of the acquirer group has a good reputation and is well funded, some sellers also accept guarantees from affiliated companies of the acquirer (ie, the foreign investor). In certain cases, a letter of comfort of the holding company of the foreign investor stating that the acquisition vehicle will be sufficiently funded throughout the acquisition period may also be sufficient. In any event, a guarantee and a letter of comfort is the preferable option because it can save considerable fees that a bank may charge for providing a bank guarantee.

DEBT CAPITAL MARKET INSTRUMENTS

The German debt capital market is similar to the UK market and includes in particular the following instruments:

- bonds of industrial companies, German Pfandbrief bonds and promissory notes;
- structured bonds such as credit-linked notes, certificates, options and equity-linked bonds;
- equity-linked products, such as convertible and exchangeable bonds, and participation certificates;
- securitisations (both true sale and synthetic securitisations);
- OTC derivatives (ISDA agreement and German master agreement), such as currency and interest rate swaps, credit default swaps, options, forwards, securities loans and repurchase agreements including advice on insolvency law (eg, netting opinions); and
- loan portfolio transactions (performing and non-performing).

KEY REGULATORY ISSUES

Private financing arrangements (eg, bank loans) do generally not pose specific regulatory issues. German companies and banks will, however, have to comply with certain fundamental rules, eg, anti-money laundering rules that may require that the foreign investor identifies the full shareholding structure of its group and provides information on the origin of the equity that will be used to pay the purchase price.

Raising public finance, eg, by bonds on the capital market, is subject to financial regulation and supervision, in particular by the BaFin. These rules define in particular the content of the prospectus that has to be published in relation to the issue of a new bond and the procedure of the listing of the bond on the capital market.

German law does not provide for any restrictions on the provision of foreign currency loans. In practice, the question on the form of the guarantee is often analysed from a financial and tax perspective. In this regard, major debtors often require that the enforcement of the guarantee is secured and that the value of the foreign currency is not too volatile.

9. MERGER CONTROL

The German merger control rules are set out in sections 35 to 43 of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*).

The German national competition authority is the Federal Cartel Office (*FCO*). The FCO is an independent federal authority and, although it accounts to the Federal Ministry of Economics and Energy (*Bundesministerium für Wirtschaft und Technologie, – BMWi*), it does not receive political orders with respect to its decision making.

In addition, cases of mergers or restrictive agreements or concerted practices with only local or regional effect fall within the remit of regional competition authorities (*Landeskartellbehörden*).

THRESHOLDS FOR MERGER CONTROL FILING

Section 37 GWB provides that the following types of transactions are considered to be concentrations:

- the acquisition of (direct or indirect) control over another undertaking or parts thereof by one or several undertakings
- the acquisition of all or substantial part of the assets of another undertaking
- the acquisition of shares in a company's capital or voting rights resulting in an overall shareholding reaching or exceeding 25% or 50% respectively
- any other combination of undertakings enabling one or several undertakings to directly or indirectly exert a competitively significant influence on another undertaking

The concept of "control" in German merger control law is very similar to the concept applied in EU merger control. Control can be acquired by rights, contracts or any other means which separately or in combination, and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking.

The concept of "competitively significant influence" is much broader and may also cover acquisitions of minority shareholdings of less than 25%, particularly in case of transactions involving strategic buyers.

German merger control rules do not apply to concentrations that are subject to the EU merger control rules set out in Regulation (EC) 139/2004 on the control of concentrations between undertakings (*EU Merger Regulation*), except for particular cases set out in the EU Merger Regulation.

A concentration is subject to German merger control if in the last completed financial year preceding the transaction all of the following criteria were met:

- the combined worldwide turnover of all participating undertakings exceeded €500 million;
- the turnover of at least one participating undertaking exceeded €25 million in Germany; and
- the turnover of at least one other participating undertaking exceeded €5 million in Germany.

Foreign-to-foreign mergers are subject to German merger control as well, provided the above turnover thresholds are met and the proposed concentration will have an appreciable effect in the German territory. (In most cases a concentration will be deemed to have an appreciable domestic effect if the turnover thresholds are met.)

On a general note, there are no substantial differences between the powers of the FCO or the regional competition authorities in relation to cases dealt with under Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) and those dealt with only under German law. The concept of turnover in German merger control law is very similar to the concept applied in EU merger control.

When calculating turnover in the context of German merger control, only 75% of the turnover resulting from the trade of goods (that is, goods which were bought and resold) is to be taken into account. Special rules apply to undertakings which are active in the publication, production and distribution of press or in the production, distribution and broadcasting of radio and television programmes and the sale of radio and television advertising time. In such cases, the relevant turnover must be multiplied by 20 for merger control purposes.

German merger control rules do not apply and no notification is required if one of the following two exemptions applies:

- the worldwide turnover of one participating undertaking was less than €10 million (*de minimis* company exemption). In this case, the turnover of the seller must be considered as well when calculating the turnover of the target, provided that the seller controls the target prior to the proposed transaction; or
- the concentration exclusively affects a market in which goods or commercial services have been offered for at least five years and which had a market volume of less than €15 million in the last calendar year (*de minimis* market exemption).

Transactions falling under this *de minimis* rule will need to be notified.

Two or more concentrations which, individually, do not meet the thresholds indicated above, but take place within a two-year period between the same parties, will be treated as one and the same concentration arising on the date of the last transaction.

DOCUMENTATION AND TIMEFRAME

There is no deadline for submitting pre-merger notifications to the FCO. A notification can be filed at any time before the completion of the proposed concentration, even before the signing of the transactional documents.

At the relevant parties' request, the FCO may give informal guidance.

All undertakings participating in the proposed concentration are responsible for submitting a notification. In practice, however, it is sufficient if only one party submits the notification on behalf of all the other parties involved.

There is no compulsory form to be used for the notification of concentrations to the FCO.

German merger control proceedings are subject to a fee, which is imposed by the FCO on the notifying party at the end of the proceedings. The fee amount depends on the FCO's administrative expenses as well as the economic significance of the notified transaction. The fee can amount to €50,000 - €100,000 in exceptional cases). In cases of minor importance, the fees usually range between €5,000 and €15,000.

A concentration subject to German merger control must not be implemented before the FCO has granted clearance. Any violation of this prohibition constitutes an administrative offence and results in all underlying contracts/transactions being (preliminarily) void and unenforceable under German law. In exceptional cases, the FCO may grant derogation from the obligation to suspend the closing of the transaction, for example, if a suspension would severely harm the participating undertakings or third parties.

Initial examination proceedings (Phase I)

Upon receipt of a pre-merger notification, the FCO starts a preliminary investigation examining whether the concentration may raise substantial competition concerns in Germany and, thus, is likely to meet the conditions for prohibition. If the FCO does not identify substantial competition concerns, it issues an informal letter informing the notifying parties that the concentration is cleared and can be completed. The clearance letter is not reasoned and cannot be appealed by the participating undertakings or by third parties.

If the FCO does identify substantial competition concerns, it must inform the notifying parties that a main examination proceeding will be initiated within one month of receiving the (complete) notification. If the FCO does not notify parties of the initiation of main examination proceedings within one month, the concentration is deemed to be cleared.

Main examination proceedings (Phase II)

If the main examination proceedings confirm the existence of competition concerns, the FCO sends a written statement of objections to the notifying parties setting out the relevant issues. The parties can then submit (further) comments and/or proposals for commitments.

Phase II proceedings must be finalised within four months of receipt of the (complete) notification by one of the following:

- unconditional clearance decision;
- clearance decision, which is subject to conditions/commitments; or
- prohibition decision.

If no decision is taken by the FCO within the prescribed period, the concentration is deemed to be cleared under German merger control rules. However, the four-month period may be extended, provided that the notifying parties consent to it. Decisions adopted by the FCO in Phase II are formal decisions, which must be reasoned and may be appealed.

10. REAL ESTATE

REAL ESTATE LAW

Governing laws

Real estate is mainly governed by the Civil Code (*Bürgerliches Gesetzbuch*), the Hereditary Building Rights Act (*Gesetz über das Erbbaurecht – ErbbauRG*), the Condominium Act (*Gesetz über das Wohnungseigentum und das Dauerwohnrecht – WoEigG*), the Land Registration Code (*Grundbuchordnung – GBO*), the Notarisation Act (*Beurkundungsgesetz – BeurkG*) and the Capital Investment Act (*Kapitalanlagegesetzbuch – KAGB*).

Local common law has no specific impact on real estate law as the German legal system is a codified system of law. The German judiciary interprets and applies the law, rather than mainly relying on precedents from prior cases as in a common law system (see chapter 1 above).

Restrictions on ownership of real estate

There are no such special legal restrictions. In principle, each person or entity with legal capacity is entitled to ownership.

However, certain restrictions may apply with regard to regulated investment companies.

Real estate rights

There is a significant difference between purely contractual rights and rights *in rem* (*dingliche Rechte*). The main rights *in rem* are (co-) ownership (*Miteigentum*), condominium ownership (*Wohnungseigentum*), hereditary building rights (*Erbbaurechte*), ground easements (*Grunddienstbarkeiten*), limited personal easements (*beschränkt persönliche Dienstbarkeiten*), usufructs (*Nießbrauchsrechte*), registered leases (*Dauernutzungsrechte*), *in rem* pre-emptive rights (*dingliche Vorkaufsrechte*), conveying rights to recurrent payments or services (*Reallasten*), mortgages (*Hypotheken*) and land charges (*Grundschulden*).

Hereditary building rights

Hereditary building rights have the particularity that the right to a real estate may diverge from the right to a building constructed thereon. The beneficiary of a heritable building right holds the right to own and use a building constructed on the land whereas the land is owned by a different person or entity. It is a limited temporary right *in rem* and can be bought and sold and even inherited and also been encumbered with easements, etc. The owner of the underlying real estate is generally paid ground rent or a non-recurring lump-sum.

REGISTRATION

Land register

All land is in general subject to registration in the land register (*Grundbuch*). Ownership is transferred to the buyer upon registration of the transfer of title in the land register.

There is no central land registry. Except for the Federal State of Baden-Wuerttemberg, the land registers are kept by the local courts. Each land registry is responsible for the land located in the specific district. Registration procedures are governed by the Land Registration Code.

Each land registry can issue a land register excerpt for the land located in its area. A land register excerpt can be used to prove ownership to third parties. Most of the land registries enable electronic inspections of the land register to accelerate the review of the land register.

The law confers public faith in the land register, ie, that every person can in general rely on the correctness and completeness of the information provided unless otherwise proven or known or unless an objection notice (*Widerspruch*) is registered. However, such public faith does not apply to the description of the property (eg, size and location).

All rights *in rem* need to be registered. A non-registration means that such rights in land remain without *in rem* effect.

Rights in land that are not required to be registered

Statutory rights, such as statutory pre-emptive rights and restraints on disposal, are not subject to registration. Furthermore, solely contractual rights, such as lease rights not additionally secured by a right *in rem*, are not required to be registered.

Priority of rights

The priority of rights registered, depends on order and time of registration. The priority regarding rights registered in the same division depends on the order of registration, whereby the order of registration generally depends on the order the application for registration is received. It is, however, also possible to register rights with the same order of priority or to determine the rank between rights within a division of the land register. The priority of rights registered in different divisions depends on the date of registration. Rights registered on the same date have the same order.

Registration process

The following documents must be provided to the land registry to register a change of ownership:

- notarised conveyance of ownership (*Auflassung*);
- clearance certificate (*Unbedenklichkeitsbescheinigung*) issued by the tax authority regarding the payment of real estate transfer tax (RETT); and
- declaration by the competent public authority regarding the waiver of statutory pre-emptive rights or the non-existence of such rights.

An additional permission according to the Real Estate Transaction Ordinance (*Grundstückverkehrsordnung – GVO*) is required in certain states.

Access to the land registry

The land register is not publicly accessible. Only persons claiming a legitimate interest may inspect the land register. Such interest is established where the applicant provides objective reasons, which exclude the possibility that the inspection serves unauthorised purposes or is based on mere curiosity. A potential buyer may be granted inspection of the land register if he can prove that sales negotiations have already become sufficiently specific.

REAL ESTATE MARKET

Persons generally involved in real estate transactions

Other than the buyer and the seller of real estate, the following parties are generally involved in real estate transactions in Germany:

- real estate brokers and investment banks are often involved as advisors. Their roles vary and may also include a valuation of the asset
- legal and tax advisors are usually involved in real estate transactions pursued by institutional or quasi-institutional investors. The buyer's legal and tax counsel will conduct a legal and tax due diligence of the target and draft and negotiate the sale and purchase agreement of the transaction in cooperation with the corresponding advisors of the seller
- in addition, the buyer will usually engage technical and environmental advisors

The conclusion of a sale and purchase agreement requires notarisation; this is why a notary public gets involved at a certain stage of the transaction. The notary also supervises the satisfaction of conditions precedent to the validity of the agreement and the maturity of the purchase price, as the case may be, and can also be entrusted with additional obligations necessary for the sale and purchase agreement to become effective.

Form of remuneration of advisors

Brokers and investment banks are usually paid on a lump sum basis. Lawyers and tax advisors are usually paid by the hour, technical and environmental advisors usually by man days. Parties often agree on lump sum arrangements. Notaries are remunerated according to the statutory provisions of the Code on Court and Notary Costs (*Gesetz über Kosten der freiwilligen Gerichtsbarkeit für Gerichte und Notare – GNotKG*).

Real estate finance market

The real estate finance market has traditionally been dominated by German commercial and mortgage banks. Foreign banks played a strong role prior to the financial crisis and until 2008 but have mostly – with a few exceptions – withdrawn from the German real estate lending market. Recently, German insurance companies and pension funds have become more active lenders and are, at times, an alternative to the traditional lending banks. Together with the emergence of alternative sources of real estate debt in the German real estate market goes a trend to capital market - oriented finance products such as bonds. Overall and in the current market environment, the German real estate lending market offers attractive terms and sufficient debt capital for investors.

Strong development activity in Germany

Development activity is high in Germany. The market has seen a large increase of residential developments. Speculative developments of commercial real estate have become rare; solid pre-lettings usually support commercial developments. Demand for commercial real estate in most German urban rental markets has been rather strong and has, jointly with the availability of debt financing, provided a solid ground for development activities.

Shift in the approach of investors towards residential as an asset class

Asset classes other than office and retail enjoy increasing interest by investors. Asset classes such as hotels, logistics, student housing or elderly living have become institutionally accepted asset classes and attract a large degree of investor attention.

LIABILITIES OF BUYERS AND SELLERS IN REAL ESTATE TRANSACTIONS

Minimum formalities for the sale and purchase of real estate

The minimum formalities are the conclusion of a notarised sale and purchase agreement as well as the registration of the transfer of ownership in the land register. The sale and purchase agreement has to contain the key terms of the transaction (ie, names and addresses of the parties, description of the object of purchase, purchase price, etc.).

Duty of disclosure

A duty of disclosure is not explicitly regulated by statutory law. However, the seller is obliged to act in accordance with the principle of good faith, which implies specific duties of the seller. Thus, the seller should disclose any information that is of real significance for a reasonable buyer's purchase decision and for which disclosure can be expected under prevailing commercial practice. This would usually include disclosure of material or legal defects.

Contractual warranties

In general, sellers would try to exclude contractual warranties. However, in most transactions the seller will accept certain contractual warranties where circumstances cannot be finally clarified or assessed in the buyer's due diligence. Such warranties usually serving to apportion risks often relate to title and encumbrances, hidden defects, lease agreements, public law and environmental aspects. In general, warranties should not be a substitute for the buyer carrying out his own due diligence as it is not unlikely that warranty claims can only be realised by way of time consuming legal disputes.

10. REAL ESTATE (CONTINUED)

As the buyer can rely on the correctness of the land register, there is in general no need for such warranty where the buyer buys from the registered owner. The land register will usually be checked by the notary prior to notarisation. However, if the seller is not registered as owner in the land register he would usually warrant ownership in the sale and purchase agreement.

Costs in addition to the purchase price

Besides his obligation to pay the purchase price, the buyer is usually liable to pay all transaction related costs such as the RETT, the notary fees, the fees for registrations in the land register, etc.

FINANCE AND BANKING

Regulations concerning the lending of money to finance real estate

The Civil Code contains the main regulations whereas the Banking Act (*Kreditwesengesetz – KWG*) contains provisions with respect to the supervision of banks by the competent supervisory authority (ie, BaFin). The regulations do not differ between residents and non-residents but provide for different levels of protection, especially when it comes to consumer protection laws.

Form of securisation

Mainly property financings are secured by either an accessory mortgage or the more commonly used non-accessory land charge. In addition, security is provided by assignment of rents or other receivables (including claims against insurers or guarantors) as well as pledges over bank accounts and the shares of the borrower and/or the general partner of the borrower in case the borrower is a limited partnership.

Enforcement of securities

Enforcement may be subject to the procedural rules governing compulsory enforcement of charges on property. It is common that the borrower submits himself by way of a notarial deed to immediate enforcement action. Nevertheless, the competent local court is always involved when it comes to enforcement, since the foreclosure sale is carried out and the administrative receiver is appointed and supervised by it.

Minimum formalities for real estate lending

The loan agreement must at least provide for the so-called "*essentialia negotii*" (ie, loan amount, term, interest rate, etc.). In addition, agreements with consumers must be concluded in writing and provide for a statutory right of revocation in favour of the borrower. A mortgage or land charge has to be recorded by a notary and registered in the land register.

Protection of the lender

In case of pending insolvency proceedings, the creditors already secured by a mortgage or land charge prior to the opening of such proceedings are accorded preferential treatment. The proceeds from a public auction will therefore be distributed to the security holders (in the order of their ranking in the land register) and are independent from the insolvency proceedings. If the secured creditor has not been satisfied in full by the proceeds, it is still possible to submit the outstanding claim to the insolvency administrator.

TAX

Real Estate Transfer Tax

The purchase of real estate is subject to Real Estate Transfer Tax (RETT). The tax rate depends on the Federal State where the object of purchase is located and currently varies from 3.5 to 6.5%. The tax base for asset deals is the purchase price. According to statutory law, both parties are liable for the payment of RETT; however, the parties usually contractually stipulate that RETT shall be borne by the buyer. In case RETT becomes due because 95% or more of interests in a real estate holding partnership are transferred, RETT is payable by the partnership itself.

Due date of Transfer Tax

RETT is generally triggered already as of notarisation of the sale and purchase agreement (ie, purchase price payment is no precondition). In case RETT becomes due because 95% or more of interests in a real estate holding partnership are transferred, RETT is triggered upon transfer of partnership interest. The notary, the seller and the buyer have a statutory obligation to report the sale and purchase agreement to the tax authorities. This is also true in case shares or interests in property holding companies or partnerships are directly or indirectly transferred and RETT is triggered. After the tax office issues a RETT assessment, the tax is in general payable within one month of receipt. Where the sale and purchase agreement itself is subject to a condition precedent, RETT only becomes due upon the fulfilment of such condition. The new owner will be registered in the land register only after payment of the RETT (not relevant in a share deal scenario).

Income tax

If the property was held as a private asset for less than ten years, income from the sale is generally subject to income tax and solidarity surcharge (progressive tax rate, in total up to 47.5%). After a holding period of 10 years, capital gains from private property sales are income tax free. In case the property is part of a business (for example real estate trading business) the income from the property sale is always subject to income tax (progressive tax rate, in total up to 47.5%) and trade tax (TT, only applicable for German resident individuals). Foreigners are generally not subject to TT if they are not German tax residents and do not have a permanent establishment with a real estate business in Germany. TT varies from 8 to 16% depending on the municipality; however, TT is creditable against income tax to a certain extent. Commercial trading will generally be assumed if more than three properties are sold within five years and the respective properties were held by the seller for less than five years.

VAT

In general, the sale of real estate is either non-VATable or free of VAT (value-added tax). In case the property sold does not qualify as an independent business (for example if a real estate is only sold partly) the seller may opt for VAT (rate 19%), permitting it to deduct input VAT on services received. The buyer is liable for VAT (reverse charge), but is allowed to deduct input VAT at the same time. Thus, there is, in general, no cash leakage.

Other taxes

If the property was held by an individual, there are no other taxes.

Corporations, mostly with limited liability (*GmbH*), selling real estate are exposed to Corporate Income Tax (CIT) and a solidarity surcharge (*Solidaritätszuschlag*) thereon at a total rate of 15.83%. Further, TT will be due, except if the company fulfils the prerequisites of the extended TT deduction. Foreign corporations are subject to CIT but not to TT, provided they do not have a permanent establishment or a place of management in Germany.

Taxation in case of a share deal

1) RETT

In the event of a disposal of real estate by way of a share deal, RETT will be due if the buyer (and related entities) acquires directly or indirectly 95% or more of the shares or interests in the entity holding the real estate. Further, RETT is triggered if 95% or more of the interests in a real estate holding partnership are transferred to new partners within a five-year period. RETT will in this case be calculated based on the tax rate applied to a special tax value of the real estate which can be somewhat lower than the fair value depending on the nature of the real estate. While specific RETT blocker structures allowing for a transfer of economically more than 95% have been widely used in the past, such structures can do not work any longer due to recent legislation. However, it is still possible to avoid RETT if a 5.1% shareholding in PropCo (Property Company) is retained with the seller or if the shares in PropCo are acquired by more than one (unrelated) party and no party acquires 95% or more in PropCo.

2) Income taxes

If an individual sells shares in a property holding company (PropCo) which are held as private assets, in general, 60% of the capital gain is subject to income tax and solidarity surcharge (progressive tax rate, effectively up to 28.5% tax, *Teileinkünfteverfahren*).

However, in case the individual holds less than 1% in PropCo the capital gain from the sale is subject to a special capital gains tax (*Abgeltungssteuer*) of 26.4% (incl. solidarity surcharge). Upon the sale of PropCo shares held by another corporation, regularly 95% of the gain is effectively tax-exempt. Only the remaining 5% will be subject to CIT and TT but, however, subject to certain restrictions (tax rate effectively approx. 1.5%). In case, interest in a real estate holding partnership is sold, generally the taxation consequences are as if the seller would sell a fraction of the real estate (see questions 9.3 and 9.5 above on transparent taxation of partnerships). Due to the complexity and variety of the German tax law it is strongly recommended to obtain specific tax advice.

LEASES OF BUSINESS PREMISES

Applicable law

Such leases are mainly regulated by the Civil Code including special provisions regarding General Terms and Conditions (*Allgemeine Geschäftsbedingungen – AGB*). In addition, there are some specific laws, eg, regarding the legitimacy of indexation clauses and operational or heating costs.

Types of business lease

There are residential leases (*Wohnraummietverträge*), leases regarding other assets (*Mietverträge*), leases regarding assets, inventory, and rights or aggregated assets such as restaurants, hotels or companies (*Pachtverträge*) and land leases (*Landpachtverträge*).

Typical provisions for leases of business premises in Germany

(a) Length of term: Business leases are usually concluded for a fixed term and often contain prolongation options in favour of the tenant. The Civil Code (*Bürgerliches Gesetzbuch – BGB*) limits the fixed lease term to a maximum of 30 years. If a lease agreement shall be concluded for a fixed lease term of more than one year it has to comply with the statutory written form.

(b) Rent increases: Mostly business leases contain indexation clauses providing for a rent adjustment in accordance with the change of the Consumer Price Index. The validity of such clause requires that the lease is binding on the landlord for at least ten years and that it includes a rent adjustment upwards and downwards. Instead of such indexation clauses, business leases sometimes provide for a step-rent.

(c) Tenant's right to sell or sub-lease: Usually in business leases the tenant shall not be entitled to sub-lease the lease object without the landlord's prior written consent, such consent shall not be unreasonably withheld.

(d) Insurance: The majority of the business leases stipulate that the landlord must conclude a building insurance (fire, all risk, etc.) and often a landlord's liability insurance. The tenant is usually required to conclude insurances regarding its business (liability insurance), inventories or goods.

(e) Change of control of the tenant: Clauses relating to a change of control of the tenant are not very common in business leases. However, if the tenant is a subsidiary of a large group, the landlord may try to include such provision in the lease agreement.

10. REAL ESTATE (CONTINUED)

(f) Transfer of lease as a result of a corporate restructuring: Such clauses are also not very common. As a lease would usually be transferred by law in such an event it is usually not necessary to agree upon such a specific provision.

(g) Repairs: As statutory law provides for the landlord to keep the lease object in a proper condition and to carry out repairs related to the usual use of it, business leases usually contain provisions according to which the tenant shall be responsible for repairs of the lease object and shall bear the costs of such repairs. Under most leases the responsibility for maintenance and repair of roof and structure remains with the landlord.

Taxes payable on rent

The revenue generated from rent is generally not subject to VAT. However, in order to enable the landlord to deduct input tax, in business leases the parties regularly opt for the rent to be subject to VAT by waiving the statutory exemption from VAT. Such option for VAT is only possible if both parties are business entities and if the lease object is used for business purposes.

Termination and renewal of leases

If a business lease is concluded for an indefinite lease term it can be ordinarily terminated by either party within the statutory termination periods (3-9 months). A business lease concluded for a fixed lease term can only be extraordinarily terminated in the event of default. The events of default are defined in the Civil Code and regularly also contractually agreed upon. In the event of an extraordinary termination the defaulting party is likely to be exposed to compensation claims from the other.

There are no statutory provisions allowing the tenant to extend or renew the lease, however, many lease agreements provide for a prolongation option.

Liability of the former landlord and/or tenant of a business lease after the sale of the real estate

In case of a transfer of the ownership of the lease object, the lease agreement is transferred to the buyer by statutory law. Unless otherwise agreed, the buyer will become the beneficiary of any rental securities. However, if the acquirer does not return such securities to the tenant at the end of the term or does not fulfil other obligations, the tenant may claim these from the original landlord. The tenant is usually not entitled to transfer his obligations.

Green leases

A standard of a "green lease" has not yet been adopted. However, the Civil Code, as well as most lease agreements, contain provisions which may be qualified as "green" as they seek to promote greater sustainable use of the lease object and to reduce the "environmental footprint". Further, the landlord shall be entitled to any measures leading to energetic modernisation or to a reduction of consumption of resources and under certain circumstances even be entitled to increase the rent due to such measures. Further, leases usually contain provisions providing for operating costs to be allocated to the tenants in accordance with their consumption or causation.

PUBLIC LAW PERMITS AND OBLIGATIONS

Applicable law

Public building law is governed by various federal and state laws, such as the Federal Building Code (*Baugesetzbuch – BauGB)*, the Federal Ordinance on Land Use (*Baunutzungsverordnung – BauNVO*) and the Building Ordinances (*Landesbauordnungen – LBOs*) of the federal states. These regulations refer to actual building, zoning and planning requirements, as well as to requirements concerning the actual construction. The Soil Protection Act (*Bundesbodenschutzgesetz – BBodSchG*) and relevant state regulations, complemented by the Soil Protection and Contamination Ordinance (*Bodenschutz- und Altlastenverordnung – BBodSchV*), aim to sustainably protect and restore the soil's function.

Expropriation

Expropriation is regulated by the Basic Law and shall only be permissible for the public good. The requirements of such expropriation are very high. Compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected.

Bodies controling land/building use and/or occupation and environmental regulation

The responsibility of public authorities for a matter depends on competence and jurisdiction. Reliable information on these matters can therefore be obtained from the competent public authority on state, municipal or city level. When entering into sales negotiations, relevant documentation is commonly provided by the seller who requests such information from the competent authorities.

Permits or licences required for building

The construction, change or change of use of a construction generally requires a building permit, unless otherwise stipulated by law. Building works and/or the specific use of a real estate may be subject to additional permits and licences, if specifically regulated by law.

Building permits shall be granted if the construction project does not inflict with any public law provisions or rights of neighbours to be examined within the approval procedure. Implied permission is not commonly obtained, in particular protection due to long-term use and/or continued existence is only acknowledged under very strict circumstances.

Costs of permits and timing

The charges for building/use permits are stipulated in the Construction Charges Ordinance (*Baugebührenordnung – BauGO*) and

depend on the extent of the construction project. According to the respective Building Ordinances of each state, the building control authority shall generally give its decision on the construction application within one month after the full application documents have been provided.

Protection of historic monuments

The individual states are responsible for the protection of historic monuments and have enacted relevant state regulations. Reporting requirements are attached to the transfer of a historic monument, when transferred.

Registries on contamination and pollution of real estate

Registries regarding contaminated surfaces and/or sites are kept at the competent soil conservation authorities. Information requests may be either made by the owner or by another party with the owner's consent.

Environmental clean-up

Environmental clean-up is, in general, mandatory in a situation, which with a sufficient degree of probability in an unhindered course of events, will result in damage. The applicable law depends on the kind of contamination and the time the deposition was completed.

Assessment and management of the energy performance of buildings

The energy performance of buildings is assessed in energy performance certificates. These certificates contain general energy-related information with regard to the building, such as the energy source used for heating and the energy indices. Energy performance certificates are mandatory for all buildings according to the Energy Saving Ordinance (*Energieeinsparverordnung – EnEV*). The Energy Saving Ordinance for example, aims to save energy consumption in buildings by imposing various energy efficiency requirements. The Ordinance sets out different energy efficiency standards and measures for both newly constructed and existing buildings. The Ordinance further regulates the issuance of building energy performance certificates which contain the energy-related data of the building and serve the purpose of providing prospective tenants and buyers with the relevant information.

11. EMPLOYMENT

Germany has over 400 universities and universities of applied sciences (UAS). Almost 70,000 engineers and over 67,000 mathematicians and natural scientists graduated in 2011, with tendency to rise. Through a combination of on- and off-the-job training in Germany's so-called dual education system, hiring and training costs are reduced (especially for skilled craftsmen and technicians) and recruitment risks minimised. Vocational colleges closely cooperate with 470,000 companies in Germany, ensuring that education meets specific industry needs. Highly flexible working practices such as fixed-term contracts, shift systems, and 24/7 operating permits contribute to enhance Germany's international competitiveness as a suitable investment location for internationally active businesses.

REGULAR EMPLOYMENT

Employees are generally hired by signing an employment contract. A written contract is, however, not necessary. The employer and the employee have to agree on the main terms of the employment.

German employees benefit from extensive labour protection rules if they are employed for at least six months with the same employer. The protection applies unless:

- the employee is employed less than six months (during this initial period of six months, an employee can be terminated at any time with a two weeks' prior notice);
- the employer has less than 10 employees; or
- the employee has been employed for a restricted period of time (maximum of two years).

If none of the three limitations mentioned above apply, the employee can generally not be terminated by the employer without a "special reason". Such special reason can be:

- dismissal for personal reasons (eg, employee physically or mentally not capable of performing the work);
- dismissal for conduct related reasons (eg, misconduct of the employee); or
- dismissal for business reasons (eg, plant closure, restricting or insufficient work).

Please note that the reasons for dismissal that are not related to an individual person (eg, insufficient work) do require the employer to assess, based on social conditions, what employees he may terminate.

TEMPORARY EMPLOYMENT

Temporary employment means that a company can hire staff without concluding an employment contract. Instead, the company hires staff from a temporary employment agency (*Zeitarbeitsunternehmen*) by concluding a service contract which regulates the conditions under which the employees are sent to the hiring company.

The employee is legally employed by the temporary employment agency, which means that the employee receives financial remuneration only from the temporary employment agency, as no contractual relationship exists between the hiring company and the employee. The hiring company pays a certain fee to the temporary employment agency as set out in the service contract.

The duration and the terms of termination of the service of the employee in the hiring company are not subject to labour regulations, but only set out in the service contract between the hiring company and temporary employment agency.

The general working conditions, such as weekly working hours and wages, are usually determined in collective agreements between unions and the respective employers' associations of the temporary employment industry. These collective agreements provide flexible working hour models by using working hour accounts to adjust the demand of the hiring company and working time regulations.

EMPLOYMENT CONTRACTS

A contract of employment setting out the terms and conditions of the employer-employee relationship is usually drawn up in writing (verbal agreements are also possible). In principle, the contract can be formulated in any language. However, a binding German version is advisable as German courts require a German translation of any contract drawn up in another language in the event of any legal proceedings being instigated.

There is no legally fixed form for a contract of employment. Nonetheless, it is highly advisable to define certain points, such as:

- the description of the location and activity
- the date of appointment and notice periods (in the case of fixed-term employment contracts the duration of the contract)
- the daily or weekly working time
- arranging of a probationary period
- the level of the wage (gross) and possible bonuses
- vacation entitlement
- non-disclosure agreements or non-compete obligations
- contractual penalties

PROTECTION AND BENEFITS

Protection

In contrast to some other industrialised countries, the core social security in Germany is financed collectively by means of a process of redistribution. The current costs (for pensioners, sick people or those in need of nursing care, and unemployed people) are paid directly from contributions by employees and employers.

Social security contributions are made up of:

- health insurance
- nursing care insurance
- pension insurance
- unemployment insurance
- accident insurance

Generally speaking, social security contributions are roughly shared equally by employer and employee. Only the costs for accident insurance are exclusively borne by the employer. In total, the employer's share of social insurance contributions amounts to approximately 21%of the employees gross wage.

Benefits and incentives

Labour-related incentives play a significant role in reducing the operational costs incurred by new businesses. Germany's Federal Employment Agency (*Bundesagentur für Arbeit*) and the German states offer a range of labour-related incentives programs designed to fit the different company needs when building a workforce.

The range of programs offered can be classified into four main groups: programs focusing on:

- recruitment support
- training support
- wage subsidies
- on-the-job training

Labour-related incentives are available throughout Germany; independent of factors such as company size, industry sector, or investment project location. Programs can be carried out and adjusted by local authorities according to investor needs – usually in close cooperation with the investor.

DEALING WITH TRADE UNIONS AND WORKS COUNCILS

Employees' representation in Germany has a binary structure: trade unions that set the framework for working conditions, such as collective wage agreements, for whole sectors or single companies, defining wage levels and working time on the one hand – and works councils (*Betriebsräte*) that are elected by employees and represent their interests on company level. They shape and supervise the execution of the frameworks set by trade unions and laws in the company.

Works council

A works council may be established in companies with five or more employees.

Works councils are in-house committees representing the interests of the employees within a company. Their activities range from information and non-binding consultation rights to exercising co-determination rights in organisational and social affairs. However, the works council is generally prohibited from becoming involved in corporate governance.

Rights regarding the formation of works councils are governed by the German Works Council Constitution Act (*Betriebsverfassungsgesetz – BetrVG*). Accordingly, works councils can be formed by the employees through election (no quorum required). Works council members are elected for four years by the employees in direct and secret elections. Candidates do not have to be union members.

Works councils have informative and advisory rights relating to company internal policy and organisation. Specifically, they can negotiate rules pertaining to organisational and social issues, and must be consulted regarding specific personnel decisions. The employer and works council can negotiate rules on matters such as:

- end and beginning of daily working hours (not the duration as such)
- vacation schedules
- internal behavioural rules
- safety issues (accident prevention)
- surveillance installations
- internal social facilities (eg, canteens)
- general company wage structures (but not individual salaries)

Trade unions

Trade unions in Germany have a history reaching back to the German revolution in 1848, and still play an important role in the German economy and society. The most important labour organisation is the German Confederation of Trade Unions (*Deutscher Gewerkschaftsbund – DGB*), which represents more than 6 million people (31 December 2014) and is the umbrella association of several single trade unions for special economic sectors.

In the energy sector, the largest trade union is the Union for the Mining, Chemical and Energy industries (*IG Bergbau, Chemie, Energie, – IG BCE*), with about 675,000 members, organising employees in mining, chemical and energy industries.

Several energy companies are organised in an employer association (*Arbeitgeberverband energie- und versorungswirtschalfticher Unternehmen – AVEU*) that is negotiating the work conditions, in particular any rises of salaries of employees, with the trade union.

11. EMPLOYMENT (CONTINUED)

FOREIGN EMPLOYEES, EXPATRIATES AND SECONDEES

Employees from an EU Member State, Switzerland, Liechtenstein, Norway or Iceland, can live and work in Germany without any restrictions.

However, transition regulations do apply to the new EU Member States Romania and Bulgaria. Although their citizens do not require a visa, they do require a special labour permit. It is issued by the special department for foreign employees of the German employment agency (*Zentrale Auslands- und Fachvermittlung der Bundesagentur für Arbeit – ZAV*). The ZAV does also help foreign employees with their application for a labour permit or permission to access the labour market.

All other foreigners require a visa if they wish to stay for a long duration. For this purpose employees should contact the German Mission in your home country. An exception applies to citizens from Australia, New Zealand, the USA, Canada, Israel, Japan and the Republic of Korea: they can also apply for the necessary residence permit in Germany from the responsible immigration authorities.

How quickly and uncomplicated your labour permit can be issued, depends to a considerable extent on the profession. At the moment engineers, scientists and computer specialists are particularly in demand, as are fully qualified doctors and healthcare personnel. Specialists from other service sectors also have good chances, such as from the hotel and catering industry.

12. TAX

On acquiring a business or a company or investing in Germany, specialist tax advice should be sought at an early stage. The following is intended to be an overview of the most relevant areas of tax law.

TAX RESIDENCE FOR CORPORATES

Corporate companies, such as the limited liability company (*Gesellschaft mit beschränkter Haftung – GmbH*) or the stock corporation (*Aktiengesellschaft – AG*), based in Germany or with an executive board in Germany are liable to corporate income tax on globally generated income. Dividends that have been generated and taxed abroad may be exempt from taxation in Germany or taxes paid in a foreign country can be offset against taxation in Germany.

Corporate companies who are neither based in Germany, nor have an executive board in Germany are only liable to corporate income tax on income generated inside Germany (eg, via a permanent establishment, dividends or licenses).

TYPES OF TAX AND CALCULATION METHODS

Corporate tax

Germany does not have a consistent nationwide tax rate for companies. Instead, companies are usually taxed on two levels: On the first level, corporations – such as the limited liability company or the stock corporation – are subject to corporate income tax (*Körperschaftssteuer*), whereas partnerships are subject to personal income tax (*Einkommenssteuer*). Both taxes are levied by the federal government.

On the second level, all business operations – corporations and partnerships alike – are subject to the trade tax (*Gewerbesteuer*), which is imposed by local municipalities (ie, the town or city where the company is based).

As a result of the fixed and variable components, the overall tax burden can differ by up to 10% between locations.

Taxable income (ie, annual business profit) forms the tax base for corporate income tax. Under German commercial law, corporate company annual profit is calculated according to the accrual basis accounting method. This is recorded in the annual financial statement and forms the basis for determining taxable income.

However, German tax law provides different accounting options and income correction rules, meaning that the taxable income usually differs from the annual profit determined in the financial statement under commercial law.

Corporate income tax is levied as a flat nationwide tax at a rate of 15% of taxable corporate income.

In addition, a solidarity surcharge (*Solidaritätszuschlag*) is added on top of the corporate income tax. The solidarity surcharge was introduced in 1995 to finance German reunification. The surcharge is 5.5% of the 15% corporate income tax; creating a total of 0.825% of taxable income. Thus, corporate income tax and solidarity surcharge add up to a total of 15.825%.

Personal income tax for limited partnerships

Limited partnerships (KG) are not separate legal entities but associations of partners; with the partners themselves generally being subject to all rights and obligations (see chapter 3 above).

Accordingly, partnerships are not subject to corporate income tax (*Körperschaftssteuer*) but to personal income tax (*Einkommenssteuer*), with the individual tax rate applicable to each shareholder.

The personal income tax rate starts at:

- 14% for an annual income exceeding the tax-free allowance of €8,354
- it rises progressively to a maximum personal income tax rate of 42% which is applicable to annual income of €52,882 or more
- an increased tax rate of 45% applies to every euro in excess of earnings of €250,731 per year

These tax rates also apply for personal income tax for employees.

As with corporate income tax, the solidarity surcharge is also added to personal income tax. Accordingly, the solidarity surcharge is 5.5% of the individual personal income tax rate of every partner. If a partner has an individual income tax rate of 30%, the combined personal income tax + solidarity surcharge burden on the partner's share in the profits would add up to 31.65%.

Generally, distributed and retained earnings of partnerships are subject to personal income tax with progressively rising tax rates. In order to reduce the tax burden for partnerships (making it similar to the tax burden of corporations), the reform of company taxation introduced two options:

- To avoid a progressively rising personal income tax rate, partnerships can apply for a flat taxation rate of 28.25% plus solidarity surcharge on retained earnings - leading to a flat taxation rate of 29.8% equalling the tax burden for corporations. (If retained earnings (taxed according to flat taxation) are distributed to partners at a later date, the distributed earnings are, under certain conditions, subject to a subsequent taxation rate of 25%).
- Trade tax payments for both distributed and retained earnings can be offset against personal income tax. Please refer to our following section on trade tax for more information.

12. TAX (CONTINUED)

Trade tax

All commercial business operations in Germany are liable to pay trade tax (*Gewerbesteuer*) irrespective of their legal form.

The trade tax is set by local authorities which means it can vary from one municipality to the next. However, trade tax is generally the same rate for all businesses within one municipality. Trade tax in Germany is currently set at between 7 and 17%.

The corresponding rate of trade tax depends on two components:

- the tax base rate (3.5% throughout Germany), and
- the multiplier (*Hebesatz*) stipulated individually by every municipality.

The taxable income of the company is multiplied with the tax base rate (3.5 %) which results in the so-called tax base amount. The tax base amount is then multiplied with the corresponding municipal multiplier, which results in the sum total of trade tax which is due.

The multiplier is set by each municipality. On average, it is between 350 and 490% but may not total less than 200%. There is no upper limit for the municipal multiplier (*Durchschnittshebesatz*). It is generally higher in urban areas than it is in rural areas, although it does currently not total more than 490% in any of the large cities.

VAT

Value-added tax (VAT) is due on any supply of goods or services made in Germany, which are taxable supplies made by taxable persons in the course or furtherance of a business carried on by them. Supply includes all forms of supply. It is not restricted to the provision of goods and services by way of sale but can apply equally to other forms of transaction.

Supply does not include anything done other than for a consideration. However, certain actions carried out for no consideration are deemed to be supplies; for example, the giving of business gifts, European Union (EU) dispatches within the same legal entity (such as a corporation), and the private use of business assets.

Certain transactions are not subject to German VAT; for example, cash payments, the assumption of a debt as a form of payment and genuine compensation payments.

The standard rate of VAT is 19%. There is a reduced rate of 7% for certain goods and services, including, for example, food, plants, and animals, books and newspapers, entrance fees to cultural sites etc.

The list of VAT exemptions with input tax recovery (zero-rated supplies) includes, for example: exports, supply, import, repair, and maintenance of ships and aircraft under certain conditions, the supply and import of gold to central banks etc.

If a business makes taxable supplies in Germany, it will be required to notify the German tax authorities of the date of commencement of taxable activities. It will receive a fiscal registration number (*Steuernummer*).

If a business makes intra-Community supplies in Germany, it will be required to notify the German tax authorities of the date of commencement of such activities. It will also receive a VAT identification number (*Umsatzsteuer-Identifikationsnummer*).

Certain entities are not required to submit periodical VAT returns and are not liable for German VAT such as, for example, non-taxable legal entities and small entrepreneurs.

PREFERENTIAL TAX POLICIES

If a German subsidiary company distributes profits to its foreign parent company (a dividend payment) then a 25 per cent rate of withholding tax (*Kapitalertragssteuer*) is payable in Germany.

In the event of the existence of a double taxation agreement (DTA) between the Federal Republic of Germany and a foreign nation, the rate of withholding tax that is paid can be reimbursed according to the agreements made in the corresponding DTA.

As a rule, dividend payments on the basis of a DTA are taxed at a reduced rate of taxation at levels of just 5.10 or 15%. At a partial level, there is also the possibility of an initial exemption from withholding tax.

The withholding tax paid in Germany can also be credited against the tax liability of the parent company which exists abroad or the parent company is made exempt from the taxation in regard to the received dividends. In effect, this means that no double taxation takes place.

Within the EU, dividend payments between a corporate domestic subsidiary company and a corporate foreign parent company may be tax-free over and above a 10 per cent stake.

13. INTELLECTUAL PROPERTY

COPYRIGHT

In order to qualify for copyright protection a work must generally be the "author's own intellectual creation". Examples are literary, artistic or musical works. The work must be original (it must show an individuality of a certain creative level beyond the average of a well-skilled and trained person in the area). All such works are secured under the German Copyright Act (*Urheberrechtsgesetz – UrhG*).

There are no formalities or costs involved to create a copyright. The author of a work is the first owner of copyright in it.

The copyright applies for the lifetime of the author plus 70 years after the author's death.

The German Copyright Act states that the copyright protects the author's intellectual and personal relationship with his work, and also the use of his work. Therefore, under German copyright law the author of a copyright-protected work (ie, the owner of the copyright) has certain exclusive rights. A violation of these rights may be prevented by the author of the copyright-protected work. The author can in particular claim damages and file for injunctive relief.

A copyright cannot be transferred but only individual rights under the copyright can be licensed to other parties (eg, publication rights).

PATENTS

An invention qualifies for patent protection if it is new, capable of industrial application and involves an inventive step. Patents are secured under the Patent Act (*Patentgesetz – PatG*).

An application for a German patent must be filed with the German Patent and Trade Mark Office (*Deutsches Patent- und Markenamt – DPMA*). The filing fee is €40 for an electronic application or €60 for a paper-based application. Other fees may apply (a complete list is available on the Patent and Trade Mark Office's website at www.dpma.de/patent/gebuehren, accessed May 2016). The application for the patent must describe the invention in sufficient detail to enable an expert to use or deal with the invention. An application for a European patent (covering Germany and other designated European Patent Convention member countries) may be made either at the DPMA or through the European Patent Office (EPO) in Munich, The Hague or Berlin.

The lifetime of a patent is 20 years from the date of filing the application for the patent (provided that maintenance fees are paid).

A patent owner can prevent the unlawful exploitation of the patent. The patent claim covers any product which is the subject of the patent, any process which is the subject of the patent and products directly obtained from the process.

The general principle is that a patent belongs to its inventor. However, the patent right may be assigned to a person other than the inventor.

An employee who makes an invention during the course of his employment must notify his employer of the invention to enable the employer to decide whether to apply for patent protection under the Employee Inventions Act (*Gesetz über Arbeitnehmererfindungen – ArbnErfG*).

TRADEMARKS

The relevant criteria for trademarks are based on the First Council Directive 89/104/EEC of 21 December 1988 (First Trademarks Directive) to approximate the laws of the Member States relating to trade marks (OJ 1988 L40/1 – EC Trade Marks Directive). In summary, trade mark protection is available for any sign that is capable of distinguishing the goods or services of one undertaking from those of a different undertaking. Under German law trademarks are secured under the Trade Mark Act (*Markengesetz – MarkenG*).

An application for registration of a German trade mark must be made to the German Patent and Trade Mark Office (*Deutsches Patent- und Markenamt – DPMA*), specifying the goods or services for which the trade mark is to be registered. The fees for registration of a trade mark depend on the scope of the application. The application fee to register a trade mark in one class is €290 for an electronic application and €300 for a paper-based application. A list of the current fees (including fees for additional classes and renewal fees) is available on the DPMA's website (dpma.de/marke/gebuehren, accessed May 2016).

Trade mark registration lasts for an initial period of ten years from the application date and is renewable indefinitely for subsequent ten-year periods on payment of a renewal fee.

The acts which constitute infringement of a registered trade mark are based on those set out in the EC Trade Marks Directive. These acts are in particular the use of the relevant trade mark, offering of trade mark related products or services and the import or export of trade mark related products.

The owner of a trade mark is its registered proprietor. This may be a natural or legal person or a partnership with the capacity to acquire and incur liabilities. By changing the registration details, the ownership can be transferred to another person.

14. INSOLVENCY

Buying a company out of insolvency can be a quick and cost-effective alternative for foreign investors to enter the German market or expand the existing market presence in Germany. The motives behind such transactions are often to gain access to the European markets and to technologies and know-how. The interest in acquiring insolvent companies is also growing because restructuring and a going concern lies at the centre of the statutory framework. All stakeholders, especially customers and employees, are informed in due time and become involved in the procedure, which can significantly reduce any possible damage to the company's image.

SPECIAL ASPECTS TO ACQUISITION OF INSOLVENT COMPANIES

Acquisitions of insolvent companies involve a range of special aspects which have to be taken into account by a foreign investor. The main task is to reconcile different interests of banks, employees, labour unions, customers, vendors, landlords/lessors. In addition, buying a company out of insolvency involves generally greater time pressure than normal M&A transactions. Usually, the M&A acquisition is carried out in form of an asset deal. As a result, the assets required for the company's operation are transferred to the buyer's company created to continue the activities of a former company in liquidation. This is the advantage that the buyer is not liable for any liabilities of the insolvent company such as liabilities to banks or retirement benefit obligations.

A further advantage is that insolvency law allows more easily adjusting the staff structure or early termination of unfavourable contractual obligations (eg, expensive lease contracts). Typically, a transfer company is put in place with the aim to continue an employment relationship with the staff laid off from the insolvent company for up to 12 months.

Phases of an insolvency proceeding

The following overview sets out the different stages of an insolvency proceeding. As a foreign investor would generally acquire an insolvent company through an asset deal, he would only intervene at the point "disposal of assets". All other phases have to be carried out by the insolvency administrator. Nonetheless, the knowledge of all phases of an insolvency proceeding is important because investors can discuss in prior stages to the disposal with the insolvency administrator how and what bundle of assets will be offered to investors. This allows investors to indicate to the insolvency administrator in time what kind of restructuring he should carry out to render the target more attractive.

Pre-opening stage: insolvency court examines if insolvency proceedings are to be opened. Preliminary insolvency receiver is appointed. Insolvency court vests certain powers in preliminary insolvency receiver to safeguard that estate is secured if, and until, the proper insolvency proceedings are opened.

Formal opening of insolvency proceedings: usually after one to three months after the pre-opening stage, a proper insolvency receiver is appointed. The Insolvency debtor may not dispose of assets any more. The Insolvency receiver holds the estate. Payments are to be made to the insolvency receiver only. The Board of creditors is established.

Decision how to proceed with estate: about one to three months later, the insolvency receiver presents reports on status of estate and whether any company held by the insolvency debtor should continue operations or be disposed of. To this end, the insolvency receiver invites the creditors to a meeting.

Collecting and securing of assets: after the formal opening of the insolvency proceedings, the insolvency receiver starts collecting and securing assets. This includes demanding that assets belonging to the estate be handed over, but also terminated disadvantageous contracts. This phase may in principle continue until the insolvency proceedings are closed.

During this time, the insolvency receiver also communicates with secured creditors and ascertains their positions. The secured creditors should ensure that the insolvency receiver is aware of their position by eg, notification to the insolvency receiver. Where secured creditors enjoy rights of segregation, they may demand that the insolvency receiver hands over the assets or refuse any such requests by the insolvency receiver and dispose of the assets on their own account. Where the insolvency receiver disputes the creditor's position, the competent court – not the insolvency court – will decide; there is no general jurisdiction of the insolvency court.

Filing of insolvency claims: following the opening of the insolvency proceedings, the insolvency receiver invites the creditors to file their claims with the insolvency receiver so that the claims may be registered in the insolvency schedule. The insolvency receiver usually fixes a deadline of about 1 to 3 months. This deadline is, however, not binding. Claims can be filed until the very end of the insolvency proceedings. Still, belated filings may cause additional costs for late creditors.

While the insolvency proceedings are pending, the filing of a claim with the insolvency register is the only way to enforce a claim against the insolvency debtor. The German courts will not accept any court actions. The German courts will in general also not enforce foreign judgments or arbitral awards, awarding the claim where the claim has not been filed with the insolvency schedule.

Creditors' meeting to review claims registered in the insolvency schedule: at a date to be fixed by the insolvency court, but usually close to the deadline for filing of claims, the creditors and the insolvency receiver meet to discuss the claims registered in the insolvency schedule. At this meeting, the insolvency receiver, the insolvency debtor or any creditor may object against a claim in full or

in part. To the extent that a claim is not objected against, it will be "acknowledged". This has the same effect as if a German court has ruled that the claim exists.

Filing suit against claims objected against: where a claim has been objected against, the creditor can sue the objecting party. The law suit is to be filed with the court that generally has jurisdiction under the applicable contracts or national or international law. Again, there is no general jurisdiction of the insolvency court for objected claims. In fact, where the claim is subject to an arbitration clause, the claim must be filed with the proper arbitral tribunal. There is no general deadline to file a claim, but limitation periods must be observed. Where a creditor is successful, the objection is removed and the claim is acknowledged in the insolvency register. Proceeds will then be paid on the basis of the general principles applying to the distribution of proceeds, ie, by quota.

Disposal of assets: where it has been decided that the insolvency debtor's estate is to be disposed of, the insolvency receiver will start disposing of and realising the assets. This usually happens by sale to third parties. In theory, this stage may continue right until the end of the insolvency proceedings.

Distribution of proceeds to creditors: during and after the disposal of assets, the insolvency receiver will, from time to time, make preliminary distributions of proceeds, with creditors being considered depending on whether they are secured creditors and/or enjoy other privileges. Creditors will usually receive only a quota of their claim, again depending on their overall position. The final distribution is made when all assets have been disposed of. This often takes a number of years.

Reorganisation of insolvency debtor's estate: as an alternative to the disposal of assets and distribution of proceeds, the parties, with the approval of the insolvency court, can also agree in an "insolvency plan". This is, in essence, a road map to reorganising the insolvency debtor so that he may again operate with a profit. Creditors will then receive parts of these profits over time. Agreeing on an insolvency plan usually requires that the creditors accept (substantial) haircuts on their claims.

End of insolvency proceedings: the insolvency proceedings end when all the assets have been disposed of and all proceeds been distributed or, in case of an insolvency plan, when the conditions laid down in the insolvency plan are fulfilled. From this point on, the insolvency receiver's office ends. The insolvency debtor can again dispose of and handle his assets. Claims can again be filed against the insolvency receiver without having to file them with the insolvency register.

Typically, the end of the insolvency proceedings is reached two to five years after the formal opening.

15. LITIGATION

Large commercial disputes in Germany are generally resolved through litigation or arbitration (see below); however litigation is the most frequently used. The arbitration-friendly environment created by the revision of the German arbitration law in 1998 has led and is still leading to an increasing number of arbitrations, particularly in cross-border disputes.

COURT SYSTEM

The judicial system comprises three types of courts. Ordinary courts, dealing with criminal and most civil cases, are the most numerous by far. Specialised courts hear cases related to administrative, labour, social, fiscal, and patent law. Constitutional courts focus on judicial review and constitutional interpretation. The Federal Constitutional Court (*Bundesverfassungsgericht*) in Karlsruhe is the highest court and has played a vital role through its interpretative rulings on the Basic Law.

The ordinary courts are organised in four tiers, each of increasing importance. At the lowest level are several hundred local courts (*Amtsgerichte; sing., Amtsgericht*), which hear cases involving minor criminal offenses or small civil suits. These courts also carry out routine legal functions, such as probate. Some local courts are staffed by two or more professional judges, but most have only one judge, who is assisted by lay judges in criminal cases. Above the local courts are more than 100 regional courts (*Landgerichte*; sing., *Landgericht*), which are divided into two sections, one for major civil cases and the other for criminal cases. The two sections consist of panels of judges who specialise in particular types of cases. Regional courts function as courts of appeals for decisions from the local courts and hold original jurisdiction in most major civil and criminal matters. At the next level, Higher Regional Courts (*Oberlandesgerichte; sing., Oberlandesgericht*) primarily review points of law raised in appeals from the lower courts. (For cases originating in local courts, this is the level of final appeal.) Appellate courts also hold original jurisdiction in cases of treason and al activity. Similar to the regional courts, appellate courts are divided into panels of judges, arranged according to legal specialisation. Crowning the system of ordinary courts is the Federal Court of Justice. It represents the final court of appeals for all cases originating in the regional and appellate courts and holds no original jurisdiction.

Specialised courts deal with five distinct subject areas: administrative, labour, social, fiscal, and patent law. Like the ordinary courts, they are organised hierarchically with the Land court systems under a federal appeals court. Administrative courts consist of local administrative courts (*Verwaltungsgerichte; sing., Verwaltungsgericht*) higher administrative courts (*Oberverwaltungsgerichte; sing., Oberverwaltungsgericht*), and the Federal Administrative Court (*Bundesverwaltungsgericht*). In these courts, individuals can seek compensation from the government for any harm caused by incorrect administrative actions by officials. For instance, many lawsuits have been brought in administrative courts by citizens against the government concerning the location and safety standards of nuclear power plants. Labour courts (*Arbeitsgerichte; sing. Arbeitsgericht*) also function on three levels and address disputes over collective bargaining agreements and working conditions. Social courts (*Sozialgerichte; sing., Sozialgericht*), organised at three levels, adjudicate cases relating to the system of social insurance, which includes unemployment compensation, workers' compensation, and social security payments. Fiscal courts (*Finanzgerichte; sing., Finanzgericht*) hear only tax-related cases and exist on two levels. Finally, a single Federal Patents Court (*Bundespatentgericht*) in Munich adjudicates disputes relating to industrial property rights.

Except for Schleswig-Holstein, each Land has a state constitutional court (*Landesverfassungsgericht*). These courts are administratively independent and financially autonomous from any other government body. For instance, a state constitutional court can write its own budget and hire or fire employees. These powers represent a degree of independence which is unique in the government structure.

COURT PROCEEDINGS

In civil and commercial matters, the civil courts generally have jurisdiction. The local courts and the regional courts have jurisdiction as the courts of first instance. Further, the higher regional courts, notably the Higher Regional Court in Düsseldorf, have jurisdiction to hear petitions against certain decisions of the cartel authorities. Different rules apply to claims for which administrative courts, labour courts, fiscal courts or social courts have jurisdiction.

As a general rule, where the action has to be filed depends on the value of the matter in dispute. The regional courts generally have jurisdiction to hear all civil and commercial matters where the value in dispute exceeds €5,000. Local courts have jurisdiction if the value in dispute is below that threshold. Therefore, large commercial disputes are generally brought before the regional courts. Parties must generally be represented by an attorney in all courts higher than the local courts.

The regional courts are organised in chambers (*Kammern; sing., Kammer*) of three professional judges. In large commercial disputes, the full chamber hears the case, except possibly when the proceedings present no major difficulties in terms of both facts and law.

In larger regional courts, there are special chambers for commercial matters (*Kammern für Handelssachen*) with one professional judge presiding and two members of the business community sitting as lay judges. However, legal disputes are only referred to the competent chamber for commercial matters on motion of one of the parties.

Larger regional courts also have special chambers for certain kinds of legal disputes, for example, unfair competition law, intellectual property law, maritime law and banking law. These specialised chambers are organised either as chambers for commercial matters or as standard civil chambers.

Special patent dispute chambers at certain regional courts (most importantly in Düsseldorf and Mannheim) have jurisdiction for patent disputes.

Court proceedings are public. The court can exclude the general public in certain circumstances, for example, to protect:

- important trade or other secrets
- the life or safety of a person
- minors
- state interests

In commercial cases, such exclusion is very rare.

This general principle of publicity (*Öffentlichkeitsgrundsatz*) allows the general public to be present at hearings (subject to available space) but does not extend to picture or sound recordings or to TV/radio transmissions from the court room.

SPECIAL RULES ON DISPUTE RESOLUTION AND GOVERNING LAW FOR FOREIGN INVESTMENT

German law does not provide for any special rules on dispute resolution for foreign investors. Foreign investors should, however, take into account that special rules can apply if a conflict of laws arises with regard to the choice of law or the choice of the jurisdiction.

Choice of law

Generally, courts respect a choice of law clause in a contract. As a basic principle under German private international law, the parties can unrestrictedly choose which law governs their contract (Article 3, Regulation (EC) 593/2008 on the law applicable to contractual obligations – Rome I).

However, if the parties have chosen a certain law, but all facts underlying the contract point to another jurisdiction, mandatory provisions of that jurisdiction apply. The free choice of law is also restricted in relation to, for example, consumer or employment contracts.

Certain mandatory provisions of German law, for example, relating to exchange regulations or embargoes, may apply despite an otherwise valid choice of law.

Choice of jurisdiction

Generally, courts respect the choice of jurisdiction under a contract. Under Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) and under the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention), a jurisdiction clause is generally respected if certain (mostly formal) prerequisites are met, unless it violates certain special provisions relating to jurisdiction for insurance matters, consumer contracts and employment contracts. Further, in certain areas the courts have exclusive jurisdiction under the Brussels Regulation and the Lugano Convention that cannot be waived by the parties. These areas include proceedings on:

- rights *in rem* in real property
- the validity of the dissolution of companies or decisions of their organs
- registration or validity of patents, trademarks and designs

Where the Brussels Regulation and the Lugano Convention do not apply, the parties to a contract can agree on jurisdiction in commercial transactions, unless a different court has exclusive jurisdiction for a particular subject matter, such as certain insurance matters or rights *in rem* in real property. However, the chosen jurisdiction is exclusive only if this has been (explicitly or implicitly) agreed. There is no presumption in favour of exclusiveness like under the Brussels Regulation.

16. ARBITRATION

The most prominent German arbitration organisation is the German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit – DIS*). The DIS was formed in 1992. The DIS Arbitration Rules (DIS Rules) which are in force since 1 July 1998 follow German arbitration law in all major aspects. The International Chamber of Commerce (ICC) is also widely used as an arbitration institution.

GERMAN ARBITRATION LAW

The law on arbitration is contained in sections 1025 to 1066, 10th book, of the Code of Civil Procedure (*Zivilprozessordnung – ZPO*). The text can be found in German and English at www.dis-arb.de. The 10th book of the ZPO, in effect since 1 January 1998, regulates all arbitration proceedings with their seat in Germany without distinguishing between domestic and international arbitration. German arbitration law is based on the UNCITRAL Model Law, with only a few minor differences.

Principles

German arbitration law contains a small number of mandatory provisions, including the following:

- the parties must be treated equally and each party must be given a full opportunity to present its case (section 1042 (1) ZPO)
- counsel cannot be excluded from acting as authorised representatives (section 1042 (2) ZPO)
- any default of a party justified by that party to the arbitral tribunal's satisfaction will be disregarded (section 1048 (4) ZPO)
- an arbitral tribunal has the power to rule on its own jurisdiction (section 1040 (1) ZPO)
- several provisions relating to the right of recourse to the state courts:
  - the right to request the court to appoint the arbitrator or arbitrators if the arbitration agreement grants greater rights to one party in relation to the composition of the arbitral tribunal (section 1034 (2) ZPO);
  - the right to request the court to rule on the challenge of an arbitrator if the arbitral tribunal rejects the challenge (section 1037 (3) ZPO);
  - the enforcement of interim measures ordered by the arbitral tribunal through the state courts (sections 1041 (2) and (3) ZPO); and
  - the right to challenge an award made in Germany before the state courts (section 1059 ZPO).

Arbitration agreement

A valid arbitration agreement must make clear that certain or all disputes between the parties arising out of a defined legal relationship will be finally settled by an arbitral tribunal to the exclusion of the state courts. General statutory provisions regarding the validity of a contract apply to an arbitration agreement.

The formal requirements for an enforceable arbitration agreement are as follows (section 1031 ZPO):

- the arbitration agreement must be contained either in a document signed by the parties or in an exchange of letters, faxes, telegrams or other means of telecommunication which provide a record of the agreement
- the form requirement is deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party (or by a third party to both parties) and if no objection was raised in good time, the contents of the document are considered to be part of the contract according to common usage
- the parties can also refer to an arbitration agreement contained in the standard terms and conditions of one of the parties
- an arbitration agreement is also concluded by the issue of a bill of lading if the latter contains an express reference to an arbitration clause in a charter party
- arbitration agreements to which a consumer is a party must be contained in a document which has been personally signed by the parties. The written form can be substituted by electronic form. No agreements other than those referring to the arbitration proceedings can be contained in this document or electronic document (this does not apply to a notarial certification)

However, any non-compliance with the formal requirements is waived if the other party enters into an argument on the merits without raising objection as to form.

Choice of arbitrators

The parties are free to determine the number of arbitrators. Failing agreement, the number of arbitrators is three (section 1034 (1), sentence 2 ZPO). The appointment of an arbitrator can be challenged if circumstances exist, that give rise to justifiable doubts as to his impartiality or independence (section 1036 ZPO and section 18 DIS Rules). An arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence as soon as he becomes aware of them. The IBA Guidelines on Conflicts of Interest in International Arbitration are beginning to be used as guidance by the German arbitral community and courts in deciding grounds for justifiable doubts.

Procedure

Unless otherwise agreed by the parties, a claimant can initiate arbitration proceedings by sending a notice of arbitration to the respondent (section 1044 ZPO). The proceedings commence on the date on which the notice of arbitration is received by the respondent. The notice of arbitration must include:

- the names of the parties
- a short description of the issues in dispute and a reference to the arbitration agreement
- the nomination of an arbitrator

The parties can determine the applicable procedural rules, ranging from the procedure applicable in German court proceedings, to any foreign procedural law or individual provisions in any of those laws. The procedural rules arbitrators are likely to follow depend on the legal background of the parties and the arbitrators. There is a distinct tendency in the German international arbitration community to seek guidance from the IBA Rules on the Taking of Evidence in International Arbitration, but not to agree on their applicability specifically in a procedural order.

The arbitral tribunal has full discretion on how to conduct the taking of evidence. Witnesses, experts, documents and inspection are admissible as evidence. It is accepted that anyone can be a witness, including parties or party officers. Although there is a tendency towards tribunal-appointed experts, party-appointed experts are also admissible.

There is no provision on confidentiality in German arbitration law. Therefore, by law, while arbitrations are not public, they are not necessarily confidential without a party agreement on confidentiality. However, there is a very broad confidentiality provision under section 43 of the DIS Rules, whereby the parties, the arbitrators and the persons at the DIS secretariat involved in the administration of the arbitration proceedings must maintain confidentiality towards all persons regarding the conduct of arbitration proceedings, particularly relating to the parties involved, witnesses, experts and other evidentiary materials.

German courts can intervene during a pending arbitration to:

- grant interim relief (section 1041 ZPO)
- assist in taking evidence (section 1050 ZPO)

Assistance in taking evidence includes assistance in compelling witnesses to attend. However, German courts are bound by their own procedural rules in assisting arbitration proceedings. Therefore, they cannot assist in enforcing broad disclosure orders which would be inadmissible under German procedural law.

If a court action is brought in breach of an arbitration agreement and the respondent raises an objection, the court will reject the action as inadmissible, unless the court finds that the arbitration agreement is (section 1032 ZPO):

- null and void
- inoperative
- incapable of being performed

The respondent must raise this objection before the beginning of the oral hearing on the substance of the dispute. Failure to comply with this time limit prevents the respondent from raising an objection. If an action is rejected as inadmissible, a claimant can initiate arbitration proceedings if it wishes to pursue its claim.

GLOSSARY OF TERMS

ABBREVIATIONS

AG
Aktiengesellschaft (stock corporation)

AGB
Allgemeine Geschäftsbedingungen (General Terms and Conditions)

AktG
Aktiengesetz (German Stock Corporation Act)

ArbnErfG
Gesetz über Arbeitnehmererfindungen (Employee Inventions Act)

AWG
Außenwirtschaftsgesetz (Foreign Trade Act)

AWV
Außenwirtschaftsverordnung (Foreign Trade and Payments Regulation)

BaFin
Bundesanstalt für Finanzdienstleistungsaufsicht (Federal Agency for Financial Market Supervision)

BauGB
Baugesetzbuch (Federal Building Code)

BauGO
Baugebührenordnung (Construction Charges Ordinance)

BauNVO
Baunutzungsverordnung (Federal Ordinance of Land Use)

BBodSchG
Bundes-Bodenschutzgesetz (Soil Protection Act)

BBodSchV
Bundes-Bodenschutz- und Altlastenverordnung (Soil Protection and Contamination Ordinance)

BetrVG
Betriebsverfassungsgesetz (German Works Council Constitution Act)

BeurkG
Beurkundungsgesetz (Notarisation Act)

BGB
Bürgerliches Gesetzbuch (Civil Code)

BKartA
Bundeskartellamt (Federal Cartel Office)

BMWi
Bundesministerium für Wirtschaft und Energie, (Federal Ministry of Economics and Energy)

CIT
corporate income tax

DGB
Deutscher Gewerkschaftsbund (German Confederation of Trade Unions)

DIS
Deutsche Institution für Schiedsgerichtsbarkeit (German Institution of Arbitration)

DPMA
Deutsches Patent- und Markenamt (German Patent and Trade Mark Office)

DTA
double taxation agreement

EC
European Commission

EFTA
European Trade Association

EnEV
Energieeinsparverordnung (Energy Saving Ordinance)

ErbbauRG
Gesetz über das Erbbaurecht (Hereditary Building Rights Act)

EU
European Union

FCO
Federal Cartel Office

GBO
Grundbuchordnung (Land Registration Code)

GmbH
Gesellschaft mit beschränkter Haftung (limited liability company)

GmbHG
Gesetz betreffend die, Gesellschaften mit beschränkter Haftung (Limited Liability Companies Act)

GNotKG
Gesetz über Kosten der freiwilligen Gerichtsbarkeit für Gerichte und Notare (Code on Court and Notary Costs)

GVO
Grundstückverkehrsordnung (Real Estate Transaction Ordinance)

GWB
Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition)

HGB
Handelsgesetzbuch (Commercial Code)

IGBCE
Industriegewerkschaft Bergbau, Chemie, Energie, (Union for the Mining, Chemical and Energy industries)

JV
Joint Venture

JVA
Joint Venture Agreement

KAGB
Kapitalanlagegesetzbuch (Capital Investment Act)

KG
Kommanditgesellschaft (limited partnership)

KWG
Kreditwesengesetz (Banking Act)

LBOs
Landesbauordnungen (Building Ordinances)

LoI
Letter of Intent

MarkenG
Markengesetz (Trade Mark Act)

OTC
Over-the-counter

PatG
Patentgesetz (Patent Act)

PropCo
Property Company

RETT
real estate transfer tax

TFEU
Treaty on the Functioning of the European Union

TT
trade tax

UAS
universities of applied sciences

VAT
value-added tax

WoEigG
Gesetz über das Wohnungseigentum und das Dauerwohnrecht (Condominium Act)

WpHG
Gesetz über den Wertpapierhandel (German Securities Trading Act)

WpÜG
Wertpapiererwerbs- und Übernahmegesetz (German Securities Acquisition and Takeover Act)

ZAV
Zentrale Auslands- und Fachvermittlung der Bundesagentur für Arbeit (Central Agency of Foreign an Professional Affairs of the Federal Employment Agency)

ZPO
Zivilprozessordnung (Code of Civil Procedure)

PUBLIC AND GOVERNMENTAL INSTITUTIONS

Bundesagentur für Arbeit
Federal Employment Agency

Bundesanstalt für Finanzdienstleistungsaufsicht
Federal Agency for Financial Market Supervision

Bundeskanzler
Federal chancellor

Bundeskartellamt
Federal Cartel Office

Bundesländer
Federal states

Bundesministerium für Wirtschaft und Technologie
Federal Ministry of Economics and Energy

Bundesrat
Federal council

Bundestag
Federal parliament

Deutsche Institution für Schiedsgerichtsbarkeit
German Institution of Arbitration

Deutscher Gewerkschaftsbund
German Confederation of Trade Unions

Deutsches Patent- und Markenamt
German Patent and Trade Mark Office

Industriegewerkschaft Bergbau, Chemie, Energie
Union for the Mining, Chemical and Energy industries

Landeskartellbehörden
Regional competition authorities

Zentrale Auslands- und Fachvermittlung der Bundesagentur für Arbeit
Central Agency of Foreign and Professional Affairs of the Federal Employment

THE GERMAN COURT SYSTEM

Amtsgericht
Local court

Bundesgerichtshof
Federal court of Justice

Bundespatentgericht
Federal Patents Court

Bundesverfassungsgericht
Federal Constitutional Court

Bundesverwaltungsgericht
Federal Administrative Court

Finanzgericht
Fiscal court

Landesverfassungsgericht
State constitutional court

Landgericht
Regional court

Oberlandesgericht
Higher Regional Court

Oberverwaltungsgericht
Higher Administrative Court

Verwaltungsgericht
Local Administrative Court

LEGISLATION

Aktiengesetz
German Stock Corporation Act

Außenwirtschaftsgesetz
Foreign Trade Payments Act

Außenwirtschaftsverordnung
Foreign Trade and Payments Regulation

Baugebührenordnung
Construction Charges Ordinance

Baugesetzbuch
Federal Building Code

Baunutzungsverordnung
Federal Ordinance on Land Use

Betriebsräte
works councils

Betriebsverfassungsgesetz
German Works Council Constitution Act

Beurkundungsgesetz
Notarisation Act

Bundes-Bodenschutz- und Altlastenverordnung
Soil Protection and Contamination Ordinance

Bundes-Bodenschutzgesetz
Soil Protection Act

Bürgerliches Gesetzbuch
Civil Code

Energiesparverordnung
Energy Saving Ordinance

Gesetz betreffend die, Gesellschaften mit beschränkter Haftung
Limited Liability Companies Act

Gesetz gegen Wettbewerbsbeschränkungen
Act against Restraints of Competition

Gesetz über Arbeitnehmererfindungen
Employee Inventions Act

Gesetz über das Wohnungseigentum und das Dauerwohnrecht
Condominium Act

Gesetz über Erbbaurecht
Hereditary Building Rights Act

Gesetz über Kosten der freiwilligen Gerichtsbarkeit für Gerichte und Notare
Code on Court and Notary Costs

Grundbuchordnung
Land Registration Code

Grundstückverkehrsordnung
Real Estate Transaction Ordinance

Handelsgesetzbuch
Commercial Code

Kapitalanlagegesetzbuch
Capital Investment Act

Kreditwesengesetz
Banking Act

Landesbauordnungen
Building Ordinances

Markengesetz
Trade Mark Act

Patentgesetz
Patent Act

Urheberrechtsgesetz
German Copyright Act

Wertpapiererwerbs- und Übernahmegesetz
German Securities Acquisition and Takeover Act

Gesetz über den Wertpapierhandel
German Securities Trading Act

Zivilprozessordnung
Code of Civil Procedure

LEGAL TERMS

Abgeltungssteuer
capital gains tax

Aktiengesellschaft
stock corporation

Allgemeine Geschäftsbedingungen
General Terms and Conditions

Auflassung
notarised conveyance of ownership

Aufsichtsrat
supervisory board

Bankbürgschaft
bank guarantee

beschränkt persönliche Dienstbarkeit
limited personal easements

Bundesgesetze
Federal Laws

Bürgschaft
guarantee

Dauernutzungsrechte
registered leases

Deutscher Corporate Governance Kodex
German Corporate Governance Code

dingliche Rechte
rights *in rem*

Dingliche Vorkaufsrechte
in rem pre-emptive rights

Durchschnittshebesatz
municipal multiplier

Einkommenssteuer
personal income tax

Erbbaurechte
hereditary building rights

Geschäftsführer
managing director

Geschäftsordnung
rules of precedere

Gesellschaft mit beschränkter Haftung
limited liability company

Gesellschafterversammlung
shareholders´ meeting

Gesellschaftsvertrag
Articles of Association

Gewerbesteuer
trade tax

Grundbuch
land register

Grunddienstbarkeiten
ground easements

Grundrechte
Basic Rights

Grundschuld
land charges

Hauptversammlung
general meeting

Hebesatz
multiplier

Hypotheken
mortgages

Kammer
chamber

Kapitalertragssteuer
withholding tax

Kommanditgesellschaft
limited partnership

Körperschaftssteuer
corporate income tax

Landesgesetze
State Laws

Landpachtverträge
land leases

Miteigentum
(co-) ownership

Nießbrauchsrechte
usufructs

Öffentliches Recht
Public Law

Öffentlichkeitsgrundsatz
principle of publicity

Privatrecht
Private Law

Reallasten
conveying rights to recurrent payments or services

Rechtsstaat
Constitutional State

Satzungsstrenge
articles-strictness-principle

Solidaritätszuschlag
solidarity surcharge

Steuernummer
fiscal registration number

Teileinkünfteverfahren
progressive tax rate

überschuldet
over-indebted

Umsatzsteuer-Identifikationsnummer
VAT identification number

Unbedenklichkeitsbescheinigung
clearance certificate

Vorstand
management board

Widerspruch
objection notice

Wohnraummietverträge
residential leases

Wohnungseigentum
condominium ownership

zahlungsunfähig
lack of liquid funds

Zeitarbeitsunternehmen
temporary employment agency

HERBERT SMITH FREEHILLS AT A GLANCE

As one of the world's leading law firms with 3,000 lawyers, including 470 partners, in 26 offices worldwide, we advise many of the biggest and most ambitious organisations across all major regions of the globe. Our clients trust us with their most important transactions, disputes and projects because of our ability to cut through complexity and mitigate risk.

Our growing international presence puts us close to your business; our deep sector expertise means our lawyers can look beyond the obvious. We can bring a new perspective to your operations, working with you to identify opportunities and manage risk in today´s uncertain marketplace. Recognised for our responsiveness and reliability, empathy and understanding of the industries and geographies in which you work, we collaborate with you to build strong and lasting business relationships.

Operating from **26 offices** in **18 jurisdictions** spanning **Asia, Australia, Europe, Africa**, the **Middle East** and the **US**, we can deliver whatever expertise you need, wherever you need it.

THIS IS WHAT WE DO:

PRACTICE AREAS

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Competition, regulation and trade
Compliance and regulatory
Corporate
Corporate governance and head office advisory
Cyber security
Dispute resolution
Employment, pensions and incentives
Environment and planning
Finance
Intellectual property
Investigations
Investment funds
Mergers and acquisitions
Projects and infrastructure
Real estate
Restructuring, turnaround and insolvency
Tax

INDUSTRIES

Agribusiness
Construction and engineering
Consumer products
Energy
Financial buyers
Financial services
Government and public sector
Infrastructure
Leisure and sport
Manufacturing and industrials
Mining
Pharmaceuticals and healthcare
Professional, support and business services
Real estate
Technology, media and telecommunications
Transport
Wealth and asset management

AND WHERE WE DO IT:

Belfast, Berlin, Brussels, Düsseldorf, Frankfurt, London, Madrid, Moscow, Paris, Doha, Dubai, Johannesburg, Riyadh, Bangkok, Beijing, Hong Kong, Seoul, Shanghai, Singapore, Tokyo, Jakarta, Brisbane, Melbourne, Perth, Sydney, New York

HERBERT SMITH FREEHILLS GERMANY

Our offices in Berlin, Düsseldorf and Frankfurt provide local and international clients with leading expertise in corporate, dispute resolution, finance, real estate, competition/regulatory and employment matters.

CORPORATE/M&A

Our German corporate team acts on a wide variety of areas from traditional M&A work relating to both private and public companies, through to private equity, restructuring and insolvency, securities and capital markets regulatory work. The team regularly advises on corporate law, with a focus on cross-border work, general corporate advisory and capital markets as well as leveraged buy-outs, joint ventures, corporate restructurings and venture capital investments. Our German corporate practice is headed by the managing partner for Germany, **Dr Ralf Thaeter**, who has a strong focus on public and private M&A, cross-border work, general corporate advisory and capital markets. Corporate partner **Dr Nico Abel** has more than 15 years' experience of advising corporates, financial investors and financial institutions on international mergers and acquisitions, including private acquisitions and disposals, public takeovers, joint ventures and restructurings. Corporate partner **Dr Dirk Hamann** has a particular focus on the energy and natural resources sector, infrastructure, healthcare and general industries. Corporate partner **Dr Markus Lauer** advises private equity, financial and industrial clients in public and private mergers and acquisitions, leveraged buyouts, general corporate law and corporate governance matters. Markus has broad experience in transactions involving the real estate and automotive sectors.

Dispute resolution

Our German Dispute Resolution team offers a comprehensive dispute resolution service for domestic and international clients ranging from complex commercial litigation, international arbitration, contentious regulatory advice, investigations and specialist risk management expertise, all underpinned by ADR techniques. The team provides advice in the field of construction and infrastructure, energy and natural resources, financial services, life sciences, telecommunications, media and entertainment. Partner **Dr Mathias Wittinghofer** and his team provide expert advice in banking and finance-related disputes and post M&A litigations and arbitrations as well as disputes arising out of derivatives and OTC trading, loan facility agreements, securitisations, syndicated loans, project financing and mis-selling claims. The team's specialist areas include administrative and public law, competition litigation, fraud and investigations, health and safety and public international law.

Partner **Thomas Weimann's** practice spans a wide range of disputes work, local, domestic and international, with a special focus on high value construction related disputes including plant construction, industrial engineering and civil construction projects and disputes. Thomas also sits as an arbitrator in proceedings under the auspices of the ICC, DIS, CIETAC and PCA and other renowned arbitral institutions. He has been counsel to about 40 major construction arbitrations with a regional focus on Germany, the Arab region, the US and Russia. As the President of the Chinese European Legal Association he has well developed links with China.

Partner **Dr Patricia Nacimiento** specialises in both commercial and investment treaty arbitrations, acting as counsel and arbitrator. As a party representative, she has conducted over 120 arbitration proceedings under the rules of numerous arbitration institutions. The German government appointed her as of 2008 to the panel of arbitrators at the International Centre for Settlement of Investment Disputes (ICSID). She is also regularly appointed as an arbitrator and has led numerous international ICC, DIS and ad hoc arbitration proceedings as a chairperson, sole arbitrator or party appointed arbitrator.

Partners **Dr Helmut Görling** and **Dr Dirk Seiler** specialise in advising and representing companies that have fallen victim to economic crime. They regularly advise companies in compliance matters, tort liability and white collar crime cases as well as in cases involving directors' and officers' liability. Helmut Görling is one of the most renowned practitioners in the field of compliance investigations. In 2015, Görling and his team were named law firm of the year for compliance investigations at the JUVE awards.

Real estate

Our German real estate practice is headed by **Thomas Kessler**, one of the leading real estate lawyers in Germany and the EU. Most of the team members have worked with Thomas for a long time prior to their joining Herbert Smith Freehills as a team in 2013. Many of the team members speak several languages, including Russian and Mandarin Chinese. Our German real estate team handles real estate transactions that are high value, complex and innovative. Our clients value our integrated offering, which makes us a preferred, one-stop partner of the real estate industry. In addition to our core real estate related advice, our practice encompasses corporate/M&A, fund formation, regulatory and employment advice, all with a focus on the real estate industry. Naturally our practice includes finance lawyers, who offer innovative financing solutions for the real estate industry, including bank financing as well as capital market products.

Banking and finance

Our truly international banking and finance practice has strong capability across our global network. We offer a comprehensive service to lenders, borrowers, advisers and other intermediaries and our main clients are leading global banks and businesses, who come to us for the perspective we bring to deals, our strong transaction management and our ability to handle demanding structuring issues. Our real estate finance experts act for some of the foremost lenders, investors and developers in the market. Finance partner **Julia Müller** advises on a range of financing transactions, in particular leveraged and acquisition finance and real estate finance. Julia has extensive

HERBERT SMITH FREEHILLS GERMANY (CONTINUED)

experience in domestic and cross border finance transactions. Finance partner **Kai Liebrich** is a general finance specialist, advising German and international financial institutions, international investment banks and financial investors on a wide range of products and transaction types. Kai regularly advises on and document derivatives transactions and structured products, particularly highly structured derivatives and other treasury and trading activities.

Competition

Dr Michael Dietrich heads up our German competition group and specialises in all aspects of European Union and German competition law, with particular expertise in cartel investigations, competition litigation including follow-on damages and strategic competition advice, particularly on joint ventures and mergers. Michael has been involved in a very significant number of cartel investigations of the EU Commission and the Federal Cartel Office ever since the start of his career. Currently he advises clients in several investigations pending at the Federal Cartel Office and the Court of Appeals in Düsseldorf including the largest ever investigation against companies in the German food retail sector. His industry focus includes consumer products, leisure and retail, media, logistics, automotive, building materials and public banking. He has extensive experience in working with clients in China, Japan and the U.S.

Employment, pensions, incentives

Our German employment team is headed by **Moritz Kunz** and embedded in our international employment practice. The team advises on a wide range of contentious and non-contentious employment and pensions issues and has broad experience in all fields of individual and collective employment law. In addition, we have a special focus on advising international and national companies on the structuring of employment terms & conditions and pension schemes, the implementation of HR measures and on issues of works constitution law. We also represent clients in employment court proceedings and negotiations with works councils and trade unions. Another focus of our work is the advice on transactions and all restructuring and outsourcing measures as well as the implementation of remuneration systems and incentive plans.

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