



Foreign Investments in Germany

Legal and Tax Aspects of M&A and Real Estate Transactions

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A. Introduction

I. Germany = the World's Fifth Largest Economy

After the United States, China, Japan and India, Germany is ranked the world's fifth largest economy (according to gross domestic product (GDP) derived from purchasing power parity (PPP) calculations), is seen as the largest economy in Europe and considered the world's second leading exporter of merchandise after China, with exports accounting for more than one-third of the national output. Germany influences the world economy in beginning, managing or ending crises, including the European Monetary Union, and "Made in Germany" is a worldwide renowned brand of quality.

II. Efficient Legal Framework

Germany has tried harder: The reunification process was managed and the modernization and integration of the East German economy was propelled, domestic structural problems in the labor market were addressed by gradual deregulation and bureaucratic regulations were set to be simplified. German law is more efficient, cost-effective and predictable than commonly reported since statutory law (instead of case law) provides legal certainty. The Global Competitiveness Report 2010-2011 of the World Economic Forum even shows Germany to be top-ranked in the category of "Efficiency of legal framework" and "Judicial independence".

III. Investment Opportunities

Around 3.6 million businesses and 2.48 million sqm of real estate in Germany provide for countless investment opportunities. Compared to the Anglo-Saxon countries, M&A activities in Germany may not have even reached their peak. This brochure provides an initial overview of what to expect for those who want to seize these opportunities. Individuals, entrepreneurs, corporations, financial investors, managers and others will find the major issues, challenges, risks and business habits addressed from a German perspective which are involved in the acquisition of businesses and real estate.

IV. Aim of the Brochure

This brochure is designed as a clear and brief guide for those investors seeking information on the legal and tax framework for foreign investments in Germany.

B. Investment Possibilities

I. Share Deal vs. Asset Deal

When investing in German companies, one can choose either to buy shares of a certain target company or its assets. Generally speaking, it is more common to buy shares as it is much easier. On the other hand, situations may occur when it is more advisable to buy assets, e.g. if the target company has filed for insolvency, if the share ownership of the seller cannot be verified, or if the purchaser only wants to buy a certain business unit by way of spin-off.

Similarly, in real estate transactions the question arises of whether to carry out the deal as an asset deal or a share deal. Regarding various aspects, which are often connected with tax advantages, a share deal could be the right choice, e.g. to escape property transfer tax. Therefore, large real estate portfolios in particular are frequently purchased by way of a share deal. However, apart from such transactions, an asset deal is still rather common in German real estate transactions. One main disadvantage of a share deal is the preparation stage, which requires more legal advice and is therefore more expensive than a real estate asset deal. One important advantage of a share deal is that the transaction can be carried out much more quickly because no time-consuming registrations in the land register are required. The purchaser will therefore benefit from the real estate and the seller will receive the purchase price much more quickly. No costs for the land register are incurred and notary costs can be kept rather low. An additional advantage of the share deal is that existing loans can be used for financing and no prepayment penalties will become due. In case the acquisition has been carried out by way of a share deal, the exit will typically be carried out thus too. The existing book values will be adopted in a share deal; since the real estate property will continue to be subject to depreciation, an exit by way of an asset deal will only be beneficial in case the book value has increased for some reason.

Ultimately, it is a matter of weighing the pros and cons to decide whether a share or an asset deal is preferable in the relevant situation.

II. Acquisition of Various Share Types

1. Private Limited Liability Company (GmbH)

a) General

The form of a GmbH is by far the most frequently used corporation form in Germany. According to current statistics, around one million commercial entities are

organized as GmbHs. One of the main advantages of a GmbH is that the shareholders are not personally liable for the company's debts. However, foundations of a GmbH, as well as capital increases and share transfers, require notarization by a notary public.

b) Share Capital

The nominal share capital must be determined in the articles of association and shall amount to a minimum of EUR 25,000. Before the 2008 reform of the Limited Liability Companies Act (GmbHG), each shareholder was only permitted to subscribe to one share in the company and each share was required to have a minimum amount of EUR 100 and be divisible by 50. The 2008 reform of the GmbHG granted shareholders much greater flexibility regarding the amounts of their contributions. Shareholders are now enabled to subscribe to as many shares as they wish and such shares have to be denominated in an amount of at least one Euro. This new flexibility has particularly simplified the purchase of shares if a shareholder intends to sell only a part of his stake, as well as joint ventures and management participation programs.

c) Maintenance of Share Capital

The GmbHG provides for the maintenance of the nominal share capital insofar as it is not permitted to make distributions to shareholders if the remaining assets (at book value) would not cover the company's share capital and its liabilities. In other words, only free reserves and accumulated profits are allowed to be distributed to shareholders. The 2008 reform of the GmbHG reinstated the traditional "balance sheet-based" approach of determining whether a transaction between a shareholder and a GmbH affects its net assets and therefore constitutes a distribution. Such approach – and thereby the permissibility of balance sheet-neutral transactions such as cash pooling systems, as well as upstream securities in connection with leveraged buy-outs – had been questioned by a decision of the German Federal Supreme Court in 2003. The lawmaker of the 2008 GmbHG reform overruled such decision, in particular aiming to put cash pooling systems on a secure footing.

d) Authorized Capital

The 2008 reform of the GmbHG implemented the instrument of authorized capital as known in the German Stock Corporation (AktG). The primary purpose of authorized capital shall be to facilitate the financing of the limited liability company through the allocation of new equity capital. The GmbHG now enables the shareholders to authorize the managing directors of the company for a maximum term of five years to increase the registered capital of the company by issuing

new shares against contributions in cash or kind. The nominal amount of the authorized capital may not exceed half of the existing registered capital at the time of authorization.

e) Commercial Register

It is important to know that only such shareholders who are registered in the shareholders' list are deemed to be shareholders of the respective GmbH. A copy of such shareholders' list must therefore be filed with the competent commercial register and is publicly available to anyone who is interested. The 2008 reform of the GmbHG introduced the possibility of acquiring shares in a GmbH in good faith whereby the shareholders' list serves as a point of reference. In principle, a purchaser can trust that a person entered in the list actually is a shareholder in the company. However, this applies only if the respective entry has been incorrect for at least three years without objection, so the theoretical possibility of good faith acquisitions will not actually make due diligence procedures superfluous.

f) Management

A GmbH is led by one or more managing directors. Contrary to the legal concept in a German stock corporation, the applicable law allows shareholders of a GmbH to appoint and remove managing directors relatively easily at any time. Further, managing directors are bound by instructions provided by the shareholders' meeting. In general, the managing directors are responsible for business management and the representation of the GmbH. A legal entity is not allowed to serve as managing director. For some business transactions, the managing directors need to obtain prior consent of the shareholders' meeting. Usually, such business transactions are described in detail in the articles of association or in the rules of procedure for the management.

g) Advisory Board/Supervisory Board

Moreover, the shareholders of a GmbH can opt to implement an advisory board or a supervisory board. Managing directors must not be members of a supervisory board. If a GmbH (together with its subsidiaries) has more than 500 employees, the foundation of a supervisory board is required by mandatory labor law, whereby the employees are entitled to appoint at least 1/3 of its members. In case a GmbH has more than 2,000 employees, half of the members of the supervisory board are appointed by the employees. In cases of a tie vote, the chairman of the supervisory board who is appointed by the shareholders has a casting vote.

h) Administrative Seat Abroad

The 2008 reform of the GmbHG eliminated the requirement that the registered

seat of the GmbH had to be identical with its principal place of business. Therefore, it is now possible for a GmbH to have the administrative seat abroad while its registered office remains in Germany. This allows a very flexible handling of a GmbH which may now move its principal place of business to any other country without any corporate restrictions. This is not restricted to the European Union, as long as the third country recognizes the applicability of German law to the GmbH. The possibility to operate abroad in the familiar legal form of a GmbH might be an especially attractive option for German groups and their foreign subsidiaries.

i) Entrepreneurial Company (UG)

The government's first draft of the 2008 reform of GmbHG intended to reduce the minimum share capital of a GmbH from EUR 25,000 to EUR 10,000. The legislator ultimately decided to maintain the previous minimum capital. For new businesses that only have a limited amount of nominal capital at the start of operations and only need a small amount of capital, the reform introduced an alternative to the established form of the GmbH called an entrepreneurial company (Unternehmergesellschaft) which can be founded with an initial share capital of EUR 1.00. An UG is more or less a GmbH with the special characteristic that 1/4 of the annual profits must be put into the capital reserves until the share capital amounts to EUR 25,000.

2. Stock Corporation (AG)

a) General

Alongside the GmbH, the second major type of German corporate entity designed for mid-cap and larger corporations is the AG. The shares in an AG may be, but must not necessarily be, publicly listed. In fact, most of the German AGs are not listed, but are privately held.

The legal regime that applies to an AG is considerably stricter than the one that applies to a GmbH. As a rule of thumb, the articles of association of an AG may only contain provisions that deviate from those contained in the German Stock Corporation Act (AktG) when this is expressly permitted by the Act, whereas the articles of a GmbH may contain any provision unless such provision is prohibited under the German GmbHG. As a consequence, the flexibility in structuring an AG is quite limited, in particular with respect to its corporate governance.

b) Corporate Governance

The three mandatory corporate bodies of an AG are the management board, the supervisory board and the shareholders' meeting.

aa) Management Board

The management board is responsible for the management of the company. The authority of the management board to represent the company may not be restricted vis-à-vis third parties. In addition, the management board is not subject to instructions from the shareholders' meeting or the supervisory board. However, the articles of association may impose certain restrictions on their powers of representation (internally, i.e. vis-à-vis the company), by decision of the supervisory board or the shareholders' meeting and by the rules of procedure of the management board, if any.

The members of the management board are appointed by the supervisory board for a term not to exceed five years, with dismissal only possible for cause.

bb) Supervisory Board

The members of the supervisory board are elected by the shareholders' meeting, unless employee representatives are delegated to the board according to mandatory codetermination law. As a general rule, if an AG employs more than 500 employees, one third of the board shall consist of employee representatives and if it employs more than 2,000 employees, half of the supervisory board members shall be elected by the employees (see B.II.1.g)). The supervisory board shall, in particular, supervise the management board and it is competent for the (internal) consent to certain operative measures (see B.II.2.b)aa)).

cc) Shareholders' Meeting

The shareholders' meeting shall resolve on all matters expressly attributed to it by law or the articles of association. The shareholders' meeting is not allowed to instruct the management board with respect to the operative management of the company, unless the management board itself has requested that a decision be made by the shareholders' meeting. However, according to a doctrine established by the German Federal Supreme Court in its so-called "Holzmüller" decision, the shareholders' meeting shall grant its consent to matters relating to the management of the company which materially affect the membership rights of the shareholders, in particular upon the intended sale and disposal of material assets.

c) The German Corporate Governance Code

The German Corporate Governance Code, adopted in 2002, does not constitute statutory law. It contains both recommendations and suggestions for German listed stock corporations which aim to make the German corporate governance system transparent and understandable, and to promote the trust of international and national investors, customers, employees and the general public in the ma-

management and supervision of listed AGs. The management board and the supervisory board shall declare annually that the recommendations of the Code have been and are complied with, or which of the Code's recommendations have not been or are not applied and why ("comply or explain"). Some important recommendations of the Code relate to, inter alia, the composition of the overall compensation of members of the management board, reports on the shareholdings in the company held by individual members of the management board and the supervisory board, and the information of shareholders and third parties during the fiscal year by means of interim reports.

Even if the Code does not constitute statutory law, according to a decision of the German Federal Supreme Court, approval given by the shareholders' meeting for the actions of the management board and the supervisory board may be set aside by the court if an incorrect declaration of compliance with the Code has been issued. The court has also noted that, in case certain recommendations of the Code are no longer complied with, the declaration has to be amended immediately.

d) Share Capital, Shares, Sale and Transfer of Shares

The minimum stated share capital of an AG amounts to EUR 50,000. The minimum nominal amount per share is EUR 1.00. The creation of preference shares is possible. The shareholders' meeting may resolve upon an authorized or contingent capital.

In contrast to the law governing the GmbH, the sale and transfer of shares in an AG does not require a specific form. According to the articles of association, however, the transfer of registered shares – as opposed to bearer shares – may be subject to the consent of the company. Consent is generally granted by the management board through consideration of the best interests of the company. Any actions with respect to the shares in a listed AG must comply with insider trading law. The violation of insider trading directives routinely constitutes a criminal offence.

As set out in G.III.1., certain notification requirements must be complied with 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 voting right at the shareholders' meeting.

3. Limited Partnerships (KG)

a) General

A German KG consists of at least one general partner and one limited partner. Limited partners are not liable for the partnership's debts, unless they have not

paid their fixed contributions committed to be registered with the commercial register. Prior to payment, the liability is capped at the agreed fixed contribution amount. The personal liability of the general partner is unlimited. The general partner generally has no participation in the fixed capital of a KG and is responsible for the management and representation of the KG. Unless otherwise stated in the partnership agreement, limited partners are excluded from managing and representing the KG. Limited partners are generally only entitled to receive certain relevant information relating to the annual financial statements and have the right to object to general partner's decisions only to the extent that they go beyond the ordinary course of business.

b) GmbH & Co. KG

It is legally permissible and very common to implement a GmbH as general partner, offering the opportunity to investors to manage the KG via a GmbH, thereby avoiding the risk of personal liability as general partner. Thus, investors can benefit from the advantages offered both by a KG and a GmbH.

c) Partnership Limited by Shares (KGaA)

The legal form of a German KGaA is a combination of a KG (see above) and an AG (see B.II.2.). As with an AG, the limited partnership interests are shares that can be traded via stock exchanges. Comparable to a KG, the shareholders of a KGaA are divided into limited and general partners. Thus, except for some provisions in the AktG especially for a KGaA, the general provisions of the AktG for an AG and the provisions of the German Commercial Code (HGB) for a KG apply. The KGaA is well-suited to family dominated businesses and, furthermore, is in fact frequently used for pharmaceutical and medical companies.

4. Other Partnerships

a) Silent Partnerships

Silent partnerships are advisable for investors intending to invest and participate in a company without disclosing their participation to third parties.

In the absence of detailed legal regulation, the internal relationship between the silent partner and the company is to be agreed upon by the partners of the silent partnership in the silent partnership agreement. The agreement typically provides for certain funding obligations of the silent partner in exchange for participation in the profits of the company. Statutorily, the silent partner does not have any managing rights ("typical" silent partnership). However, such (internal) managing rights may be stipulated in the silent partnership agreement ("atypical" silent partnership).

In relation to third parties, the company is managed by the non-silent partners only. The external legal structure of the silent partnership is therefore similar to a (subordinated) loan.

b) Public Private Partnerships (PPPs)

In PPPs, private investors and public bodies cooperate to develop, operate or maintain certain long-term projects. Infrastructure projects like the building of highways (e.g. the Autobahn), toll charge systems, waste management or waste water disposal are typical examples for PPPs.

PPPs in Germany are not governed by any specific statutory law. As a consequence, PPPs require detailed written joint venture contracts. Generally, but subject to the contractual agreement between the parties, the private investor is responsible for planning, establishing and financing the project. In exchange, the private investor gains access to new business areas generally engaged by the public sector.

5. European Companies

In addition to the aforementioned national legal entities for the incorporation or establishment of a business, two legal forms based on European law have or shall become available in the member states of the EU and the European Economic Area (EEA), including Germany, notably the SE and the SPE.

a) European Stock Corporation (SE)

The European Company (denoted by its Latin name *Societas Europaea*) is a European AG. The legal framework of the SE is based on European Community law directly applicable in all EU member states and the member states of the EEA Convention, as well as – and to a larger practical degree – on the respective relevant national legislation enacted to implement the SE in the different jurisdictions. An SE can be incorporated in five ways:

- ▶ merger of two stock corporations,
- ▶ incorporation of joint holding SE,
- ▶ incorporation of joint subsidiary SE,
- ▶ conversion of German stock corporation and
- ▶ incorporation of a subsidiary SE by another SE.

Thus, an SE can be used as a vehicle for cross-border mergers, since it may be established by way of merger of two or more companies in different EU/EEA member states. However, since the European Directive on Cross-Border Mergers was implemented in Germany in 2007, certain corporations existing under German law may also be directly merged with entities in other EU/EEA member states.

The SE allows for more flexible corporate governance and more flexibility with respect to employee participation (each see below).

The SE has the following primary features:

- ▶ Once registered, the SE has legal personality.
- ▶ An SE is required to have a minimum amount of subscribed share capital of at least EUR 120,000.00.
- ▶ The shares of an SE can be traded on a stock exchange.
- ▶ The registered office of the SE and its head office, meaning the place where effective control of the SE is exercised and the management of the SE is situated, must be in the same EU/EEA member state, but may be moved from one member state to another without the SE being dissolved or wound up. However, an SE must offer to acquire the shares of those shareholders objecting to the move across the border against equitable compensation in cash.
- ▶ The articles of association of an SE can either provide for a one-tier corporate governance system with an administrative board which is responsible for both, the management, including the election of managing directors, and the supervision of the affairs of the company, or a two-tier structure consisting of a management board and a supervisory board as in a German AG (see B.II.2.b)bb)).
- ▶ An SE is not subject to national employee participation or co-determination law. Instead, employee participation and co-determination is – subject to certain limitations – governed by an agreement between the management and the employees, represented by a so-called special negotiating body. The negotiations are a mandatory part of the process of establishing an SE and a prerequisite for its registration.
- ▶ An SE must be treated by the EU/EEA member states as if it were an AG, i.e. laws applicable to an AG in the member state in which the SE is registered, in Germany in particular the AktG, are applicable to the SE, unless the EU regulation or the national implementation laws provide otherwise.

The administration and management, shareholder rights and corporate governance of an SE are primarily governed by its articles of association and by national statutory laws. In essence, German laws have more of a practical influence on the governance of an SE than the European legal framework.

b) Outlook: European Private Company (SPE)

In June 2008, the European Commission has published draft legislation on a European GmbH (denoted by its Latin name *Societas Privata Europaea*). Contrary to the SE, with only a few exceptions, the SPE will be entirely governed by European Community law directly applicable in all member states. This is

expected to significantly facilitate cross-border business and reduce the costs and complexity normally associated with setting up and maintaining a business in another member state. However, since June 2008, the legislative process on this matter has been stalled. Mid 2011, the last compromise proposed by the Hungarian EU-Presidency has been denied by some member states. These states fear that employee matters, in particular co-determination rights applicable to national legal forms of a GmbH (see B.II.1.g)), might be overridden. It is therefore not clear if and when the SPE will, in fact, become available.

6. Joint-Ventures (JV)

Two or more enterprises can cooperate in form of a JV. Reasons for the establishment of a JV can be that a participant of the JV is seeking access to a new market or has very special know-how which is of great interest to the other JV partner. Usually, both JV partners benefit from the cooperation.

JVs can appear in various forms. In the case of a contractual JV, the cooperation is only based on bilateral agreements without forming an independent organization. In the case of an equity JV, the partners of the JV set up a single-purpose vehicle for their collaboration. Such entity often adopts the legal form of a German KG or a GmbH.

III. Acquisition of Real Estate

1. Description of and Title to Real Estate

a) Cadastral Map

In Germany, land is registered both with the cadastral office and the land register. Therefore, a title search is quick and reliable.

Every piece of land is divided up into cadastral plots. Each piece of land consists of at least one cadastral plot but may consist of several. Each cadastral plot is given a corresponding plot number and is registered with the cadastral office. The cadastral map contains valuable information on the exact boundaries, the cut and the location of the cadastral plots. It is also important to examine the cadastral map to ensure the property is accessible by public roads. In addition, the cadastral maps contain information on the existing development and superstructures, i.e. buildings crossing the boundaries.

b) Land Register

The cadastral plots are also registered in the land register. The land register is

maintained at the district courts. It is divided up into an inventory and three sections. The inventory contains the plot number. Section 1 contains information on ownership of the plot of land, i.e. the owner or, in case of several co-owners, the shares of the co-owners, and sometimes notes of registrations of easements in favor of the plot of land. Section 2 contains encumbrances, including easements, limited personal easements, usufructs, priority notices (of conveyance) and restraints on disposal such as heritable building rights (see B.III.2.d)). Section 3 contains the liens such as mortgages, land charges and annuity land charges. The rights registered in the land register have different priorities/ranks. Generally, the priority of the rights depends on the time of their registration, i.e. the older right is ranked higher than the more recent right.

c) Good Faith

Anyone may rely on the content of the land register in good faith and is protected to the extent that the content of the land register is considered to be correct, regardless of its actual correctness. Therefore, it is possible to acquire land from the owner registered in the land register even if he is not the true legal owner. Further, encumbrances that are not registered in the land register are generally deemed as nonexistent vis-à-vis a purchaser. This leads to great transparency and makes real estate transactions reliable and safe.

Unlike the commercial register, the land register can only be inspected online by a notary public. Furthermore, in order to receive information from the land register a valid interest must be demonstrated. However, the purchaser of a real estate property generally has such valid interest. Cadastral maps are publicly available (and in some municipalities even online).

2. Types of Ownership in Real Estate

Every person and every public or private legal entity (e.g. German federal states, cities, municipalities, AGs or GmbHs, as well as partnerships or civil law partnerships) may be the owners of land. There are different types of real estate ownership.

a) Sole, Co- and Joint Ownership

The most common form of ownership is sole ownership, i.e. one person or company owns a piece of land. Where land is owned by several persons or companies, they are co-owners or joint owners. In the former, more common case, every co-owner has a share of the property to a certain fraction, e.g. 1/2. Each co-ownership share can be sold and encumbered separately and generally without the consent of the others. In case of joint ownership, each owner owns the whole land jointly with the other owners and is therefore restricted by the rights of

the other owners. The whole piece of property can only be sold and encumbered by all joint owners, but not separately.

b) Buildings and Other Components

Ownership of land includes all objects firmly attached to the land, e.g. buildings and garages. The premises attached to the land consist of all components used for their construction. This can under certain circumstances include the fixtures and fittings of a building, if they were customized to the building structure, if they form a unity with the building and they have considerable impact on the appearance of the building as a whole. The sale of real estate thus always includes the building located on it. By contrast, in the newly-formed German states (Brandenburg, Mecklenburg-Pomerania, Thuringia, Saxony, Saxony-Anhalt) and the eastern part of Berlin before 1990, ownership was only procured for buildings, whereas the land on which it was located was simply leased. This regulation was continued after reunification of the German states, so this concept of independent ownership of buildings still exists in Eastern Germany.

c) Condominiums

aa) General

German law also acknowledges the individual ownership of condominiums, which can also include the right to the exclusive use of parking spaces, cellars or balconies. The individual ownership of the condominium itself includes the co-ownership of all commonly used spaces in the condominium building. This co-owned common property embraces the land itself, as well as all those sections and facilities of the building that are not subject to individual ownership. A fund for maintenance work is created for the maintenance of the common property which is not refunded upon the sale of the condominium.

bb) Conversion into Condominium

To convert a property into condominiums and common property a notarized partition deed must be drawn up containing a description of each apartment and colored plans of the building illustrating the individually owned condominium spaces. Generally the ratio of co-ownership of the common property corresponds with the ratio of the individually owned condominium space in relation to the whole building, but may alter due to subsequent expansions within the building, e.g. in the attic. Such conversion requires a governmental certificate confirming separated units. Each condominium is individually recorded in a separate folio in the land register (condominium land register) and is henceforth, with respect to the applicable law, independent of other condominium property on the same land.

cc) Transfer

Like land, a condominium is independently transferrable and can be independently charged or otherwise encumbered. Likewise, a foreclosure sale does not affect other condominiums. The sale of the condominium can, however, under certain circumstances require the approval of other condominium owners on the same land or of the building administrator.

d) Heritable Building Right

Finally, heritable building rights can be created under German law. A heritable building right entitles one to build and own a building on a piece of land (or below ground, e.g. underground parking) for a certain period of time, e.g. 99 years. The building is considered an integral part of the heritable building right and not of the land. Heritable building rights are often used by municipalities or the Church in order to retain ownership of land while receiving an annual ground rent, usually 4 to 5% of the value of the land per year. Like rent, ground rent can be subject to indexation, i.e. increase in accordance with a certain index such as the consumer price index. A heritable building right is created by way of a contract between the owner of land and the beneficiary and has to be registered in the land register (see B.III.1.b)). Moreover, a separate folio, the heritable building right register, is created in which the beneficiary of the heritable building right is registered as the owner of the heritable building right. Like land, the heritable building right can be sold and purchased and may be encumbered with easements and charged with land charges. However, the owner of the land will usually reserve the right to approve such transactions, i.e. prior consent is required for any transaction. Upon the expiration of the heritable building right, the owner of land automatically becomes the owner of the building and therefore has to pay compensation to the beneficiary. Lease agreements concluded by the beneficiary automatically devolve to the owner of land. It is also possible to agree on a right to acquire the land in favor of the beneficiary.

3. Encumbrances and Charges

a) Priority Notice

A priority notice secures the enforcement of a claim relating to a property, e.g. the right of conveyance. It is recorded in the land register (see B.III.1.b)) and has, at that point in time, the immediate effect of invalidating any subsequent transaction concerning the same plot of land to the extent that the beneficiary's claim would be impaired. It thus preserves the priority of the beneficiary's position over any right with respect to the estate which was created subsequent to the beneficiary's own claim. Any dispositions by way of foreclosures, distress warrants or insol-

veny proceedings, as well as any contractual dispositions made by the seller, are invalid vis-à-vis the beneficiary to the priority notice. In case of insolvency of the seller, such priority notice will entitle the purchaser protected by such priority notice to claim performance despite the insolvency proceedings without being subject to an insolvency quota. Consequently, German purchase agreements regularly stipulate that the purchase price shall not become due before the priority notice of conveyance has been registered in the land register.

b) Easement

An easement obliges the owner of the encumbered plot of land to tolerate specific conduct of someone else (the beneficiary of the easement) on his or her plot of land or to refrain from specific conduct on the plot of land for the benefit of someone else. The easement may be registered in favor of and restricted to a certain person/company, a limited personal easement, e.g. a tenant's right to run a retail store or a permanent right of residence. More often, easements are registered in favor of the respective owner of a plot of land, e.g. to secure a right of way or a pipe way leave. Since easements have a material impact on the value of a property because they restrict the right of use or secure an adequate use of the property, all existing or required easements should be reviewed in the course of due diligence.

c) Usufruct

A usufruct on a plot of land entitles the beneficiary to possess the land and to take the emoluments of the land and accessories, e.g. rent payments.

d) Charge on Land

Also, a plot of land may be encumbered in such a way that recurring acts of performance are to be made from the plot of land to the person in whose favor the encumbrance is created (charge on land). It is possible to agree as to the content of the charge on land that the acts of performance to be made are adjusted to changed circumstances without notice if, based on the requirements stipulated in the agreement, the type and scope of the encumbrance of the land can be determined. The charge on land may be created in favor of a certain person/company or the respective owner of another plot of land. Often, a charge on land is created to ensure that credit facilities are repaid, which were concurrently agreed upon between the parties.

e) Other Land Charges

German law provides for a number of security interests in real estate. The most important security interests are mortgages and land charges, the difference

being that the mortgage secures a specific debt and the land charge does not, for which reason the land charge is the preferred security interest in most transactions. They both give the beneficiary (primarily banks) the right to collect a specific sum of money by way of a forced sale or forced management of the encumbered plot of land. The transferability of a mortgage/land charge can be increased by the creation of a certificate.

4. Transfer of Title and of Leases

a) Transfer of Title

A peculiarity of German law is that, in addition to the purchase agreement, a special agreement regarding the conveyance itself is required. Usually this agreement is included in the purchase agreement, i.e. seller and purchaser agree that the title of property shall pass from the seller to the purchaser (see C.IV.4., C.IV.5.).

If the agreement regarding conveyance is concluded separately from the purchase agreement, it must be notarized like the purchase agreement itself. However, the agreement regarding conveyance must be concluded before a German notary in the physical presence of both parties, whereby either party may be represented by an agent. It can only be unconditional and must not contain any sort of time limit (however, this stipulation does not apply to the purchase agreement). The entire agreement, including the agreement regarding conveyance, is valid only if the seller is the owner with unrestricted authority to dispose or a third person with authority granted by the unrestricted owner. If the seller does not have the authority to dispose, the purchaser can only acquire the title if the seller is registered as owner in the land register and the purchaser acts in good faith (see B.III.1.c)).

The conveyance will only become effective upon its registration in the land register, which may take a long time. However, the parties shall enable the purchaser to use the property as soon as possible. It is thus common practice in real estate transactions to agree that the economic ownership (transfer of possession) will be passed on earlier, irrespective of the registration of ownership in the land register, but generally not before the registration of a priority notice of conveyance (see B.III.3.a)) and the payment of the purchase price. This includes, inter alia, the right to collect rent.

The legal transfer of the lease agreements from the seller to the purchaser, however, will occur by operation of law upon the registration of the purchaser in the land register. However, this automatic transfer only applies in case the seller, owner of the real estate and landlord under the lease agreement are identical. If not, it is not sufficient to agree upon the transfer in the purchase agreement.

Rather, an agreement between all three parties involved – purchaser, seller and tenant – is required. In case a lease agreement has been concluded but the premises have not yet been handed over to the tenant, the purchaser has to assume all obligations of the landlord in the purchase agreement in order to ensure a transfer of the lease. As the purchaser assumes all obligations of the landlord, including the liability for any deposit made by the tenant, it should be ensured that all deposits are in fact transferred to the purchaser.

IV. Acquisition of Leveraged Loans

1. Attractiveness

Despite the recent strong improvement in the German economy, some portfolio companies of private equity investors are still suffering from the credit crunch or over-leveraging in the pre-crisis years as the economy slows; those are prepared or have no alternative but to breach the financial covenants of the facility agreements, even if they struggle to find new lenders for necessary refinancing. As a consequence, the prices of leveraged loans of these companies fall well below par. This, on the other hand, attracts investors to acquire leveraged loans.

2. Necessity of Banking License

According to the German Banking Act (KWG), the acquisition of a leveraged loan does not necessarily require a banking license, so that even private equity funds may generally purchase the loans of their portfolio companies. A banking license is only needed if an entity carries out “credit business”, i.e. inter alia, the professional granting of loans. The acquisition of leveraged loans, the facility repayment and/or the enforcement of claims as such do not constitute a “credit business”. However, this might be different in the case of refinancing a loan or if a facility agreement gives the lenders certain ancillary rights, e.g. determination of new interest rates. Therefore, it is recommended to examine in each individual case whether a banking license is required for the acquisition of a leveraged loan.

3. Transfer of Loans

Under German law the transfer of a loan does not have to meet any specific form requirements, i.e. a loan transfer agreement can be signed on the parties' private capacity without notarization. The transfer of a loan, however, should always be indicated to the borrower in order to avoid his making payments to the transferor with debt discharging effect.

4. Assignment Clause

Another legal aspect concerning the acquisition of a leveraged loan is the assignment clause in the facility agreement. Does the assignment clause permit the assignment of the lender's rights arising from the facility agreement to the respective acquirer of the leveraged loan? In this respect, some facility agreements restrict the potential circle of acquirers to banks and financial institutions and expressly exclude any funds or other such entities. Further, many facility agreements require the consent of the company to the change of lender which, however, may not be unreasonably withheld.

5. Specialties

If the acquirer of a leveraged loan is simultaneously a shareholder of the borrower and the lender, two main issues arise from a German legal perspective: first, the subordination of any repayment claims of the acquirer arising from the facility towards other creditors in case of borrower's insolvency and, second, the conflict of interest as the shareholder will be both owner of the borrower and its creditor.

a) Subordination

According to German insolvency law, any outstanding shareholder loan or similar contribution is always a subordinated insolvency claim and the repayment of any shareholder loan or similar contributions within the time period of one year before filing or after filing of insolvency proceedings can be reclaimed by the insolvency administrator. Since any loan for which a shareholder is (or has once been) the creditor is treated as a shareholder loan and is therefore subject to these rules, an investor must always be aware of his subordinated position in case of the insolvency of the portfolio company. However, the aforementioned rules do not, inter alia, apply to shareholders holding less than 10% of the registered capital of the borrower.

b) Conflict of Interest

If the leveraged loan was granted by a syndicate and the shareholder only acquires a part of the facilities granted to the portfolio company, the shareholder might encounter a significant conflict of interest to the possible disadvantage of other creditors: On the one hand, the shareholder represents the owner of the borrower and, on the other hand, it is part of the syndicate. Due to this conflict of interest, there is a material risk that under German law the shareholder's voting rights in the lenders' syndicate might be withdrawn.

C. Transaction Procedures

I. Acquisition Procedures

Sales processes in Germany are typically set up as a private sales process or an auction process. In both cases, the seller must be well-prepared prior to starting a transaction process with one or more potential purchasers. This includes the prior identification of risks and opportunities, as well as the feasible repair of already identified deficits. In some cases, the seller decides to carry out its own vendor due diligence to get the aforementioned information about the target company in preparation for the upcoming transaction and to speed up the intended sales process.

1. Private Sales Process

a) Typical Procedures

A private sales process is characterized by a sales process with only one potential purchaser. In Germany, a private sales process typically begins with a letter of intent/memorandum of understanding between seller and purchaser with respect to the intended purchase of the company, which is essentially non-binding (see C.II.2.a)). However, the potential purchaser is interested in negotiating a binding exclusivity period prior to starting its costly due diligence work. After signing a separate confidentiality agreement or, respectively, a confidentiality clause within the letter of intent or the memorandum of understanding, the potential purchaser obtains the possibility to execute due diligence, including an interview with the management of the target company. After scrutinizing the company, the parties negotiate a sale and purchase agreement on the basis of the terms “agreed” upon in the letter of intent/memorandum of understanding, appropriately modified by the findings from the due diligence process and the management presentation.

b) Disadvantages for Seller

The option of the seller to sell its company by means of a private sales process bears two major disadvantages for the seller: On the one hand, the acquisition process is necessarily terminated if the potential purchaser decides, for whatever reason, to terminate the negotiations with the seller. On the other hand, the seller is typically not in the position to facilitate the sale of its business at the highest price on the best possible terms.

c) Advantages for Seller

However, a private sales process may be less expensive than the execution of an auction process with respect to the generated transaction costs. Furthermore, only one potential purchaser will receive confidential information on the target company.

2. Auction Processes

a) Typical Procedures

An auction process is quite common in order to achieve a higher price by generating higher demand with multiple potential purchasers. Consultants (e.g. an M&A consultant or an investment bank) provide their business contacts to many potential financial and/or strategic bidders and prepare a company teaser describing the company to be sold in general without disclosing any individual information identifying the target company. In case potential bidders are interested in obtaining more information about the target company through receipt of an information memorandum, they must first sign a separate confidentiality agreement/non-disclosure agreement. At the same time, the seller and its consultants have completely assembled the (in most cases virtual) data room with all available information on the target company (see C.III.5.). All potential bidders who are interested in purchasing the company are invited to submit a non-binding offer letter containing a first proposal for the purchase price and answers to specific questions requested by the seller. The seller is particularly interested in how the respective bidders are financed and how they can secure the purchase price. The seller then decides to grant a limited group of potential purchaser access to the already prepared data room and to the management of the target company in this second phase of the process. After execution of the due diligence and interviews with the management have been conducted, all further interested potential bidders are invited to submit a final (but also typically non-binding) letter. After evaluation of all final offer letters and comments on the sale and purchase agreements, the seller decides which potential bidder will proceed to the third phase of the auction process. Those potential purchasers will have the opportunity to negotiate the respective sale and purchase agreements with the seller. Sometimes, bidders request an exclusivity period during this last phase to enhance their position.

b) Disadvantages for Seller and Purchaser

The auction process is a very time-consuming and costly process. Often, the seller has to negotiate two sale and purchase agreements simultaneously at the end of the last phase of the auction process. Due to the existing demand among the potential purchasers, each purchaser has to figure out which purchase price and which amendments to the sale and purchase agreement are essential to obtaining the target company.

II. Getting Started

1. Information Memorandum

In an auction process potential bidders will receive the first detailed information on the target company upon receipt of an information memorandum. The information memorandum generally contains business, financial, legal and tax-related facts on the company. The business description and the organization of the target company are the most important pieces of information for the purchaser. Typically, the information memorandum will be prepared by the seller together with its consultants (e.g. M&A consultant or investment bank).

2. Preliminary Agreements

a) Letter of Intent/Memorandum of Understanding

The letter of intent and the memorandum of understanding are instruments used to bring together the seller and potential purchaser in a private sales process. Those (sometimes only one-sided) declarations are typically the first written documents in which the seller and potential purchaser announce their initial intention with regard to the execution of the transaction and their current negotiation results. Most statements made in a letter of intent or memorandum of understanding are non-binding, unless explicitly stated otherwise.

Often such letter of intent or memorandum of understanding contains a few explicitly binding clauses regarding the granting of a period of exclusivity, including legal consequences in case of a breach, a confidentiality clause, clauses dealing with the payment of costs in case of a broken deal (e.g. break-up fees or reimbursement of expenses) and non-solicitation and non-competition clauses.

b) Confidentiality Agreement/Non-Disclosure Agreement

Irrespective of whether it is a private sales process or an auction process, the seller is interested in having an extensive confidentiality agreement with the potential purchaser or bidder. The confidentiality agreement shall protect the seller and the target company against any transfer of information resulting from the potential purchaser's access to all transaction documents (in particular to the documents in the data room). Within this context, it is important for the seller to define special terms for the confidential information, the purpose of the disclosure, as well as the disclosure and receipt of information.

III. Due Diligence

1. Purpose of a Due Diligence

Due diligence is an investigative process designed to evaluate the commercial, financial and legal aspects of the business of the target company. The main purpose of due diligence is to provide the (potential) purchaser with the information required to decide whether to complete and how to structure the transaction. Due diligence also enables the purchaser to better negotiate the purchase price, representations and warranties and arrange for sufficient protection in material areas. Moreover, due diligence provides the purchaser with information about the key personnel and the culture of the target company which will surely be significant for post-closing integration measures.

Pursuant to German case law, the seller is obliged to fully disclose all essential facts which would have an impact on the purchaser's decision on whether to complete the acquisition or refrain from it. If risks have been identified, the purchaser and the seller usually negotiate which party is to bear these risks and the purchaser may decide on which terms he wants to proceed with the transaction.

Most due diligence processes are initiated by the purchaser. However, the number of vendor due diligence processes, i.e. the seller and his advisors conducting due diligence on the target company, has increased in recent years. The advantages for the seller of conducting vendor due diligence can be considerable. Foremost, it gives the seller the chance to identify and react to any issues, which may have an impact on the value of the assets about to be sold before the sale process has started. In addition, the preparation of the vendor's own due diligence report may also save precious time, in particular in a tightly scheduled auction process.

2. Components of a Due Diligence

Usually, the due diligence investigation consists of financial, legal, tax and commercial elements. Depending on the business of the target company, the due diligence process may also cover environmental examinations, technical issues, human resources and/or insurance issues. In general, due diligence is carried out by the purchaser himself and his legal, tax, commercial and financial advisors and – if applicable – other consultants.

3. Focus of Legal Due Diligence

The topics of legal due diligence may vary from transaction to transaction. However, the scope of legal due diligence generally includes corporate and commer-

cial legal documentation of the target company, financing of the target company, material contracts (in particular leases and agreements with suppliers and customers), human resources, real estate, intellectual property and information technology, litigation, public affairs, environmental issues and insurance policies.

4. Focus of Tax Due Diligence

Tax due diligence is conducted to obtain information on tax risks at target company level which might (e.g. in the course of a subsequent tax audit conducted by German authorities) result in a tax burden of the target company or the purchaser. Such tax issues are not only relevant in the course of a share deal, but also in an asset deal where the purchaser may – under certain circumstances – become liable for business taxes of the assets. Moreover, tax due diligence provides details on the target company in respect to a tax-efficient acquisition structure, as well as post-acquisition reorganization.

5. Due Diligence Process

As outlined above, the due diligence process is usually conducted in cooperation with several participants, such as the management of the target company, external financial advisors, lawyers, tax advisors and other consultants. The due diligence investigation inevitably exposes conflicts of interest between seller and purchaser. The seller does generally not want to disclose details about the target company before being certain that the purchaser will actually complete the acquisition, while the purchaser typically requests comprehensive disclosure of all relevant information and documentation about the target company right from the start of the due diligence process. To satisfy both needs, in most auction processes therefore only basic information is provided in the beginning, with more confidential information to be disclosed at a later stage to the shortlisted bidders. However, regardless of whether the transaction is executed as a private sales process or an auction process, a successful due diligence process always requires close cooperation of every party involved, including the management and the key personnel of the target company.

Generally, the consultants (in particular tax advisors and lawyers) prepare request lists tailored to the specific transaction and due diligence questionnaires being delivered to the management of the target company. The requested material is then presented for review in a data room. Nowadays, particularly when the transaction is conducted as an auction process, the seller sets up a virtual data room. Such a virtual data room easily enables international networking and collaboration among the purchaser and his advisors. This is particularly essential when advisors specialized in different foreign jurisdictions are involved in the due diligence process.

6. Due Diligence Report

Depending on the purchaser's instructions, legal due diligence may either result in a comprehensive due diligence report or a red flag report. A comprehensive due diligence report describes in detail the documents reviewed by the advisor. It also includes an executive summary that concentrates on the material risks and legal issues that may have an impact on the final bid, the preparation and negotiation of the sale and purchase agreement, as well as on the structure of the envisaged transaction. On the contrary, a red flag report does not describe each disclosed document in detail, but rather summarizes the legal material risks and issues relevant for the terms, the structure and the completion of the acquisition, as well as for post-closing measures.

In principle, a due diligence report is primarily prepared for the client. The report may only be used for the envisaged transaction and may not be circulated to third parties without prior approval of the respective advisor. The report usually contains a limitation of liability in favour of the advisor. The amount of such limitation depends on the volume of the envisaged transaction. In case of a leveraged transaction, the financing bank usually also requests a due diligence report before providing necessary funds to the purchaser. Commonly, the bank requests that a due diligence report prepared for the purchaser is forwarded for review rather than to entrust its internal and/or external advisors to conduct a due diligence on the target company. The permission to forward the due diligence report to the financing bank is typically provided in a reliance letter concluded between the advisor and the financing bank.

IV. Sale and Purchase Agreement (SPA)

1. "German" vs. "Anglo-Saxon" Contracts

Traditionally, commercial contracts under German law are substantially shorter than those Anglo-Saxon investors are used to in their own jurisdictions. To a certain degree, this also applies to SPAs in the mergers and acquisitions context, although the influence of Anglo-Saxon legal culture has been significant over the past two decades. "Anglo-Saxon style" SPAs are most frequent (and have become the market standard) in large and mid-cap private equity transactions, where the need for international syndication of debt or equity instruments has a strong impact on market practice. On the other hand, comparatively short "German style" documents continue to prevail in many all-equity-financed transactions (even very large ones) and in many transactions involving typical German medium-sized companies, as well as most transactions involving insolvency receivers. Or, as the CEO of a German corporation wishing to make a mid-cap

acquisition stated when confronted with the seller's five-page "German style" SPA draft: "This type of contract we use only for the very small and for the very big acquisitions."

2. Relevance of Statutory Law

The brevity of German-style documentation should not be misread as sloppiness. Rather, it should be noted that most key areas of German corporate and contract law are dominated by extensive statutes such as the HGB, first enacted on 10 May 1879, and the 2,385 sections of the German Civil Code (BGB), most of which date back to 1 January 1900. Statutory law makes many of the definitions and much of the explanatory language of Anglo-Saxon style contracts redundant (or in many cases even misleading) under German law. On items like remedies for violation of warranties, calculation of damages, contributory negligence and the like, German contracts often rely on statutory law (including long-standing case law interpreting it). On the one hand, this makes German contracts shorter and easier to read than Anglo-Saxon counterparts; on the other hand, the wording of the contract sometimes gives little guidance on practical handling issues as the wording is to be understood within the context of statutory law and general legal principles (which may or may not be known to the person actually dealing with the execution of the contract).

3. Interpretation of Contracts; Substance over Form

Principles of interpretation of contracts under German law differ substantially from common law principles. In particular, the purpose and intention of a clause is often predominant in interpretation (with results which may even be contrary to the wording, if taken literally). This explains why "boiler plate" language such as headings being for reference only, masculine terms including the feminine, plural including the singular, etc. are missing in typical German SPAs. In many cases, the parties choose German law but use English as the language of the contract. This requires great care by the lawyers involved because many standard terms in English-speaking M&A practice, such as "representations and warranties", "best knowledge" and the like, are by no means identical to the usual German counterparts or are ambiguous under German law. Such terms need to be clearly defined in the agreement in accordance with categories of German law.

4. Notarization Requirements and Fees

A peculiarity of German law is the importance of notaries public in transactional practice. Any German law agreement involving the transfer of GmbH shares or real property must be notarized. This means that the entire document, including any ancillary agreements related thereto and including any exhibits, which are

substantially part of the agreement (other than lists and tables, as to which an exception applies) must be read aloud by or in front of the notary. Therefore, allow a whole day for “signing” of a detailed German law SPA containing many exhibits! Foreign investors often avoid this by sending their German lawyers with a power of attorney. Note that for some purposes (such as capital increases in GmbHs and real estate purchases) the power of attorney itself needs to be notarized.

German notary fees are governed by a mandatory, non-negotiable fee schedule and are calculated on the basis of transaction value. Accordingly, they range from EUR 10 (e.g. for the notarization of a 200 page SPA involving the purchase of a heavily indebted GmbH for EUR 1) to a maximum amount of approximately EUR 55,000 (at a transaction value of EUR 60,000,000 or more, even if the SPA is only five pages long). Notary fees are customarily borne by the purchaser. In order to avoid the costly German notary fees, parties used to “flee” to Switzerland to have SPAs notarized by Swiss notaries (who are allowed to negotiate fees in accordance with the actual work load and usually charge only a fraction of the German fees). Note that this practice is impossible for real estate transactions (for which notarization by a German notary is mandatory for the transfer of ownership) and has become less common with regard to GmbH shares following certain amendments of the GmbHG in November 2008.

5. Substantive Standards and Market Practice

In substance (although often not in style and wording) German law SPAs are similar to standards used elsewhere. When reading German SPAs, foreign investors may be confused by the distinction between the sale and the transfer which are described as two separate transactions. The “sale” constitutes the obligation to transfer the share while the transfer constitutes the actual passage of title. The same applies for the sale and the conveyance of property (see above B.III.4.). The transfer (but not the sale) is usually subject to the condition precedent of payment of the purchase price. In cases in which antitrust filing requirements apply, the transfer (but not the sale) must be subject to antitrust clearance. A typical German SPA contains the sale as well as the transfer but the transfer may be subject to certain closing conditions. A “German closing” therefore consists of mutual acknowledgements regarding satisfaction of such conditions but no actual instrument on the transfer of title is executed upon closing.

Note that, under German law, only an AG may issue share certificates; titles to GmbH shares or KG interests pass by virtue of the agreement only, which is unusual for many foreign investors and makes them feel somewhat uncomfortable given that, as a matter of law, neither entries in the commercial registry nor a chain of previous transfers evidenced by notarial deeds inspected in legal due diligence constitutes conclusive evidence of share ownership in a GmbH. Amend-

ments to the GmbHG enacted in November 2008 have improved the status of bona fide purchasers relying on the share register, which can be inspected online in the commercial registry. A bona fide acquisition is now possible if the alleged owner has been registered as owner for at least three years, and no objections have been filed against such registration.

As in any jurisdiction, purchase price and adjustment clauses are core elements of the SPA. Since the beginning of the subprime crisis in 2007, net financial debt and working capital adjustments as of closing have become more frequent and “locked box” schemes (with fixed purchase prices determined on the basis of past figures and purchasers being protected only by restrictive covenants between signing and closing) have been on the retreat and have remained the exception rather than the rule, even after the recovery of buy-out markets in 2010/11.

Representations and warranties are usually as detailed and comprehensive as in most other jurisdictions. During the financial crisis, market standards have changed and more comprehensive warranty catalogues have become standard practice (except in deals through insolvency for which the receiver will not usually give any business warranties at all). In 2010/11, the standards on warranty catalogues, caps, etc. have developed to a “middle ground” between the extremely purchaser-friendly standards of 2008/09 and the rather seller-friendly standards of the boom years 2005 – 2007.

V. Public Tender Offers

1. General

A particular way of acquiring control over a listed company is through the issue of a public tender offer. In cases in which a controlling position cannot be reached merely by the purchase of block holdings in off-market transactions, a public tender offer is often the only viable way of acquiring a majority stake in a listed company without purchases on the open market. In addition, if a private transaction or purchases on the open market cause the acquirer to reach or exceed the threshold of 30 % of the voting rights, an obligation to make a public offer will result from the transaction (so-called “mandatory offer”, see C.V.2.). As a consequence, the acquisition of a listed company is, in practice, often structured as a combination of purchases on the open market, the acquisition of one or more blocks of shares in private transactions, and the issue of a public tender offer.

2. Types of Public Tender Offers

Public tender offers can be made by way of two main types of offers, namely voluntary offers and mandatory offers. Voluntary offers aiming at the acquisiti-

on of control over a listed company are so-called “takeover offers”. As opposed thereto, a “mandatory offer” must be made to the outside shareholders upon the acquisition of control in any way other than by a takeover bid, e.g. through an off-market purchase of shares, by way of purchase on the open market, by subscription in a capital increase or by merger.

“Control” is established by directly or indirectly holding 30 % or more of the voting rights. To determine whether the 30 % threshold has been met, the voting rights directly held by a shareholder and certain voting rights imputed to him must be combined. For example, voting rights which are owned by a subsidiary of the respective shareholder, or voting rights which are owned by a third party for the account of the shareholder, shall be deemed to be voting rights of such shareholder. In particular, the voting rights of two shareholders who “coordinate” their conduct with respect to the company are added up and imputed mutually to both shareholders, with the exception of agreements in individual cases (“acting in concert”). “Coordination” between two shareholders shall be deemed to exist in cases in which they reach a consensus on the exercise of voting rights or otherwise collaborate with the aim of effecting a permanent and significant change to the company’s business strategy.

3. Issue of the Offer and Pricing

a) Offer Procedure

Once the bidder has decided to make a takeover offer, or once the 30 % control threshold has been met, the bidder must immediately publish the decision or announce the fact that the control threshold has been met. Such publication must be made via internet and via an electronic data dissemination system widely used by credit and financial institutions. Thereafter, as a rule, the bidder has a period of four weeks to prepare an offer document containing the full terms of the offer, and to submit the offer document to the German Financial Supervisory Authority (BaFin) for verification. Upon approval of the offer document by the BaFin, the bidder must immediately publish the offer. The publication marks the beginning of the acceptance period. The acceptance period may generally not be less than four and not more than ten weeks. At certain intervals during and after the expiry of the acceptance period, the bidder must publish the respective acceptance level. In the event of a takeover offer, in order to protect those shareholders who have not accepted the offer within the regular acceptance period, there is generally a mandatory “extended acceptance period” of further two weeks during which the offer can still be accepted. Upon expiry of the acceptance period or, if applicable, the extended acceptance period, the transaction is settled by way of payment of the consideration for the shares in the target company.

b) Pricing

For both takeover and mandatory offers, the bidder generally has the choice between either offering adequate consideration to the other shareholders in cash or in liquid shares. The consideration must at least be equal to the higher of (i) the highest consideration which the bidder, persons acting in concert with the bidder or their subsidiary undertakings have, during a period of six months preceding the publication of the offer document, granted or promised for the acquisition of shares of the target company, or (ii) the weighted average domestic stock market price of the shares during the three month period preceding the publication of the bidder's decision to make a takeover offer or of the bidder's attainment of the 30% control threshold. However, the consideration will be adjusted to a higher price if the bidder, persons acting in concert with the bidder or their subsidiary undertakings acquire further shares in the target company, either during the acceptance period or by way of an off-market transaction, within one year after the acceptance period, in case the consideration promised or granted for such shares exceeds the value of the consideration specified in the offer. An exception thereto exists for the acquisition of shares in connection with a statutory obligation to grant compensation to shareholders of the target company, e.g. after the implementation of a domination and profit and loss transfer agreement, or in the case of a squeeze-out of the remaining shareholders.

4. Typical Takeover Strategies in Germany

Both takeover offers and mandatory offers basically follow the same legal regime. An important deviation, however, is that a mandatory offer may not be made subject to conditions, whereas for voluntary offers – and thus also for takeover offers – conditions are generally permissible. In particular, a takeover offer may be made subject to the achievement of a certain acceptance level. As a consequence, in order to ensure that a certain percentage of voting rights is obtained, bidders will usually make their offer conditional upon the tendering of the relevant number of shares into the offer. Most bidders try to reach a percentage of at least 75% of the voting rights. Such majority is required for structural measures of the target company, such as changes to the articles of association, mergers, conversions, domination agreements and profit and loss transfer agreements.

Based on the fact that a mandatory offer cannot be made subject to conditions, bidders will typically try to avoid reaching the 30% threshold. The combination of a private transaction of 30% or more with a takeover offer, subject to a certain acceptance level, is typically achieved by signing the private transaction prior to the announcement of the offer and closing the private transaction after the announcement. In so doing, the purchaser ensures that the offer is not a mandatory offer, but rather a takeover offer with conditions being permissible. In addition,

the offer price can be based on the price agreed upon in the private transaction, whereby the risk that the offer may become more expensive due to rising stock prices is mitigated.

As an alternative to a private transaction, it is possible for the seller and the purchaser to enter into an agreement in the form of a so-called “irrevocable undertaking”. The seller hereby undertakes vis-à-vis the purchaser – the future bidder – to tender its shares into an upcoming takeover offer. The main commercial difference from a private transaction is that, in so doing, the seller will be amongst the shareholders tendering their shares, and will thus be protected by all rules which are applicable to the offer, most importantly those with regard to any potential price adjustments after the completion of the takeover procedure, as set out above.

After a successful takeover with at least a 75% margin of the voting rights, the bidder will be able to take full control of the company, e.g. by way of implementation of a domination and profit and loss transfer agreement, by merger or – if the thresholds of 90% or 95% have been met – by way of a merger-specific squeeze-out (at 90%) or a regular squeeze-out (at 95%) of the remaining shareholders.

D. Acquisition Financing from a German Perspective

I. Introduction

A German acquisition structure of institutional investments, as well as of strategic investments on a stand-alone basis, regularly requires an acquisition vehicle in the legal form of a German GmbH purchasing the target group. Since an acquisition vehicle does not own essential assets, it has to be funded with (quasi-) equity by the shareholders (i.e. stated equity, equity in the form of capital reserves, as well as in the form of shareholder loans) and with bank debt (i.e. senior debt, second lien loans, mezzanine debt, as well as high yield bonds) in order to be able to pay the purchase price to the seller.

The debt-to-equity-ratio mainly depends on (i) the overall market situation, (ii) the strategy of the investor, as well as (iii) the cash flow of the target group as the subsequent debt service has to be generated from the target group's operational business. In addition, banks require granting of sufficient security by the acquisition vehicle, the target group and – so far mostly in cases of a strategic investor – by the investor.

II. Financing Process

The financing process can generally be divided into three phases: The process usually starts with a term sheet summarizing the (economic) cornerstones of the financing. The term sheet is followed by negotiations of the credit agreement and its final conclusion. On the closing date, the security agreements are executed and the funds are made available to the borrower.

III. Documentation

1. Term Sheet

If a bank is potentially willing to fund a transaction, it would provide the purchaser with a proposed structure of the acquisition financing detailed in a term sheet. The term sheet usually contains a determination of the debt-to-equity-ratio, the amount of the facilities and the essential conditions, the maturity date of the facilities, as well as the financial covenants.

2. Facility Agreements

Facility agreements throughout Europe are generally based on the standard facility agreements issued by the Loan Market Association (LMA) in London. Since 2007, the LMA is even publishing a special German law version of the LMA docu-

ments, i.e. the standard LMA documents are specifically adapted to the requirements of German law and banking practice (see D.IV.) whilst otherwise retaining the form and substance of the LMA English law documents.

In the past, the acquisition financing of a German target group was – except for the security agreements – mostly governed by English law. Lenders intending to syndicate the credit facilities insisted on English law since English LMA documents were routinely used across Europe and were therefore regarded as inevitable for a smooth syndication process. As a consequence of the availability of the version of the LMA standard that is compliant with German law, more and more acquisition financing agreements are facing German law as substantive law if the target group has its headquarters in Germany. Only the larger transactions are still commonly governed by English law. However, the English language continues to be the major drafting language of finance documents.

A bank or a consortium of banks financing an acquisition is normally also interested in (re-) financing the working capital of the target group. In this way, the acquisition financier can avoid other institutional lenders of the target group and hence the risk of draining money or of subordinated enforcement rights. A so-called “revolving facility” is therefore often also part of the senior facility agreement.

3. Securities

Naturally, lenders expect security for the granted facilities. In the facility agreements the security is usually only briefly mentioned, referring to the details in the security agreements. The security documents themselves provide very exhaustive documentation.

The following security structure is normally implemented for the benefit of the lenders: The acquisition vehicle usually pledges only its shares in the holding company of the target group since these are its only essential assets. The target group pledges any shares in any material subsidiary, as well as any bank accounts, and assigns all receivables, intellectual property rights, as well as current assets. So far only in the context of strategic investors, but as a consequence of the financial crisis also in the context of a financial investor, lenders also more frequently expect security in the form of payment guarantees from the respective investor itself. This, however, might have serious negative tax consequences for a financial investor domiciled in Germany.

If an acquisition financing has several levels, e.g. a senior and a mezzanine facility, the loans are typically linked through so-called “cross defaults” clauses. Once a borrower breaches any facility agreement, an event of default in the other credit agreements occurs and all lenders may accelerate – given certain grace periods – the facilities. Therefore, the relationships among lenders, and especially their ranking with regard to the proceeds from the enforcement of security, generally need to be governed by an intercreditor agreement.

IV. Specific Issues under German Corporate Law

In the case of an investment in a target group incorporated in Germany and finance documents governed by German law, acquisition financing faces – apart from tax implications, which are not discussed in this Part C. but in E. – specific issues under German law as follows:

1. Prohibition of Compound Interest

According to German law, the contracting parties must not agree on any compound interest or on the accrual of any default interest on overdue interest. Such agreements are invalid. However, creditors may claim compensation for any damages resulting from delayed payment of interest. Therefore, if a borrower fails to pay interest on the due date, lenders shall claim lump sum damages on the overdue amount from the due date up to the date of the actual payment. The damages usually comprise the loss of profit the bank would have made if it had invested the amount due in the market. The borrower, however, shall be free to prove that no damages have been incurred or have not been incurred in the relevant amount.

2. Prohibition of Financial Assistance by an AG

A German AG may not give upstream or cross-stream guarantees or securities to assist in the acquisition of its shares. According to German corporate law, any financial assistance by an AG (or its subsidiaries) in the acquisition of shares in itself by granting securities, providing a loan or making an advanced payment is – without exception – prohibited. Even the refinancing of loans used for the acquisition of shares constitutes undue support. Any assistance in the acquisition of stock in a German AG by the respective target is therefore, as a rule, null and void. As a consequence, a security such as the pledge of shares of the respective target group, i.e. shares in the AG itself, as well as shares in any subsidiary, or the liens on real estate for any liabilities resulting from the acquisition financing must not be granted to the lenders.

However, since the prohibition is limited to the support of the acquisition financing, a payment guarantee or an upstream security may be – subject to the “maintenance of capital rules” (see D.IV.3.) – granted by a target in the legal form of an AG for any working capital loan such as a revolving facility. For this reason, the separation of the acquisition financing from the financing of the working capital is regularly seen if the target company is an AG.

Other types of German business entities than a German AG and the rarely used KGaA, such as a German GmbH, incidentally, do not fall within the scope of the prohibition of financial assistance.

3. Maintenance of Capital Rules and Limitation Language

Any corporate entity that provides upstream or cross-stream guarantees or securities must comply with the German “rules on maintenance of capital”. These rules (indirectly) limit the financial assistance of target groups. Since they are considered to be relatively strict compared to international standards, this is the most important legal issue in acquisition financing from a German perspective.

The rules on capital maintenance for an AG are more far-reaching as compared to those which apply to a German GmbH or a KG with a GmbH as general partner. An AG is prohibited from distributing any assets to its shareholders, unless a regular distribution is concerned or the AG and its shareholder have entered into a domination and profit and loss agreement. In other words, when granting upstream and cross-stream guarantees or securities, an AG must receive an equivalent benefit or a guarantee fee at the fair market value or must be the dominated company of a domination and profit and loss agreement.

Different maintenance of capital rules apply to the German GmbH or German GmbH & Co. KG. These business entities do not comply with the maintenance of capital rules, if they distribute any assets to shareholders and do not provide for the preservation of the registered share capital of the GmbH. Therefore, managing directors may not provide any upstream or cross-stream guarantees or securities, if the granting or enforcement of such guarantees or securities causes the net assets of the company to fall below the registered share capital. However, the German capital preservation rules only apply if the borrower, i.e. the acquisition vehicle, is a direct or indirect shareholder or an affiliate of the shareholder of the German GmbH or German GmbH & Co. KG granting the upstream or cross-stream guarantees.

Since a breach of the maintenance of capital rules of the German GmbH and German GmbH & Co. KG can potentially give rise to personal or criminal liability of the management and/or shareholders of the company (see D.V.), it is standard practice to face these rules with so-called “limitation language” in the security documents. In view of the risk of personal liability, the lenders are prepared to accept contractual limitation language on the guarantees and securities in order to limit the subsequent enforcement of upstream or cross-stream guarantees and securities to the extent these are not covered by the strict rules on capital maintenance. However, the German LMA standard has not included any such language. The contracting parties must therefore negotiate the terms and conditions of the limitation language on a case-by-case basis. While a certain practice has been established in the past, there are uncertainties whether this practice is still adequate in view of the latest amendments to the GmbHG.

4. Over-Collateralisation

According to German civil law, the granting of securities is invalid by reason of acting against public policy if the lender is over-collateralized. Therefore, standard German security agreements include a clause concerning the release of securities: At any time when the total value of the aggregate securities granted by the borrower and/or the target group, which can be expected to be realized in the event of enforcement of the securities, exceeds 110 % of the secured claims, the lender shall, on demand of the borrower, release such part of the securities as to reduce the realizable value of the securities to 110 % of the secured claims.

V. Liability Risks

1. Investors

Investors may be liable for endangering a company's existence. If an investor intentionally causes the insolvency of a direct or indirect subsidiary by draining the assets of the respective subsidiary, e.g. by payments of management fees or by granting upstream securities, and the occurrence of an insolvency was reasonably likely, as well as noticeable to the investor, this may result in shareholder liability for any damages of the insolvent company.

2. Management

The management of a borrower (about to breach the financial covenants of a facility agreement) faces an essential risk of (personal) liability due to the breach of a director's duty such as

- ▶ forbidden payments of (a part of) the registered capital of the company to a shareholder;
- ▶ violation of bookkeeping requirements, e.g. misleading bookkeeping;
- ▶ insufficient risk controlling concerning the business of the company;
- ▶ failure to promptly inform other cash pool parties of a negative material impact on the financial position of the company;
- ▶ failure to convene a shareholders' meeting upon the loss of 50 % of the share capital of the company.

If (due to an event of default) insolvency of a company occurs, the management might be personal liable, especially for

- ▶ payments of the company to its shareholders that noticeably and inevitably caused the illiquidity of the company;
- ▶ careless payments of the company made after the event of illiquidity or the identification of over-indebtedness of the company;

- ▶ losses of creditors due to a delayed filing of insolvency proceedings or due to other tortuous actions.

In the very challenging situation of the occurrence of an event of default under a facility agreement, the management shall be – in order to avoid criminal liability – especially aware of the elements of a crime as follows:

- ▶ fraud, e.g. by confirming false financial covenants in a compliance certificate, especially if the company has a revolving credit line;
- ▶ violation of bookkeeping requirements or misleading financial statements;
- ▶ failure to promptly inform the shareholders of the loss of 50% of the share capital of the company;
- ▶ delayed filing for the commencement of insolvency proceedings.

E. Taxation

I. Introduction to the German Tax System

The German tax system often has the reputation of being complex as it consists of more than 40 different types of taxes; however, it follows very strict and systematic rules. Also, the effective tax burden in Germany is lower in various cases than expected at first sight. Individuals and entities can often benefit from numerous exemptions and depreciation provisions.

The German tax system usually ties in with the residence of the taxpayer. If the latter has his residence or customary place of abode in Germany, unlimited tax liability concerning his worldwide income is the consequence, whereas for all other non-resident investors, limited tax liability concerning income from German sources results. The same rules apply for corporate entities; concerning corporate tax and municipal trade tax, the registered office and place of management in combination with a permanent establishment are decisive for unlimited or limited tax liability in Germany.

Unlimited taxpayers are generally divided into two groups; their income is either assigned to be business profit or non-business profit, nevertheless it needs to be emphasized that non-business profits have to be requalified as business profits if certain criteria are met.

II. Business Taxation

1. Corporate Entities

a) Taxation of Corporate Income (KStG)

German corporations, such as the GmbH and AG, are subject to corporate income tax with respect to their entire income, whereas all income always qualifies as business income. Foreign corporations are subject to corporate income tax only with income generated in Germany (unless their registered office or place of management is in Germany; then the foreign corporation is subject to unlimited taxation). The corporate income tax rate is 15.8% (including surplus charge).

A distribution of dividends by a German corporation generally triggers withholding tax of 26.4% which is creditable at shareholder level (standard taxation) or equals the flat tax that is due at shareholder level. For dividend income and capital gains from the disposal of shares held by another corporation Germany offers 95% tax-exemption at the level of the shareholding corporation for corporate income tax.

In case a foreign corporation is subject to limited tax liability in Germany, the

withholding tax can be reduced to 15.8% if certain substance criteria are met. An exemption from withholding tax applies for distributions to foreign EU corporations (minimum shareholding of 10% required). Moreover, the withholding tax can be reduced to a lower percentage or be avoided/reclaimed according to a respective double tax treaty. However, in these cases the foreign shareholding corporation needs sufficient substance to be able to benefit from such favorable rules (see E.V.2.).

b) Trade Tax (GewStG)

A corporate entity is also subject to German municipal trade tax, as it always generates business income. Businesses which do not have their registered office or place of management in Germany but gain income which is allocated to a German permanent establishment are also subject to a municipal trade tax at a rate of 7% to 17.2% (average rate approx. 14%), depending on the location of the permanent establishment.

For dividend income and capital gains from the disposal of shares held in another corporation, Germany offers tax-exemption for trade tax purposes by excluding this income from the trade income, this results in an effective tax burden of only approx. 1.5% for this income (Schachtelprivileg). However, the exemption of dividends for trade tax purposes requires a minimum shareholding of 15% at the beginning of the fiscal year.

The overall combined tax rate for corporations is approx. 29.8% for corporate income tax and trade tax.

2. Taxation of Partnerships

a) Taxation of Income (EStG)

German partnerships are the GbR (unincorporated civil law association), the OHG (general partnership) and the KG (limited partnership). All assets, liabilities and income of a partnership with regard to taxes are allocated to the partners in proportion to their partnership interest (transparency of the partnership). However, the possibility of offsetting losses generated by a KG at the level of a limited partner is generally restricted to the amount of the respective committed equity. Partnerships can either obtain business income or conduct private asset management. For business income, the general rules apply; every income related to the business is qualified as business income. Partnerships that solely conduct private asset management (generating interest, dividend income, lease income and capital gains) do not gain business income, except from a partnership that generates deemed business income due to its structure (general partner is a corporation and no managing limited partner).

Exemptions are made for the taxation of dividend income and capital gains. Dividend income and capital gains resulting from a disposal of shares in a corporation are 40% tax-exempt and 40% of related costs are non-deductible (Teileinkünfteverfahren). Interest income is not tax-exempt and related costs are fully deductible.

The tax rate for partners is equivalent to the tax rates for individuals (see E.III.1.).

b) Trade Tax (GewStG)

If a partnership conducts business activities, the entire income of the partnership is qualified as business income (i.e. also the income from non-commercial activities) and is thus subject to trade tax. The trade tax burden can basically be offset to a large extent with the personal income tax liability of an individual partner in proportion to its equity interest in the partnership.

3. Anti-avoidance Rules/CFCs (AStG)

In order to prevent the misuse of legal forms, the use of proxies, tax havens and treaty shopping, Germany has passed the foreign transaction tax act. Basically, the act gives tax authorities the right to ignore abusive and artificial circumstances, which would lead to an untaxed constellation.

III. Taxation of Individuals

1. Unlimited Tax Liability

An individual with its residence or customary place of abode in Germany is subject to unlimited income taxation, meaning the worldwide income is taxed in Germany, supplemented by a “surplus charge”. Taxable events are exclusively enumerated in the German income tax act, e.g. income of business, rental income, income from personal services (self-employed or employed), certain other taxable events listed in the act, and capital income.

Income of individuals generated personally is currently (2011) taxed at a rate starting at 14.0% (taxable income from EUR 8,005 to EUR 13,469) and proportionally increasing up to 23.97% (taxable income from EUR 13,470 to EUR 52,881). The marginal rate for taxable income from EUR 52,882 to EUR 250,400 is 42.0%; for taxable income of more than EUR 250,400 it is 45.0%. A surplus charge of 5.5% is added to the respective tax rate.

For certain categories of interest income, dividend income and capital gains a flat tax rate of 26.4% (including surplus charge) applies (Abgeltungsteuer – “definite” tax). Expenses and costs effectively connected with such capital gain are

not deductible from the flat rate tax base. Flat rate taxation is not applicable but standard taxation applies in the following circumstances:

- ▶ The financial assets generate business income and are thus qualified as business assets.
- ▶ With respect to interest income: the borrower is a corporation and the lender holds at least a 10% shareholding or is a related party of the borrowing corporation.
- ▶ With respect to capital gains: the shareholder has a shareholding in a corporation of at least 1%.
The taxpayer can opt for standard taxation instead of flat rate taxation concerning dividend income in cases of
 - ▶ a shareholding of at least 25% or
 - ▶ a shareholding of at least 1% and employment by the corporation (typical MBO structure).

2. Trade Tax

Business income of an individual (sole proprietorship) is subject to trade tax; however, the trade tax burden can largely be offset from the personal income tax liability.

3. Limited Tax Liability

If an individual is not subject to unlimited taxation i.e. has no residence or place of abode in Germany, but has income from a German source, he is usually taxed in Germany because of his limited tax liability. The following list specifies the types of taxable events regarding limited tax liability:

- ▶ business income to the extent the business activities can be allocated to a domestic permanent establishment or a permanent agent
- ▶ rental income from domestic real estate
- ▶ (if not already included in business income) capital gains resulting from the disposal of domestic real estate, except if the real estate does not qualify as a business asset and was held by an individual or non-business partnership for more than ten years
- ▶ income from personal services which are utilized in Germany and provided by individuals (self-employed or employed) or entities
- ▶ capital gains resulting from the disposal of shares in a German corporation (minimum shareholding of 1% at one point in time within the last five years required)
- ▶ dividends and liquidation proceeds received from German corporations
- ▶ performance-related interest income paid by German debtors and capital gains derived from the disposal of such instruments

- ▶ certain other (non-performance-related) interest income (including capital gains) if the debt instrument is registered in Germany or secured by domestic real estate.

Sometimes double taxation is the result of such a constellation. The solution for this problem will be described in the section dealing with double taxation (see E.V.2.).

IV. Indirect Taxes

1. German Real Estate Transfer Tax (GrEStG)

a) Direct Acquisition of Real Estate

The direct acquisition of real estate (and certain rights in real estate, e.g. heritable building rights) located in Germany is subject to real estate transfer tax. Real estate transfer tax is already triggered by the legally binding agreement between the seller and the acquirer to transfer title of the real estate (i.e. the sale and purchase agreement, (see B.III.4.).

In case of an asset deal, the seller as well as the acquirer owes the real estate transfer tax; in practice the parties usually contractually agree with each other that only the acquirer shall bear the real estate transfer tax.

b) Acquisition of Shares in a Real Estate Holding Company

Real estate transfer tax also becomes due if 95% or more of the shares in a real estate holding entity (corporation or partnership) are held in “one hand” e.g. obtained directly and/or indirectly by one acquirer or by controlling and dependent entities or by dependent entities only (tax group for real estate transfer tax purposes). However, partnership interests are counted by the number of partners and not by the percentage of equity interests held by the partners.

Shares in a real estate holding entity that are indirectly owned via an interposed corporation can only be allocated to an acquirer if the latter holds 95% or more of the shares in the interposed corporation (indirect investment).

If more than 95% of the shares in a real estate holding entity are acquired by one acquirer, such acquirer is liable for real estate transfer tax.

Depending on the circumstances, a share deal of a real estate holding corporation may be structured specifically to avoid the triggering of real estate transfer tax. For example, this could be achieved through an interposed partnership and a third party minority investor in the partnership.

c) Acquisition of Interests in a Real Estate Holding Partnership

Furthermore, real estate transfer tax becomes due if 95 % or more of the equity interests in a real estate holding partnership are transferred directly and/or indirectly to new partners within a five year period. For purposes of this rule, partnership interests are counted by the percentage of equity interests held by the transferring partner. In the case of an entity holding an equity interest in a partnership, this equity interest is deemed to be transferred to a new partner if 95 % or more of the shares in the entity are acquired by new shareholders (indirect investment).

The real estate holding partnership is liable for real estate transfer tax.

A share deal of a real estate holding partnership may be structured without triggering real estate transfer tax by a deferred transfer of a minimum partnership interest of at least 5%.

d) Tax Rates and Tax Bases

Generally, real estate transfer tax is levied at a rate of 3.5 % - 5 % on the tax base, depending on the location of the real estate. In case of a sale and purchase agreement, the tax base is the agreed consideration, i.e. the purchase price. Any part of the purchase price paid for buildings is included in the tax base.

The base for real estate transfer tax levied on taxable transfers relating to real estate holding companies is a certain tax value of the real estate as determined according to the Tax Valuation Act. The tax value is usually lower than the fair market value of the real estate.

e) Acquisition Cost

For income tax/corporate income tax and trade tax purposes, real estate transfer tax is treated as part of the acquisition costs of the acquired assets and must be capitalized. Like other capitalized acquisition costs, real estate transfer tax is amortized over the standardized life of the buildings to the extent that the tax is allocable to buildings that qualify for depreciation and not to land.

2. German Value Added Tax (UStG)

The German value added tax is a transaction tax. The delivery and supply of goods and services are subject to such tax. The value added tax conforms to the Council Directive 2006/112/EC on the common system on value added tax, therefore there are no German specifics concerning this system.

The applicable rate in Germany for value added tax is 19 %, although a reduced rate of 7 % applies to certain privileged basic products (such as food and books), while other transactions are value added tax-exempt (such as transfer of shares

or transfer of real estate) or non-taxable (such as the transfer of an entire business unit via an asset deal). Input value added tax on purchases is generally refundable if and to the extent that it is not related to non-taxable or certain tax-exempt turnover. Exports are tax-exempt, whereas input value added tax related to such transactions can still be claimed by the entrepreneur.

V. Discussion of Exclusive Tax Problems

1. Acquisition of a Business

a) Basic Considerations

There are generally two possibilities with regard to the acquisition of a business:

- ▶ the purchase of (all) targets' assets (asset deal) or
- ▶ the purchase of the shares in the target (share deal).

The question of share deal versus asset deal has to be determined by taking all interests of both sellers and purchasers into consideration. Therefore, the identification of an appropriate transaction structure is certainly a challenge. However, usually even more challenging is the design and implementation of an optimized acquisition structure that takes into account the annual tax burden for the purchaser, as well as appropriate taxation of a subsequent exit.

From the purchaser's point of view, the following aspects regarding taxation are crucial:

- ▶ tax-effective depreciation of the purchase price (step-up)
- ▶ efficient exit taxation
- ▶ utilization of loss carry forwards of the target
- ▶ deductibility of interest expenses for acquisition debt from the tax base of the target
- ▶ minimization of transaction costs (real estate transfer tax).

b) Asset Deal/Share Deal of Partnership Interests

aa) Asset Deal

The acquisition of a business by a German acquisition vehicle via an asset deal is mostly more advantageous for the purchaser with respect to current taxation than a share deal. The purchaser can directly convert the purchase price into a tax-efficient depreciation (step-up) to the extent the assets are depreciable. The purchase price is allocated to the acquired assets which are entered in the balance sheet as of the acquisition date at their fair market value, including good-

will – if any – and is amortized over the useful lifetime (goodwill: 15 years) of the assets: However, land can be written off only to the extent that the fair market value is permanently lower than the purchase price.

bb) Acquisition of Partnership Interests

With regard to taxes, the acquisition of a partnership interest (see B.II.3.) is basically equal to the acquisition of the assets from a seller. The same tax principles apply to the acquisition of partnership interests as the entity is transparent for tax purposes.

The acquisition of partnership interests permits the inclusion of certain investors' expenses in the tax calculation of the partnership income, e.g. interest expenses that arise from the acquisition financing on the partner level. From a German tax point of view, such interest expenses are allocable to the partnership. In the foreign partner's jurisdiction, however, such interest expenses might be allocated to the business on the partner level and thus provide for a "double dip" of the interest expenses in Germany, as well as in the foreign investors' jurisdiction. However, case law and tax authorities challenge such structures under certain circumstances.

cc) Exit Scenarios

An exit from a German business investment is subject to income tax/corporate income tax at seller level and, in most cases, is also subject to trade tax. For individuals selling an entire business or partnership interest, tax relief (lower income tax rate) may apply if certain requirements are met. Trade tax is not triggered if

- ▶ an individual or a partnership disposes of its entire assets or a separate business unit (the sale of the business by a corporation is subject to trade tax);
- ▶ an individual disposes of its entire partnership interest.

Due to the tax impact for the seller upon exit (taxation at full tax rate), an asset deal is often disadvantageous when compared to a share deal and investments are thus more likely to be transferred by way of a share deal than by an asset deal.

With respect to a tax-efficient exit from an investment in a partnership, a tax-neutral conversion of the partnership into a corporation might be favorable; however, to take full advantage of a subsequent transfer of shares in a corporation, a "cooling off" holding period of seven years must be taken into account.

c) Share Deal of a Corporation

The capital gain resulting from a transfer of shares in a German corporation is 95 % tax-exempt if the seller is a corporation and 40 % tax-exempt if the seller is

an individual that holds at least 1 % of the shares or holds the shares as business assets. If the seller is a partnership, the taxation for income tax/corporate income tax purposes takes place on the partner level and tax exemptions depend on the status of the partner (individual or corporation); trade tax becomes due on the partnership level (if the shares are attributable to a domestic permanent establishment). However, with respect to foreign investors, a capital gain might be fully tax-exempt in Germany according to the respective double tax treaty (if the shares do not belong to a domestic permanent establishment). Thus, a transfer of shares in a corporation is preferable for the seller and also for the investor with respect to a subsequent exit from the investment.

By acquiring shares in a corporation, a step-up of the assets of the corporation does not take place, but the shares have to be capitalized at the acquisition costs (no step-up). Shares in a corporation are not depreciable; an extraordinary write-down is only possible if the fair market value of the shares is continuously below the acquisition costs. Such write-down is 60 % tax-effective only if the shares are held as business asset by an individual (or to the extent that an individual is partner in a business partnership holding the shares) and the shares belong to German business assets. Otherwise, a write-down is not relevant for tax purposes. Therefore, as result of the share deal, the purchaser cannot use hidden reserves in the acquired business assets through depreciation.

As the acquired corporation qualifies as a separate taxpayer, additional considerations are required to match operating profits of the target corporation with acquisition debt financing costs at the purchaser level.

d) Loss Carry Forwards (Verlustvortrag)

According to German rules, tax losses in a financial year can be carried back to the previous year up to an amount of EUR 511,500 for income tax/corporate income tax purposes (not for trade tax purposes) and can further be carried forward (“loss carry forwards”) without time restrictions (income tax/corporate income tax/trade tax). However, the utilization of loss carry forwards is limited to the “minimum taxation rule“. According to this rule, a base amount of EUR 1,000,000 loss carry forward can be utilized annually without restrictions and in excess thereof only to the proportion of 40 % of the remaining positive tax base of the respective financial year.

Such loss carry forwards are of value to a legal entity, if it generates taxable profits in a subsequent financial year. However, in the course of a sale transaction, loss carry forwards usually cease to exist or will at least be reduced. The most important rules for a forfeiture of loss carry forwards through a change of ownership are as follows:

- ▶ Asset deal: loss carry forwards cannot be transferred.

- ▶ Direct transfer of a partnership interest: trade tax loss carry forwards at the partnership level will be forfeited in proportion to the transferred percentage of the partnership equity interests. If partnership interests are not all transferred, the remaining loss carry forwards can be utilized only to the extent a partner remains in the partnership (loss carry forwards for trade tax purpose are “personalized”).
- ▶ Transfer of shares in a corporation: If within a period of five years, more than 25% and up to 50% of the corporation’s shares are transferred to one purchaser, related parties of such purchaser or a group of purchasers acting in concert, then the corporation’s loss carry forwards (corporate income tax/trade tax) will be proportionally forfeited. In case such transfer exceeds the 50% threshold within five years, the entire loss carry forwards will be forfeited. Both rules shall apply, irrespective of a direct or indirect transfer of the shares in the corporation.
- ▶ The same rules apply to trade tax loss carry forwards of a partnership which is held by a corporation in case the shares in the corporation are (directly or indirectly) transferred.
- ▶ Reorganization: For most reorganization procedures, such as a merger of entities, a spin-off, a contribution of a business unit in kind, a change of legal form from a corporation to a partnership and vice versa, the loss carry forwards of the transferred business unit, respectively legal entity, will be forfeited.

There is neither an exemption for companies to be recapitalized nor for groups. As there are no special rules for groups, the direct change of shareholders can be harmful, even if there are no indirect changes in the structure of the upper level shareholders. Consequently, restructuring and reorganization measures within a group might negatively affect the utilization of loss carry forwards.

To avoid this consequence, the seller may realize hidden reserves before carrying out the transaction by utilizing loss carry forwards and then selling a business via a share deal with increased tax book values of the assets. Minimum taxation rules need to be considered.

A tax-efficient utilization of losses is also possible by establishing a tax group (see E.V.1.e)). Within a tax group, profits and losses are taxed at top entity level and can thus be balanced. However, it must be taken into consideration that losses of a tax group entity (subsidiary) incurred before the time of the group taxation (loss carry forwards from former financial years) cannot be balanced with profits within the tax group. Such loss carry forwards are “frozen” at subsidiary level as long as the tax group exists.

e) Acquisition Structures

The deductibility of interest expenses for acquisition debt financing is a crucial issue in the tax structuring of acquisitions by means of a share deal. If the acquisition vehicle is financed with respect to the purchase price for the acquisition of the shares of the target entity, bank loans and/or shareholder loans will be provided in addition to equity capital of the investor to achieve a leverage effect. Interest expenses on the acquisition debt shall be deducted from profits of the operating target in order to reach a tax base that is as low as possible in net terms. Generally, a German acquisition vehicle is implemented to ensure that both the target entity and the acquisition vehicle are subject to German taxation. In particular, the following tax structures are usually recommended:

- ▶ *Merger*: The acquisition vehicle and the target entity will be merged in a tax-neutral way. As a result, the interest expenses occur directly at target level.
- ▶ *Tax group*: Between the acquisition vehicle and the target, a tax group (Organ-schaft) will be established. This requires that – inter alia – (i) the target entity is a corporation, (ii) the majority shareholder (acquisition company) is an individual or partnership conducting business activities or a corporation and (iii) a profit and loss transfer agreement is concluded for a period of at least five years. In a tax group, the taxable profit of the subsidiary (tax unity corporation) is transferred and taxed at shareholder level (tax unity parent).
- ▶ *Target entity is a partnership*: The target is a business partnership or will be transformed in a tax-neutral way into a partnership (change of legal form). Interest expenses for debt financing to acquire the shares of the target partnership are then allocated to the taxable income of the partnership (see E.V.1.b)). Accordingly, the interest expenses are part of the tax base of the target partnership.

f) Interest Deduction (Zinsschranke)

Interest deduction for business income in Germany is limited by thin capitalization rules, in particular from 2008 onwards, by the so-called “interest barrier”.

As a general rule, the net interest expenses (after balancing of interest income) are deductible in the financial year of expenditure only up to 30% of the company’s tax accounting-based EBITDA (earnings before interest, tax, depreciation and amortization).

Non-deductible interest expenses are carried forward to subsequent financial years and can only be deducted within the limits of the interest barrier rule. The interest carry forwards will be forfeited according to the rules for a forfeiture of tax loss carry forwards (see E.III.1.).

The interest barrier is not applicable if

- ▶ the net interest expenses (excess of interest expenses over interest income of a financial year) of a business unit are less than EUR 3,000,000 (threshold), or
- ▶ the business unit (whereby a tax group qualifies as one single business unit, despite the fact that separate legal entities are included) is not (or only partially) consolidated in the consolidated financial statements of a group (IFRS, German GAAP, other EU-GAAP or even US-GAAP can be applied), or
- ▶ the business unit is fully consolidated in the consolidated financial statements of a group, but the equity ratio of the business unit on a stand-alone basis is not lower than 1% of the equity ratio of the group in the consolidated financial statements (certain tax-related adjustments of GAAP to tax equity must be considered).

With respect to a corporation or a partnership subsidiary of a corporation, the last two exemptions above only apply if no harmful shareholder financing is in place. The financing of a stand-alone business entity is harmful if a shareholder with more than 25% shareholding, a related party of such shareholder or a third party (e.g. bank) with recourse (back-to-back financing) to such shareholder or related party grants loans to the entity and the interest for these loans exceeds 10% of the net interest expenses of the entity. Concerning a group entity, financing is harmful if a non-consolidated but more than 25% shareholder of any group entity, or a related party or a bank with recourse to such shareholder or related party grants loans to any (domestic or foreign) entity belonging to the group and the interest for these loans exceeds 10% of the net interest expenses of this specific entity.

From a practical point of view, the requirements for an escape are difficult to meet and careful tax planning is recommended.

To the extent that interest expenses are deductible for income tax/corporate income tax purposes, a 25% add-back to the trade tax base is applicable.

g) Debt Push-Down to Foreign Subsidiaries

In some cases, the interest barrier rule might limit the interest deduction in Germany. In this situation, one should consider whether a debt push-down of financing costs to foreign group entities could be beneficial. This can be achieved by cross-border intercompany loans, as well as via distributions and third party debt recapitalization of the foreign group entities.

2. German Prevention of Double Taxation

Double taxation in Germany, as well as in a foreign jurisdiction, is mitigated by double tax treaties which are in place with more than 70 countries (bi-lateral solution). If a double taxation treaty does not apply, Germany allows crediting of

foreign taxes paid abroad in its income tax return (unilateral solution). If a double taxation treaty exists, business income and rental income is usually taxed in the jurisdiction in which the permanent establishment or real estate is located; capital income (interest, dividends and capital gains from the disposal of financial assets) is generally taxed in the jurisdiction of the foreign investor's residence. In some cases of capital income, Germany has the right to levy withholding tax. Since income from dividends is of great importance for investors, in the following emphasis will be placed on the rules applying to them.

a) Dividends

aa) General Rule: Withholding Tax

Dividends distributed by a German corporation are generally subject to 26.4% withholding tax, which is creditable to the German income tax/corporate income tax liability of the shareholder. The withholding tax rate is reduced to 15.8% for foreign corporations receiving dividends if the three tests described under bb) are fulfilled. Furthermore, most double tax treaties provide that (i) such dividend income is subject to taxation in the jurisdiction of the shareholder's residence only and (ii) the withholding tax is limited to a lower rate of typically 15% or (iii) the withholding tax is even reduced to 0% if certain conditions are met (basically, the shareholder must be a foreign corporation holding a certain minimum shareholding in the German corporation). Moreover, withholding tax does not occur if the shareholder is a non-domestic EU-based corporation with a minimum shareholding of 10%.

bb) Treaty Shopping

According to the 2007 Tax Act enacted by the German parliament, withholding tax still applies at the full rate if the shareholding corporation does not have sufficient substance (treaty override). Under these German anti-treaty-/anti-directive-shopping rules, a foreign shareholder of a German corporation will not be entitled to a reduced or zero percentage withholding tax rate upon receiving a dividend distribution, if and to the extent that the foreign shareholder itself is owned by shareholders who would not be entitled to a corresponding benefit under a tax treaty or the EU directive if they would receive the dividend directly and if, in addition to this, one of the following three tests applies:

- ▶ *Business purpose test*: There is no material economic or other relevant non-tax-related reason for interposing the foreign direct shareholding entity.
- ▶ *Gross receipts test*: Not at least 10% of the direct shareholders' aggregate gross revenue for the relevant financial year is generated from their own economic activities. Dividends usually do not qualify as their own income, except when the share-

holding company is an active holding (involved in the business of the subsidiaries).

- ▶ **Substance test:** The foreign company does not have its own adequate business substance to engage in its trade or business.

According to these rules, foreign direct shareholders who solely perform “pure” asset management or whose business activities are conducted by related or third parties can generally not take advantage of withholding tax relief in Germany.

The restrictions do not apply to a direct foreign shareholding corporation whose shares are publicly traded or that qualifies as an investment fund.

In order to take advantage of the withholding tax relief, the substance and activities of the foreign shareholder require careful consideration.

b) Transfer Pricing

aa) General Aspects

Transfer pricing in the following refers to the pricing of transactions (tangible and intangible assets, services, funds, etc.) between affiliated companies or related parties across national boundaries. The valuation of such a transfer is of special interest for tax purposes, since the affiliated companies or related parties are separately subject to taxation in different jurisdictions. In cases of such transactions, the typical market mechanisms that establish prices at arm’s length between third parties may not apply.

bb) Arm’s Length Principle

Hence, according to the arm’s length principle, transfer pricing methods have become the accepted approach in dealing with cross-border intercompany transactions. The arm’s length principle requires that consideration for any intercompany transaction shall conform to the level that would have applied had the transaction taken place between unrelated (third) parties under similar conditions. However, different countries may accept different methods (e.g. “comparable uncontrolled price method”, “resale price method”, “cost plus method” or “profit split method”) of calculating appropriate transfer prices.

If and to the extent that the arm’s length principle is not met with respect to (national as well as international) transactions, the tax base of the respective German entity might be adjusted (at the latest in the course of a tax audit) resulting in an additional income tax/corporate income tax/trade tax burden (adjusted tax base) and additional withholding taxes (hidden profit distributions), as the case may be. Moreover, penalty charges may result.

German tax authorities basically accept the most common intercompany transfer pricing standards, in particular the comparable uncontrolled price method, resale price method and cost plus method.

cc) Latent Restrictions

In 2008, significant changes to Germany's transfer pricing legislation were introduced: A "relocation of functions" will be deemed to have taken place when a function performed by one entity is transferred cross-border to another group entity, even if the transfer is partial or temporary. In this context, "functions" are defined as the aggregation of similar operational tasks, including corresponding opportunities and risks, executed by certain departments of the enterprise. Moreover, the term "relocation of functions" also includes the duplication of functions. Under certain conditions, an appropriate transfer price will be established based on the supplier's minimum price and the recipient's maximum price.

dd) Transfer Pricing Documentation

German tax law requires that the taxpayer maintains proper transfer pricing documentation in cases of intercompany cross-border transactions with regard to the type and content of his business relationships with related parties, including details on the calculation of transfer prices. For material business transactions, the entity must fulfill the documentation requirements in a timely manner (6 months after the end of the financial year), in other cases upon request by the tax authorities only. If no or insufficient documentation is available, the tax authorities are authorized to assume (estimate) a higher tax base at the German entity's level and, in addition, penalty payments will be assessed.

3. Taxation of German Real Estate Investment Trusts (REIT)

As in many other countries, the establishment of real estate investment trusts is now also available in Germany. The German Real Estate Investment Trusts Act of 2007 created significant opportunities for real estate holding entities and investors in German real estate. Real estate investment trusts are real estate holding companies in the legal form of an AG listed on a stock exchange. The business purpose of a real estate investment trust is limited to acquiring, holding, managing by renting out and leasing, and selling real estate (or rights of use of real estate), and acquiring, holding, managing, and selling shares in real estate business partnerships. Sale-and-lease-back structures are also permitted.

Income of real estate investment trusts is exempt from income tax/corporate income tax at the entity level if certain requirements are met (such as a minimum free float rate of 15% (25% at the time of listing), maximum individual shareholder participation of 10%, minimum profit distribution of 90%). However, distributions of a real estate investment trust are fully subject to taxation on the investor level (without tax exemptions) and trigger withholding tax of 26.4%.

F. Management

I. Conflicts of Interest within M&A Transactions

Whatever a manager does, whether he abstains from an action or tolerates certain measures, he or she must exercise due care. Managers must identify and weigh pros and cons and balance conflicting interests. In this area, German law differs from general Anglo-American legal principles and practice in a distinct way. Shareholder primacy does not exist as a rule of law – the manager of a company may not take only the interests of the company's shareholders into account. Rather, as the target's manager is responsible to the target itself, he must consider the legitimate interests of the target and of all its shareholders (i.e. not only the interests of the shareholders) – that is employees, creditors and the general public. Even in public tender offer situations (see C.V.), the managers of the target company are arguably not strictly obliged to act like auctioneers to achieve the highest price possible for the shareholders. Managers have broad discretion and this discretion is protected by the business judgment rule. As long as the managers decide on an entrepreneurial issue and can reasonably assume that, based on an appropriate basis of information, they are acting in the best interests of the company, the judge will not second-guess the managerial conclusion. However, a judge would consider whether a manager lawfully determined the best interests of the company, i.e. whether the interests of all corporate constituencies were taken into account and that the manager was not erroneously driven only by shareholder interests (or worse, by his or her own interests as a present or future participation holder).

From the perspective of the managers, M&A transactions often entail the loss of a lucrative position, either by being laid off or by being forced to work under worse conditions. This "end game" situation induces managers to evaluate alternative employment scenarios and give up some of their loyalty to the target company. Eventually, this shift of loyalty may even result in an obstruction of the entire transaction. For this reason, members of management can often be regarded as the "third party" of the transaction. From the perspective of the remaining parties, it seems reasonable to contract for the management's loyalty.

II. Management Incentives

1. Transaction Bonuses by Target Company

In an M&A transaction, the management of the target company is typically granted a bonus upon exit. The amount of the bonus is between one and two annual gross salaries; on occasion it might increase depending on the achieved purchase

price. The bonus is generally paid upon closing. The bonus payment might be granted on a fully discretionary basis or may be dependent on the achievement of certain steps in an M&A transaction, e.g. establishment of an info memorandum and data room, preparation of due diligence or management presentations. In return, the management is often asked to deliver a “directors certificate” or “warranty deed”. In such declaration, management has to guarantee the seller that the management is not aware of any facts which are incorrectly stated in the vendor due diligence reports or which would lead to a breach of representation in the share purchase agreement with the potential purchaser. The liability under such certificate might be limited to the anticipated bonus payment.

In general, transaction bonuses paid by the employing company must be in appropriate proportion to the duties of such manager and the target company's condition. Moreover, these bonuses only have a sound legal basis if they are stipulated in the employment agreement in advance. Without such contractual basis, the bonus payments are only justified if they are paid in the interest of the company. This is deemed to be the case if, by receiving the bonus, the manager is bound to the company or if the recipient or other employees are incentivized to work for the company to achieve similar bonus payments.

2. Transaction Bonuses by Seller

Under German law, the supervisory board of a company is responsible for the appointment, revocation and compensation of members of the management board. Nevertheless, there are situations in which a shareholder intends to grant financial benefits to members of the management board in accordance with milestones to be achieved by the managers with respect to the company's conduct of business. Due to the fact that such benefits are not directly granted by the employing company, they are generally called “third party bonuses”. The performance-related milestones of these bonuses enable the alignment of the manager's conduct of business with the objectives of the third party providing the benefits. Therefore, from an economic point of view, bonuses granted by a shareholder within an M&A transaction coincide with the manager's interest, as well as the interest of the relevant shareholder, to achieve a high enterprise value for the company. However, it is disputed whether it is permissible under German law for a third party to grant transaction bonuses to the management instead of the company. It seems reasonable to demand approval by the supervisory board or at least require that it be informed.

3. Incentives within Public Tender Offers

In public tender offer situations (see C.V.) a manager's remuneration shall also be in an appropriate relationship to the duties of such manager and the target

company's condition. Transaction bonuses by the seller to the management arguably require approval by the AGs supervisory board or that the board must be informed of such measures. A bidder might be inclined to offer or grant benefits to managers, only for the purpose of winning the management's favor in order to gain ground in competitions among several bidders. Without good reason, the acceptance of these benefits is a violation of the manager's fiduciary duty owed to the target company and is therefore invalid pursuant to the German Takeover Act. Certain benefits, however, are allowed, provided they are "justified". While the exact meaning of "justification" in this context remains rather vague, it is acknowledged that benefits allowing for the continuation of the management's services can be permissible.

In public tender offer situations, the management is obliged to make a statement on the offer to the target company's shareholders. If an incentive causes a conflict of interest for the management, it seems reasonable to ask this manager either not to join the management's statement or to explain the nature of the conflict and to hire an expert witness. Moreover, the bidder has to state in his bidding documents details of any monetary or cash equivalent benefits for the management or the supervisory board, even if the benefits might be justified under the aforementioned terms.

4. Taxation and Social Security Contribution of Transaction Bonuses

Bonus payments are fully taxable as ordinary income at the manager's individual tax rate (the maximum tax rate amounts to 45% plus church taxes and surplus charge). Provided that managers are above the maximum limits by virtue of their ordinary income, no social security contributions should arise with respect to these arrangements (maximum limits are currently EUR 49,950 and EUR 66,000 increasing to EUR 50,850 and EUR 67,200 in 2012 for the Western part of Germany)

III. Management Participation

A private equity investor aims at aligning its own and concurrent interests of the management with the interests of the target company. For this reason, the implementation of an up-to-date Management Equity Program (MEP) is of utmost importance in management buyouts and became a *conditio sine qua non*. For this reason, the following principles address investments of private equity investors in particular. Nevertheless, if strategic investors implement management participation programs, in general these participations follow similar rules and, to a certain extent, the following policies can be applied accordingly.

1. Structuring

a) Participation Ratios and Amounts

Management will typically invest alongside the investor by way of an interposed trust vehicle or partnership in the acquisition vehicle. The quote depends upon the type and size of the deal and might vary from 3% to 25%. 1st line managers are requested to invest one to two gross annual salaries in addition to any potential transaction bonuses. 2nd line managers are allowed but not requested to invest between EUR 10,000 and EUR 100,000, also depending on the size of the deal and on the investment amount available to the management. In a secondary transaction, management is asked to reinvest at least 50% net of taxes of their sales proceeds.

In a typical investment scenario, management could expect a money multiple of 10 and an envy ratio of 3. Money multiple means that management shall be able to receive 10 times their invested money if the business plan for the next 5 years is met and the company is sold on the same multiple as the entry multiple. Envy ratio is the ratio between the money multiple anticipated for the management and the one for the investor.

The envy ratio is accomplished by leveraging the acquisition of those shares that are acquired by the management. This leverage effect can either be achieved by a disproportionate subscription of shareholder loans or preference shares or a non-recourse loan for the managers.

b) Shareholder Agreement

The rights and obligations of the managers and the investor are stipulated in a shareholders or co-investment agreement. Such agreement includes – inter alia – provisions on the exit and the so-called leaver scheme. In case of an exit, management is obliged to co-sell its shares with the investor (“drag-along right”) and vice versa: Management is entitled to request to co-sell its shares if the financial sponsor partially or in total sells its shares (“tag-along right”). In case of corporate actions, the rights of the management (subscription rights, retention of the capital structure, etc.) can be protected by anti-dilution clauses. The allocation of any exit proceeds follows the allocation of the shareholding in the acquisition vehicle. However, alternative liquidation preferences can be agreed upon by the parties.

c) Leaver Scenarios

Upon termination of the manager’s employment contract or upon the manager’s cessation as managing director with the target company, as well as under other specifically stipulated circumstances, the private equity investor can request the respective manager to sell and transfer his shares (call option). The manager,

respectively his heirs, might request upon the occurrence of certain events (e.g. death, disability, retirement) the acquisition of his shares (put option). In both cases, the repurchase price depends on the specific termination event. Parties distinguish between good leaver cases (e.g. death, invalidity, occupational disability, manager's termination for good cause) and bad leaver cases (e.g. manager's breach of duty, termination of manager's contract by the employing company for good cause). In good leaver cases, the repurchase price is equal to current fair market value of his shares, subject to vesting schedules. In bad leaver cases the manager is only entitled to the lower of the fair market value and his acquisition costs for his shares. Vesting of the shares might be subject to time (e.g. 25 % p.a.) or performance of the target company (e.g. achievement of certain EBITDA/free cash flow targets). Payment of the repurchase price might be made upon exercise of the respective option or deferred until the occurrence of an exit. In addition, the management's participation might be subject to money-multiple hurdles (e.g. 2.5 times the invested money) or internal rate-of-return hurdles (e.g. 25 % p.a.) set by the financial sponsors (ratchet).

2. Tax Aspects

Structuring of management incentives in Germany is, to a considerable extent, tax-driven: stock option schemes are taxed like bonus schemes, i.e. the gain recognized by management upon exit is fully taxable as ordinary income. In contrast, MEPs can be structured in order to generate favorable capital gains for managers.

For shares acquired prior to 1 January 2009, the former tax regime applies. If a manager holds less than 1 % of the stated share capital of the company, the shares can be sold free of taxes after a holding period of at least 12 months. For shares acquired after 1 January 2009, the new capital gains flat tax of 25 % (plus church taxes and solidarity surcharge) applies if the shareholding is less than 1 %. If the shareholding is above 1 %, the capital gain is subject to the partial income procedure (Teileinkünfteverfahren), i.e. only 60 % of the gain is subject to the personal tax rate (plus church taxes and solidarity surcharge).

The acquisition of shares below fair market value will trigger fully taxable ordinary income. The same applies to the whole MEP gain, if the beneficial ownership in the acquired shares is denied by the tax authorities due to intensive restrictions of shareholder rights of managers, e.g. vesting, clawbacks, transfer restrictions.

IV. Personal Obligations and Liability Risks of Managers in M&A-Scenarios

Managers in M&A transactions have personal obligations, the breach of which creates personal liability. This is relevant not only in private equity situations (with management participations on either one or both sides), but also between the target and its managers. Seller's or purchaser's managers and their advisors might have their own obligations and liabilities if they, for example, cause or induce a breach by the target company's managers, or if they otherwise participate in that violation (which might constitute fraud or another tort or criminal offence) or because they fail to detect or disclose the breach.

A manager may breach his obligations by making disclosures. Any disclosure of a company's data or secrets to another person might constitute a breach of confidentiality. Disclosure to a competitor is certainly a breach and even a financial sponsor might be, or become, a competitor through another investee company. Releasing information may be a breach of third party rights, such as express or implied confidentiality obligations to customers, suppliers or employees. Disclosure can also constitute a breach of data protection laws – either industry-specific ones such as those in the financial and telecommunication industries, or general ones such as the Federal Data Protection Act.

Non-disclosure can also constitute a breach of a manager's obligations and expose the manager to liability. Generally speaking, conflicts of interest must be disclosed. For instance, direct contact between management and bidders (or contact in the absence of the seller's representatives) is forbidden, even without a special agreement to this effect, unless it is disclosed to the target and the seller.

G. Third Party Involvement

I. Antitrust Issues

1. Restraints of Competition

German competition law has undergone remarkable changes aimed at moving national law closer in line with European legislation.

The German Act Against Restraints on Competition not only covers classical cartels between competing companies (horizontal agreements) but also other anti-competitive agreements between companies which are in a supplier-customer relationship with one another (vertical agreements). Anti-competitive agreements between companies are exempted or can be exempted from the general prohibition if certain conditions are fulfilled, i.e. specific cooperation facilities of small or medium-sized enterprises may be permitted in order to equalize disadvantages in competition with powerful large-scale enterprises. Agreements which do not comply with applicable EC Block Exemption Regulation may be void altogether or with regard to specific clauses, and are in any case not enforceable.

Otherwise, there are two possibilities for the authorities to act against anti-competitive agreements. Either the authority imposes an order to end the conduct objected to in administrative proceedings or it imposes fines within the framework of administrative offence proceedings. For so-called regular fines, the maximum is ca. EUR 1,000,000. Instead, certain violations can now be punished by a fine of up to 10% of the annual turnover of the relevant undertaking. Depending on its contribution to uncovering the cartel, a cooperative cartel member can be granted a reduction of up to 100% of the fine imposed.

2. Merger Control

Merger control interdicts the construction of oligopolies or monopolies in the market by means of acquisitions. When a company or a person intends to buy a company in the market in which they are already involved, they might have to apply for a merger control procedure if the turnover of the involved companies exceeds certain thresholds. If the thresholds of the European Commission Merger Regulation are met, only the European merger control procedure is applicable and a notification must not be filed under German Merger Control. Generally, approval or clearance by the merger control authorities is a condition precedent for closing in M&A transactions. A merger that is conducted while disregarding the suspensory obligation or without filing a notification, is provisionally invalid until its approval and the involved companies may be fined.

a) German Merger Control

German merger control will only apply where certain turnover thresholds are exceeded and the European Merger Control does not apply. In detail, the combined aggregate worldwide turnover in the preceding financial year must be higher than EUR 500,000,000 and at least one company must have turnover within Germany of more than EUR 25,000,000 and a further company must have turnover within Germany of EUR 5,000,000 or more. In this respect, the turnover includes the amounts derived from sales of products and provision of services gained by the target and its affiliated subsidiaries, as well as by the purchaser and its affiliated companies. If the operations of a company consist of trade in goods, only 3/4 of the turnover is taken into account. For companies operating in the media business (newspapers, magazines, broadcasting, etc.) 20 times the amount of the turnover is taken into account. For financial institutions and insurance companies, different thresholds are applied according to their business.

All mergers which have an effect within Germany are covered by German merger control, regardless of where the merger will be accomplished geographically.

A merger is not subject to control

- ▶ if it takes place between one company and another non-controlled company which had a worldwide turnover of less than EUR 10,000,000 (de minimis clause), or
- ▶ if a market is concerned in which goods or commercial services have been offered for at least five years and each of the product markets had a sales volume of less than EUR 15,000,000 in the last calendar year.

Even the acquisition of a single built-up or undeveloped property by way of an asset deal may principally meet the merger requirements of a so-called acquisition of assets. The Federal Cartel Office, however, upholds the opinion that – for the time being – acquisitions of real property, the total value of which stays below the threshold value of EUR 5,000,000 within the business year relevant under merger law, do not constitute such an acquisition of assets. However, this provides that the total turnover achieved by the buyer from sales, leases, rental payments, etc. within a radius of 20 km around the acquired real property did not exceed the turnover threshold of EUR 30,000,000 during the last business year.

In case the respective legal requirements are fulfilled, the parties must file a pre-merger notification. Hereafter, the Federal Cartel Office in Bonn shall decide within a month if the main merger control procedure has to be conducted. If a main merger control procedure is not demanded within a month, the approval is deemed to be given. In the event of a main merger control procedure, the Federal Cartel Office either interdicts or allows the merger depending on the market

and company structure (limited by the imposition of obligations if necessary). After a deadline of four months, the approval is deemed to be given. Mergers must not be completed within a certain deadline after the approval has been given.

b) European Merger Control

The procedure under the EC Merger Regulation, comparable to German merger control, is set up as a preventative procedure.

The merger is governed by the EC Merger Regulation if the combined aggregate worldwide turnover of the companies (as defined above) is greater than EUR 5,000,000,000 and the aggregate EU-wide turnover of each of at least two companies involved in the merger is greater than EUR 250,000,000.

Furthermore, the EC Merger Regulation is applicable if the combined aggregate worldwide turnover of all companies involved is higher than EUR 2,500,000,000 and the following terms are complied with simultaneously:

- ▶ the aggregate EU-wide turnover of each of at least two of the companies involved in the merger is higher than EUR 100,000,000;
- ▶ the aggregate turnover of each of at least two companies involved in the merger in each of at least three of these member states is higher than EUR 25,000,000;
- ▶ the combined aggregate turnover of any company involved in the merger in each of at least three member states is higher than EUR 100,000,000.

A merger is not subject to European merger control if 2/3 of the EU-wide turnover of all involved companies is made in one member state.

After filing the notification, the Commission will either make a decision to prohibit the merger or declare it to be compatible with the Common Market (limited by the imposition of obligations if necessary).

II. Foreign Investment Approvals

The acquisition of companies with offices or places of business in Germany is partly restricted with respect to investors with their seats or management outside the European Union (EU)/European Free-Trade Area (EFTA) on the one side and the acquisition of German war-related industries on the other side.

1. General Investment Approvals

Since 2009, each direct or indirect acquisition of at least 25% of the voting rights of a German company by an acquirer with its seat or management outside the EU/EFTA may be reviewed by the Federal Ministry of Economics and Technology (FMoET) within three months, beginning upon conclusion of the obligation to

acquire a company (see C.IV.5.), respectively upon publication of the decision to make a takeover bid or publication of obtainment of control. If the FMoET requests the delivery of documents relating to the acquisition, it has an additional two months to issue orders or prohibit the acquisition in case it endangers the public order or security of the Federal Republic of Germany.

If no concerns exist, each acquirer has a right to issuance of a clearance certificate vis-à-vis the FMoET. The application for a clearance certificate requires a description of the scheduled acquisition and information about the acquirer and its business. The clearance certificate is considered to be granted if the FMoET has not instituted review procedures within a period of one month beginning upon receipt of the application.

2. Approvals for Acquisitions of Defense-Related Industries

In case of the acquisition of a German company which manufactures or develops military weapons, cryptographic systems or other defense-related goods, the transaction must be announced to the FMoET. The notification requirement also applies in case of an indirect acquisition if a foreigner holds 25% or more of the voting rights of the German parent acquirer.

The FMoET can prohibit such acquisition within one month after receipt of the announcement, if the prohibition is essential in order to protect the security interests of the Federal Republic of Germany.

III. Public Financial Control

When investing in German companies, investors are subject to various regulatory requirements, depending in particular on the kind and amount of their investment and the type of company in which they are investing. As a general rule, these requirements are applicable in cases of companies incorporated in Germany; however, in some cases they may also apply to companies whose shares are admitted for trading on a regulated market in Germany.

1. Acquisition of Shares: Notification Requirements

When acquiring or selling shares in companies admitted for trading on a regulated market, as well as warrants, financial instruments or other instruments which give an unconditional right to acquire shares with voting power in such companies and, in so doing, exceeding or falling below certain thresholds in voting rights (3%, 5%, 10%, 15%, 20%, 25%, 30%, 50%, 75%), any investor has to notify the company and the BaFin) without undue delay, at the latest within four trading days. Voting rights may generally not be exercised if the notification requirement is not complied with.

Any purchaser of listed shares reaching or exceeding the threshold of 10% or any higher threshold must disclose to the issuer within 20 trading days the objects of the purchase and the source of financing, i.e. whether and to what extent means are debt or equity. Public tender offers are exempt from such disclosure, as well as purchases by investment companies regulated under the Undertaking for Investments in Transferrable Securities (UCITS) directive. The issuer is required to publish any information thus disclosed and information on all cases in which the disclosure requirement has been violated. Issuers may exclude application of the disclosure requirement in their by-laws.

When acquiring shares in AGs that are not listed on a regulated market and exceed the threshold of more than 25% of the shares, the purchaser has to notify the company and the company has to publish such notification. No similar notification requirements apply to purchases of shares or interests in companies of other legal types, such as GmbHs.

2. Public Tender Offers

Any bidder making a public tender offer (see C.V.) to purchase shares as a whole or in part in a company admitted to trading on a regulated market is subject to certain notification and publication requirements. An offer document in the German language must be submitted to and approved by BaFin. Additional requirements apply to takeover bids and mandatory offers in case voting rights reach or are intended to reach at least 30%. Upon written application by the bidder, BaFin may grant an exemption from the mandatory offer requirements in certain circumstances. In case of conflicting foreign rules, reliefs may be obtained with regard to cross-border purchases.

3. Control of Banks or Financial Institutions

When intending to acquire shares in a bank or other regulated financial services provider subject to the supervision of BaFin and, in so doing, exceeding certain thresholds in capital or voting rights (the minimum is 10%), the purchaser must notify BaFin and the German Federal Bank of its intention to buy such qualified holding and must also provide evidence of the purchaser's trustworthiness. BaFin may prohibit such purchase within three months and may later impose restrictions on the controller's exercise of voting rights or require it to sell its participation.

4. Miscellaneous

With regard to listed shares, the prohibitions of insider trading and market manipulation should be observed as general rules of conduct.

The granting of loans to portfolio companies based in Germany may be subject

to license requirements depending on the amount and quantity of the loan(s) granted.

Depending on the type of transaction and portfolio company, there may be further regulatory requirements, such as anti-money laundering checks on investors.

IV. Preemption Rights

1. Preemption Rights concerning Shares

In many cases, the articles of association of certain companies contain preemption rights in favor of the remaining shareholders. Usually, the articles of association set out a specific time frame for the exercise of the preemption right. Beneficiaries must be informed prior to an envisaged transaction or immediately after the share purchase agreement has been concluded. Therefore, provisions relating to preemption rights must be reviewed very carefully in a due diligence process. Further, it is advisable to address this issue with the respective preemptors in a timely manner. In many cases, it is easy to negotiate a waiver of the respective preemption rights.

2. Preemption Rights concerning Real Estate

The land register is only allowed to register the purchaser of a property as new owner if confirmation is provided that the municipality does not execute its preemption right. A municipality may have a statutory preemption right, e.g. in case the real estate property is located in a redevelopment area or if the property is required for other public purposes. Therefore, all purchase agreements regarding German real estate (asset deal) stipulate that the purchase price shall not fall due before the respective waiver has been issued by the municipality.

Further, statutory and contractual preemption rights may exist, i.e. the statutory preemption right of a tenant to purchase his apartment in case it was converted into a separately owned condominium (see B.III.2.c)) during the term of his lease and is now being sold for the first time. Furthermore, preemption rights can be freely created by contract with any third party, including municipalities. Please note, however, that the preemption right must be registered in the land register in order to affect a transaction. Preemption rights which are not registered in the land register and are therefore not obvious to a potential purchaser will only allow entitlement to damages vis-à-vis the other party. If registered, the preemption right is enforceable not only against the owner of the estate, but also any of his or her successors.

H. General Legal Framework for Investments

I. Labor Law

1. General Employment Conditions

A uniform labor law codex does not exist in Germany. The provisions of German labor law derive from different laws and are supplemented and overlaid by provisions of the employment contract, European legislation, collective labor agreements and bargaining agreements. Protection of the employees is of great importance and a multitude of acts exist concerning, inter alia, working hours, maternity protection and protection against chemicals in the workplace. In a nutshell, one can say German labor law is highly regulated and predominantly employee-friendly.

2. The Employment

a) Employment Contracts

The majority of employment contracts are concluded for an indefinite period of time. However, employers are free to offer fixed-term contracts. German labor law stipulates several restrictions on this right. In general, a fixed-term employment contract can be entered into for duration of up to two years. If the duration exceeds two years, the employer needs a special reason to justify the time limitation. Without such reason, the employment contract is valid for an indefinite term.

b) Temporary Work

Temporary work is allowed in Germany and available in nearly all industrial sectors and all kinds of jobs. A significant advantage of temporary work for the hirer is the greater flexibility compared to regular employment. The termination of temporary work contracts is independent from labor law restrictions and only subject to the contract between the hirer and the temporary work agency.

c) Social Protection

German employees are insured against illness, invalidity, age and unemployment by statutory social insurance. In general, employer and employees bear the costs in equal parts. Apart from such mandatory law, the employer is free to grant additional benefits, mainly occupational pension schemes, funded only by the employer or funded by employer and employees.

d) Termination of Employment

aa) Dismissal Protection and Reasons for Termination

Employees working for an employer with more than five regular employees enjoy dismissal protection; the employment contract can only be terminated for specific reasons. Therefore, termination is only admissible for personal, conduct-related or operational reasons. Dismissal for personal or conduct-related reasons requires a previous warning and is supposed to be a last resort option. Dismissal for operational reasons is based on an organizational business decision. Labor law courts are not entitled to examine this entrepreneurial decision. However, an extraordinary dismissal is possible without a previous warning, if the default of the employee is of such great extent that the continuation of employment is not reasonable for the employer. Examples of reasons are mentioned in the specific labor acts.

bb) Social Selection

Dismissal for operational reasons is only admissible if there are no other vacant jobs within the company that the employee is capable of doing. Finally, a social selection has to be executed which means that the personal needs and social situation of potentially affected employees must be taken into consideration. The social selection is under the control of the labor law courts.

cc) Notice Period and Required Form

Notice periods for termination can be found in the employment contract, in collective labor agreements or in statutory law and normally depend on the length of employment of the employee with the employer. The termination notice shall be in written form.

e) Employee Transfer in Case of an Asset Deal

In case of an asset deal, the employees who belong to the unit sold are automatically transferred to the purchaser if they do not object the transfer of their employment. The question of under what circumstances an employee belongs to the unit sold is not answered by law and is subject to extensive case law of the German Federal Labor Court and the European Court of Justice. A careful assessment on an individual basis is necessary to identify those employment relationships which will be transferred to the new owner.

3. Collective Labor Law

a) Collective Labor Law Agreements (Tarifverträge)

Unions are of great importance in the German working world, especially for the determination of remuneration and other working conditions. During the last several years, German unions have become more and more willing to conclude flexible collective labor agreements to consider specific economic conditions. As a general rule, there is one union for each major sector of economy, usually mirrored by a corresponding employers' association. The two sides represent the employers and employees in the periodic negotiations on collective labor agreements. Employment conditions set out in the collective labor agreement are binding for the employer, if the employer and employees are members of an employers' federation or union. Some collective labor agreements allow deviations from provisions set forth therein, if the employer faces economic difficulties or other circumstances which jeopardize jobs. Employers who are not members of an employers' federation are free to agree with the employees on deviating working conditions.

b) Workers' Council (Betriebsrat)

Employees of business units of an undertaking with more than five regular employees are entitled to set up a workers' council. In case an undertaking operates more than one business unit, more than one workers' council may be established. The size of the workers' council depends on the number of employees. Workers' councils have considerable consultation and information rights, e.g. relating to such issues as dismissals, organizational changes, conditions of employment, vacation schedules, etc. Further, the workers' council must be briefed by the management of the target company in the preliminary stages of the conclusion of a sale and purchase agreement, if hereby a minimum of 30% of the voting rights of the target company are acquired. The briefing must occur in due time, namely before any decision on the deal is made. The obligation to inform does not exist if the operation and business secrets of the target company are thereby endangered.

4. Co-Determination

Co-determination in bigger corporations is also realized by the election of supervisory boards. The proportion of shareholder and employee representatives depends on the branch and the number of persons employed by the company. The proportion of employee representatives ranges between 1/3 and 1/2 (see B.II.1.g)). The chairman of the supervisory board provided with a casting vote is always a shareholder representative.

II. Public Law Issues

1. Building and Planning Law

The general compliance of a real estate property with building and planning law has to be reviewed in the course of due diligence of a property. Of course, any investor has to ensure that no risks with regard to building and planning law exist. In particular, there may be restrictions on the use of a property which have an impact on the investment decision, e.g. restrictions on the conversion into “luxury” real estate or on the permitted amount of rent charged in certain “underprivileged” areas. However, some aspects of planning law may not constitute a risk but may nevertheless have a material impact on the process of the transaction itself (such as the preemption right of a municipality, see G.IV.2.) or even on the pricing.

a) (Re)Development Areas

Municipalities may decide that a certain area needs to be developed for the first time or that an older area needs to be redeveloped. The aims of such (re)development will be set out in a (re)development plan that is binding in nature. In the land register of the affected real estate properties, respective notice of (re)development will be registered (and may therefore be identified in course of the due diligence). The effect of such a (re)development area is that certain transactions require the prior consent of the municipality, inter alia:

- ▶ erection, demolition or change of use of a building, as well as material investments in a building;
- ▶ sale of a real estate property or the creation or sale of a heritable building right (see B.III.2.d));
- ▶ creation of encumbrances, e.g. a land charge for a financing bank or easements;
- ▶ conclusion of lease agreements or other usages for a fixed period of more than one year.

Therefore, basically all transactions of interest for an investor require the prior consent of the municipality.

As all urban (re)development measures aim to improve a certain area, such measures will most likely result in an increase of the value of the affected real estate properties. This increase in value, however, is collected from the owners of the real estate properties by way of a so-called compensation payment. The amount of such payment equals the amount of the increase of the value of the real estate property. An investor should therefore consider these costs in his investment decision.

b) Energy Performance of Buildings Directive and Green Building

Energy efficiency of buildings and the integration of renewable energies in modern architecture are becoming more and more important. There are both compulsory rules and voluntary standards.

Upon the erection or significant alteration of a building, an energy pass is to be issued according to the Energy Performance of Buildings Directive (EnEV 2009). EnEV 2009 is part of German building law and stipulates technical requirements for the efficient use of energy in residential and office buildings, as well as in some industrial buildings.

Since 1 January 2009 owners of a building generally have to provide an energy pass for their building to potential purchasers. Content and format are specified by EnEV. There are two different qualities (based on the building or based on the actual usage in case of existing buildings). Certificates may only be issued by qualified individuals (e.g. architects, construction engineers). In case a sale or lease agreement is concluded without respective documentation, the owner may be fined up to EUR 15,000. However, in case the owner of an existing building does not intend to sell or lease the property, an energy pass is not required. The goal of EnEV 2009 is to diminish the energy demand of buildings by 30% in comparison to the former EnEV 2007. In 2012 the provisions of EnEV 2009 will be further tightened.

The Renewable Energies Heating Act (EEWärmeG) already came into force on 1 January 2009. It stipulates that the owners of new buildings are obligated to generate a percentage of their heat (and cooling) requirements from renewable energies. This applies to both residential and non-residential buildings whose building application or building notification, respectively, was filed after 1 January 2009. The owner may decide at his own discretion which type of renewable energy is to be used. It is merely important that a certain percentage of the required heating and/or cooling is generated by the use of renewable energies. The percentage is dependent on the type of renewable energy chosen. Building owners who do not wish to use renewable energies may choose from a variety of so-called "compensation measures". The EEWärmeG was amended with effect as of 1 May 2011. Since this date, the obligation to use renewable energies not only applies to new buildings but also to existing public buildings. This exemplary function must be complied with in respect to any buildings owned by public authorities. In addition, this obligation applies to any buildings leased to public authorities.

Besides these statutory requirements, so-called "green buildings" are en vogue. Green buildings are generally recognized as having lower energy consumption and less environmental impact than standard buildings and combine particular design features with special materials and utility systems (ventilation, heating,

water, etc.) to obtain a structure with a very low to no impact on the environment. The exact definitions may vary, but the growing number of possible green solutions and approaches that emerged led to the development of national standards for green buildings such as the Leadership in Energy and Environmental Design, Green Building Rating System developed in 2000 by the U.S. Green Building Council, the Green Star Rating System developed by the Green Building Council Australia launched in 2002 and the BREEAM in the UK provided by the United Kingdom Green Building Council launched in February 2007.

Similarly, in Germany the German Sustainable Building Council was founded in 2007 and started to certify buildings in 2009. The German Sustainable Building Council has developed a German standard, also under consideration of EU requirements. It provides three certificates: “bronze”, “silver” and “gold”.

2. Environmental Law

a) Operating permits

It is important to clarify whether the business has obtained all operating permits that are required now and, if applicable, in the future. If the investment is to be made by way of an asset deal (see B.I.), the situation in the business with regard to permits should be examined with due care. In almost all cases, the operating permits entitle the business owners to operate the facilities and must be obtained again after the transaction. The most common permits are permits pertaining to pollution control, water rights and waste legislation, as well as such permits for storing and discharging hazardous substances. The permits issued by the authorities mostly include supplementary provisions such as, for instance, limit values or deadlines, with which the owners must comply. The business management should also pay attention to compliance with such supplementary requirements. Otherwise, the authorities may be entitled to withdraw the permit and stop operations. The operation of particular facilities may even be liable to prosecution if they are operated without the permits required by law.

b) Environmental Liability

In case of damages inflicted on the environment, there are a number of laws regulating liability. Liability for inherited pollution is the type of liability with the most practical significance. Both the user and the current and former owner of the contaminated site can be held liable for soil exploration, decontamination and protection at their own expenses. Soil contamination may result in cost-intensive excavation work and ground water impairment requiring longsome measures of protection and monitoring.

In case of business transactions, it is often advisable to obtain special adminis-

trative information, e.g. from the register for contaminated sites, and to involve specialized companies which follow standardized procedures in the examination of environmental issues. In an initial phase, required documentation will be reviewed, the site will be inspected and the persons in charge will be interviewed. Should these activities result in indications of environmental risks, technical and environmental examinations will be made in a second phase.

3. Public Procurement Law

Due to German history, the state is the owner of a great deal of land, in particular in Eastern Germany. Therefore, the state often appears as the seller of real estate properties. In case the state is involved, certain contracts have to be put out to tender. The violation of the public procurement law would render any respective contract void. Generally, this obligation exists only for contracts regarding the procurement of goods, building work and services. Therefore, the sole sale of land generally was and continues to be not subject to tender. However, the conclusion may change in cases in which the purchaser assumes further obligations, e.g. an obligation to build. In this case, the entire transaction may be legally regarded as constituting a building order or a building concession – and thereby be subject to the obligation to put out to public tender. At the date of publication of the last edition of this book, there was still some uncertainty due to the so-called “Alhorn jurisdiction” as to which transactions have to be, in fact, put out to tender. This uncertainty has, in the meantime, been remedied to a large extent by the amendment of Section 99 of the Act against Restraints of Competition (GWB) which came into force on 24 April 2009, as well as the judgment of the European Court of Justice (EuGH) dated 25 March 2010 in the matter “Helmut Müller” which confirms the new version of Section 99 as being consistent with European law. However, side agreements in purchase contracts which – even if merely partially – relate to services in which a public authority as the seller of a property takes a direct economic interest still remain subject to the regulations under public procurement law.

III. Investment Grants and Subsidies

Investors in Germany can benefit from numerous publicly offered incentives to all investors – regardless of whether they are from Germany or not. The German government, the individual federal states and the European Union provide funds. The support ranges from cash incentives to labor-related incentives, as well as incentives for research and development. Cash incentives provided in the form of non-repayable subsidies make up the main components of this package. Various forms of funds may be combined.

The level of grants available principally depends on the size of the enterprise and the number of new employees. Schemes are subject to alteration, a fact that must be taken into consideration. Grants and subsidies in Germany are generally approved or allowed under certain conditions, e.g. retaining in supported industry sector, minimum number of employees for a definite period, all associated assets must remain in the manufacturing facility. The intention of these conditions is to preserve the purpose of the subsidy.

1. Subsidies in the EU

The legal and financial framework of public funding throughout Europe is provided by the European Union, meaning that public funding must meet certain criteria applicable to all EU member states. The East German states (Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt, and Thuringia, as well as special areas of Berlin) are supported as a “convergence region” on a high level of public funding.

2. Subsidies in Germany

Grants and subsidies from the German federal and regional governments are generally provided in the following ways:

- ▶ subsidies (some of which are repayable under certain conditions),
- ▶ loans at low interest rates (granted by various public credit institutions; maturities of between ten and twenty years; maximum amount of between EUR 500.00 and EUR 10 million, depending on the subsidy scheme),
- ▶ capital resources aid (also available from various public institutions) and
- ▶ guarantees (provided for investments in projects and equity holdings).

If the target of an investment is subsidized by any public grant or subsidy, the aid will not be granted automatically after the sale of the company. Furthermore, the repayment of grants or subsidies under certain conditions must be taken into consideration. In case of subsidies which breach the EU framework of public funding, the subsidies can be reclaimed for an unlimited period. It is possible that the investor may be obliged to reimburse grants or subsidies. Hence, grants and subsidies are a considerable subject of due diligence, because reclaimable payments could be a crucial risk for an investor in various scenarios.

If the development or restructuring of real estate is subsidized by any public grant or subsidy, the aid is commonly dependent on the fulfillment of specified conditions. The nature of these conditions is determined by the nature of the investment. The conditions can lead to restrictions on the permitted amount of the rental fees. They have to be met for a fixed period of time (between 5 and 30 years). Any violation of the conditions may lead to an obligation by the investor

to reimburse grants or subsidies. In case of the purchase of subsidized real state during the fixed period of time, the existing conditions commonly also apply to the purchaser. Failure to meet these conditions may lead to an obligation by the purchaser to reimburse grants or subsidies or may cause penalties to be imposed. Therefore, careful review in the due diligence process is absolutely necessary.

IV. Intellectual Property

1. Situation of Intellectual Property Rights

Germany is a member of all important international intellectual property treaties and its IP system complies with international standards concerning the types of protectable IP and the enforcement of IP rights. The German legal framework is said to be highly efficient, predictable and reliable. The protection of intangible assets has always enjoyed great importance in Germany, which is for instance reflected by Germany's ranking as no. 7 (of 142 nations) in innovation, including protection of intellectual property in the Global Competitiveness Report 2011/2012, as well as by the fact that the European Patent Office is based in Munich, Germany.

Most intangible assets enjoy protection as exclusive rights only after registration. Technical inventions are protectable (if they meet the requirements of the German Patent Act) as patents (max. 20 years), utility models (max. 10 years) or as topographies (max. 10 years); only in certain cases may duration of protection be extended (for pharmaceuticals and petrochemicals for 5 years). Non-technical intangible assets that enjoy protection after registration are trademarks (renewable for 10 year terms, indefinite protection possible), design patents (max. 10 years) or domain names (indefinite term).

However, further protection exists for intangible assets without any registration, like copyright protection for "works", which also includes software programs. Copyright protection is granted for a period of 70 years after the death of the author for works. Protection without registration is also granted for secret know-how, mainly by the Unfair Trade Practices Act (for the period of secrecy) and trademarks/trade names may also enjoy protection through use (i.e. well-known trademarks). As Germany is an EU member, "European" IP rights are in place (community trademarks and community designs) which automatically provide protection in Germany without a requirement for further national registration.

2. Specific IP Issues in Transactions

After having identified all intellectual assets of the target (including the non-registered rights), specific issues should be observed in its acquisition.

a) Inventions

Under German law, an invention principally belongs to the inventor (mostly an employee) and in the past, the invention had to be claimed by the employer in writing via-à-vis the employee within a period of 4 months after notification to be transferred to the employer. The respective statutory provision was changed as of October 1, 2009 – for employee inventions made thereafter, the employer is now deemed to have acquired the invention by law if he does not release it to the inventor within 4 months. Payment of certain compensation to the employee/inventor by the employer (usually small standardized amounts if agreed in advance) is mandatory.

b) Copyrights

Under German law, the copyright as such cannot be transferred but the author may only grant exclusive rights of use and exploitation to the purchaser/transferee. The author always retains his personality rights (moral rights) to the work. There is no work-for-hire principle in Germany, except in cases of software programs. Concerning other works created by employees, the economic rights to such works have to be transferred to the employer which can be provided in the employment agreement (also implicitly if the circumstances permit such interpretation).

c) Transfer of rights and availability

For registered IP rights, the transfer of rights should be filed with the relevant registers, even if it is not mandatory for validity of transfer, but necessary for later enforcement of rights against third party infringers. Another issue in many share deals is to make sure that the relevant technology / know-how is accessible after acquisition. With regard to software, respectively IT, the crucial points are to safeguard access to and availability of customized software (source codes, documentation), as well as to assure continuing disposability of the IT infrastructure and access to the data (data transfer is subject to rather strict data protection laws) after closing of an asset deal or acquisition of a separate business division.

d) Licenses

With respect to (exclusive) license, technology transfer and R&D agreements, no permit or registration is required but there are certain anti-trust issues that merit attention as they could affect validity of the agreement. Transfer of any such agreement to the purchaser (in case of asset deals) requires the approval of the other contractual partner.

V. Product Liability

In Germany, the manufacturer, respectively the first importer to the EU, can be held liable for defects of its products that cause death or physical harm or damage other products. The German Product Liability Act is based on EU law and provides for a strict liability independent of default or a contractual relationship. Three types of product defects cause liability: design defects, manufacturing defects, and defects in marketing (improper instructions, failure to warn of latent dangers). Liability for personal harm is limited by law to EUR 85,000,000; any further limitations of liability (e.g. in general terms and conditions) are invalid. Thus, due diligence mainly serves to identify potential liability risks that require building up a reserve and/or proof of insurance coverage and can be reflected in the purchase price or in the SPA through indemnifications.

I. Venture Capital

I. General

The term venture capital refers to capital provided to companies as seed, start-up or growth money for the financing of early stages of the company's development. Companies seeking venture capital are often young, innovative businesses considered to have a high growth potential (e.g. companies from the IT or technology sector) that, however, initially cannot cover the financial requirements for the implementation of their business models or their growth strategies with internal financing and that also do not have access to affordable credit because of a lack of collateral. In contrast to typical bank financing, a venture capital investor offers unsecured long-term financing provided to the company as liable equity capital. Another main difference between typical debt financing and venture capital financing is the provision of support and managerial know-how to the management of the target company by the investor.

As consideration for the provision of venture capital, the investor is usually granted a minority equity stake in the target company's share capital, which is in most cases organized in the legal form of a GmbH or, less commonly, an AG. The investment strategy of acquiring such minority shareholding is not to receive regular dividend or interest payments. Instead, a venture capital investor intends to hold its minority shareholding for a certain investment period only and to benefit from the increase of the company's inner value within an exit transaction to be consummated within or after the expiry of such investment period (please see Part K below for possible exit scenarios).

II. Transaction Procedures

1. Acquisition of Shares

In order to avoid share transfers that are taxable on the level of the existing shareholders, the acquisition of the (minority) participation in the target company is not effected through an acquisition of existing shares from the founders, but by way of a capital increase in cash in the target company and the subscription of newly issued shares by the venture capital investor. According to Section 55 et seq. GmbHG and Section 182 et seq. AktG, the consummation of a capital increase in both a GmbH and an AG requires a notarized resolution of the shareholders' meeting and registration in the commercial register.

2. Contractual Basis

In practice, the investment and the acquisition of the participation in the target company is based on an investment and shareholders' agreement governing the terms of the investment, the rights and obligations of the parties, as well as other aspects regarding the legal relationship of the parties inter se. In addition, most venture capital investments require an amendment of the target company's articles of association, e.g. in order to implement transfer restrictions on shares, different classes of shares or special investor rights and to comply with the corporate governance provisions agreed upon in the investment and shareholders' agreement. The amendment of the articles of association is effected by a shareholders' resolution, which requires notarization and registration in the commercial register and which is usually resolved upon and filed for registration together with the capital increase resolution.

3. Investment and Shareholders' Agreement

a) Investment Provisions

The investment and shareholders' agreement entered into between the existing shareholders, the investor and the target company initially regulates the terms and conditions of the investment and therefore contains provisions with respect to the size of the offered participation, the pre-money valuation of the target company and the amount and due date of the contributions to be made by the investor (e.g. based on the achievement of certain business milestones). In order to implement the investor's participation, the existing shareholders undertake to resolve upon the necessary capital increase, to issue the relevant amount of shares and to admit the investor to subscribe to such shares. Further, the existing shareholders are usually requested to waive any rights to subscribe to the newly issued shares, as well as any applicable anti-dilution protection. In return, the investor undertakes to subscribe the newly issues shares (which are usually issued at nominal value) and to make a further contribution (usually in cash) into the target company's capital reserves (Section 272 para. 2 no. 4 HGB) in accordance with the terms agreed upon (e.g. conditional upon the fulfillment of milestones).

b) Investor Rights, Corporate Governance

A venture capital investor that provides fully liable equity capital to the company participates in the successful development of the company, but at the same time bears an entrepreneurial loss risk equal to that of the founders of the company. The investor will therefore insist that the investment and shareholders' agreement contains provisions on reporting obligations for the management and

information rights by the investor, as well as corporate governance provisions that provide the investor with a sufficient level of passive control over the management and thereby over the development of the company. Typical corporate governance provisions within an investment and shareholders' agreement are the establishment of a supervisory board (including delegation rights of the investor) and approval requirements for fundamental shareholders' decisions and business transactions. Furthermore, it is common for the investor to require the existing shareholders, the management and/or the company to represent and warrant the company's status at the time of the investment (e.g. with respect to certain business matters, as well as title guarantees regarding the ownership in the existing shares in the company).

c) Incentive of Management

The commitment and the incentive of the management are particularly important factors for the successful development of the target company. In order to commit the management to the company, investment and shareholders' agreements frequently contain so-called vesting clauses, according to which a founder who resigns as managing director of the company shall be obliged to fully or partially resign as a shareholder of the company and shall therefore transfer his/her shares in the company to the (i) the company and/or (ii) the remaining shareholders of the company. The amount of consideration to be paid is commonly dependent on the reasons for resignation (e.g. a "good leaver" shall typically receive the fair market value for the transferred shares, whereas a "bad leaver" might only demand the nominal value of the transferred shares).

d) Anti-Dilution

Early stage investments imply enormous difficulties to properly assess the valuation of the target company. Such difficulties can be countered by so-called anti-dilution or valuation adjustment clauses, through which the investor is entitled to subscribe to further shares in the company at nominal value (without any premiums) in case a further financing round with third party investors is consummated based on a lower valuation than that upon which the investor's investment was based.

e) Exit-related Provisions

Even more important for the safeguarding of the investment are so-called liquidation preferences, according to which the investor shall be, in case of an exit event, accorded a preference over remaining shareholders to receive certain amounts out of the exit proceeds. The amount of such preference payment depends on the bargaining powers in each individual case. Typically, the investor

is entitled to one time his total investment, but the liquidation preference clause might also provide for a minimum interest or even entitlement to a multiple of the investment amount. The return of the investor can be further leveraged by allocating the proceeds remaining after the preference payment not only to the remaining shareholders (so-called non-participating preference), but also to all shareholders, including the investor, pro rata according to their shareholdings in the company (so-called participating preference).

The power to enforce an exit transaction, notwithstanding the opposition of the other (majority) shareholders, is an equally important aspect for a venture capital investor, which intends to hold its (minority) participation for a limited investment period only. The investor may achieve this by so-called drag-along clauses, under which the shareholders are obliged to sell their shares in the company, along with the investor's shares, in case a third party intends to acquire the company and the investor supports such exit transaction. In return, the shareholders are often granted so-called tag-along rights (co-sale rights) that protect them against a unilateral withdrawal by the investor. Since the transfer of shares in a German GmbH requires notarization, the whole investment and shareholders' agreement needs to be notarized if drag-along and tag-along rights are implemented.

J. Acquisition of Distressed Companies

I. General

The acquisition of a distressed company is usually structured as an asset deal. In principle, this structure enables the purchaser to acquire only the valuable assets and to leave behind the liabilities.

In case of an acquisition of a distressed company, one major goal of the purchaser is to avoid legal risks. The fact of whether the transaction takes place outside or as part of an insolvency proceeding is important for this aspect.

II. Acquisition outside Insolvency Proceedings

1. Power of Disposal

Prior to the filing of an insolvency proceeding and prior to its opening, the seller is fully authorized to sell and transfer the valuable assets of the company to a third party.

After the filing of an insolvency proceeding and prior to its opening, a temporary insolvency administrator is usually appointed. During this period, the sale and transfer of assets of the company is subject to the approval of the temporary insolvency administrator.

2. Risks for the Purchaser

Although the seller is fully authorized to sell and transfer assets outside an insolvency proceeding, the insolvency administrator may challenge the transaction at an later stage with retroactive effect, if either

- ▶ (i) the sale precedes the filing for insolvency proceedings by three months or less, (ii) the seller was unable to pay its debt when due at the time of the sale and (iii) at that time the purchaser was aware thereof; or
- ▶ (i) the sale is concluded subsequent to the filing for insolvency proceedings and (ii) at the time of the sale, the purchaser was aware of seller's inability to pay its debt when due.

Moreover, the transaction must result in direct damages for the creditors. A challenge by the insolvency administrator is excluded if the purchaser paid fair market value by way of immediate available funds (cash transaction). In this case, purchaser must immediately pay the full purchase price to seller; in particular, no part of the purchase price must be held back by purchaser because of an escrow agreement.

In exceptional cases, the insolvency administrator may challenge the asset deal transaction if the sale is concluded either within the last ten years prior to the filing of insolvency proceedings or after such filing, provided that the other party had knowledge at that time of the seller's intention to harm the seller's creditors.

3. Statutory Assumption of Liabilities

In principle, the liabilities of the distressed company remain with the selling company because of the asset deal structure. However, the liabilities of the seller may pass to the purchaser by operation of law in the following cases:

- ▶ If the purchaser acquires a business and continues such business under its previous name, he assumes, by operation of law, all liabilities of the seller which have been created in the conduct of business. This assumption of liabilities can be excluded by an agreement between seller and purchaser. However, such an exclusion will only be binding for creditors (i) if they have been notified thereof, or (ii) if it has been registered in the commercial register and was officially published. If the liability of the purchaser is not effectively excluded, it is unlimited.
- ▶ Under German law, the purchaser of an entire business or of a business division becomes, by operation of law, liable for all business and withholding taxes accrued from the beginning of the last calendar year prior to the acquisition. Purchaser's liability is limited to the acquired assets. However, the assumption of liabilities cannot be excluded by an agreement between seller and purchaser.
- ▶ If purchaser acquires a business or a part of a business, he automatically assumes all rights and obligations under the existing employment contracts.
- ▶ The acquisition of real estate can render the purchaser responsible for existing contamination and clean-up costs.
- ▶ The purchaser may be liable to repay unlawful subsidies granted to the distressed company by the EU.
- ▶ The purchaser may be liable for a violation of competition rules of the EU committed by the seller.

As a rule, the statutory assumption of liabilities cannot be excluded in the acquisition agreement. Nevertheless, the purchaser may demand warranties or indemnifications from seller concerning the assumed liabilities. In practice, the purchaser must be aware that these representations and indemnifications might be valueless, if the distressed seller is effectively unable to pay. If necessary, purchaser may look for securities, for example in the form of a bank guarantee or retention of the purchase price.

III. Acquisition after Commencement of Insolvency Proceedings

In the case of insolvency, the power of disposal over the property of the debtor is in the hands of the insolvency administrator. The insolvency administrator has various methods of utilization for the real estate property. These are forced sale, forced management or an open-market sale. An investor has the opportunity to acquire real estate property in the course of a forced sale or an open-market sale.

In the course of a forced sale, the property is sold to the highest bidder; consent of the debtor is not required. The costs of the forced sale are subtracted from the auction proceeds. The rest of the proceeds are distributed between the creditors that have placed claims in accordance with the rankings of their respective claims. Upon the acceptance of the highest bid by the acting judicial officer, ownership of the property is transferred to the highest bidder at that point in time. All encumbrances and rights to the real estate property also terminate at that point in time; exceptions exist.

In case of an open-market sale, the property is sold by the insolvency administrator in the form of a “regular” real estate transaction. Due to the specifics of the insolvency, certain rules have to be incorporated into the property purchase agreement. In addition, an agreement with the creditors has to be drawn up in which such issues as the distribution of the proceeds and cancellation of land charges is regulated. In both cases described above, the purchaser obtains a right of termination for the existing lease agreements; exceptions exist.

1. Power of Disposal

After the commencement of an insolvency proceeding, the insolvency administrator is solely authorized to sell and transfer assets of the company. Thus, legal uncertainties and risks can be avoided if the transaction takes place after the commencement of an insolvency proceeding.

2. No Risk of Challenges by the Insolvency Administrator

One of the major advantages resulting from an acquisition after the commencement of insolvency proceedings is that there is no legal risk with respect to a potential challenge of the transaction by the insolvency administrator.

3. Statutory Assumption of Liabilities

Another major advantage resulting from an acquisition after commencement of insolvency proceedings is that the pre-insolvency liabilities, including those resulting from employment contracts accrued prior to the commencement of insol-

olvency proceedings, usually remain with the insolvent company and do not have to be assumed by the purchaser. Even the liabilities for the continuation of the business under the previous business name and the liabilities for business taxes are excluded. However, the other above-mentioned assumption of statutory liabilities (see J.II.3.) remains unaffected as of the commencement of insolvency proceedings.

With respect to the acquisition agreement, it is very difficult for the purchaser to get warranties or indemnifications. The insolvency administrator may argue that his knowledge of the insolvent business is only limited and that the existing risks are already covered by the low purchase price. One major goal of the insolvency administrator is to avoid his own personal liability. Such personal liability may accrue if the amount left in the insolvent company is not sufficient to cover claims for warranties or indemnifications in the acquisition agreement.

K. Exit Scenarios for Investors

I. Scenarios

The scenarios of an exit can be manifold. Shares in a publicly traded company may be sold on the stock exchange or by way of a bulk sale. Shares in a privately held company can typically be sold by way of a private agreement subject to certain limitations of the articles of association and/or a shareholders' agreement of the company.

Potential alternatives to a sale may be a true merger of a company by way of general legal succession, typically in exchange for the issuance of new shares. An exit from an investment basically triggers capital gains tax at seller level. The tax consequences are described in E. above.

The following outlines certain provisions of typically privately held companies dealing with exit scenarios in the articles of association and/or a shareholders' agreement.

II. Management of the Exit Process

A lead investor usually wishes to agree with minority shareholders in an investment or shareholders' agreement that the majority shareholder is in control of the exit process. An important feature is, inter alia, the decision on which advisors of the shareholders shall be retained in the exit process, in particular investment banks, corporate finance advisors, lawyers, accountants, etc. The majority shareholder typically desires that "his" advisors take the lead in the process.

III. Initial Public Offering (IPO)

In times of efficient capital markets, the IPO may be a preferred exit device and the parties may contractually agree on this preference. The IPO allows the investors to behave differently with regard to their respective shareholding. Whereas certain investors seek to dispose of their investment within a certain time frame (e.g. private equity investors), their strategic partners may be interested in a long-term ongoing shareholder relationship with the joint target company.

It is common that the parties agree on the time horizon with regard to an intended IPO. The parties may also pursue the exit by way of a trade sale ("dual track"; see K.IV.) simultaneously with the preparation of the IPO.

If the IPO takes place, the shareholders are commonly subject to certain lock-up obligations, e.g. for a period of 6 to 12 months, vis-à-vis the issuing banks and/or the stock exchange. The shareholders may internally also agree on certain rules on how they may limit and prioritize any sales, if any, if they are not being made by way of a bulk sale, but rather through the stock exchange. Obviously, the main concern of all parties is to protect the stock purchase price in case of substantial disposal pressure.

IV. Trade Sale

The standard alternative to the IPO is the so-called trade sale, i.e. a sale of all or almost all outstanding shares in the target company, typically by way of an organized sales/auction process. Alternatively, the assets of such company and/or its subsidiaries may be sold in a third party transaction. A further exit alternative may be a recapitalization, by which shareholders seek a return on their investment through one or more jumbo dividends that may be financed by the assumption of further debt by the target company. (For tax consequences, please see E.).

In a privately held company, it is common that the shares are not freely transferable but rather that share transfers are subject to consent requirements of the management, the board or the shareholder assembly, respectively, and to pre-emptive rights or rights of first refusal of the other shareholders.

In case of a trade sale, the minority shareholder will typically request a take-along right vis-à-vis the majority shareholder, which allows the minority shareholder to co-sell its shareholding together with the majority shareholder.

The other side of the tag-along right is the drag-along right. The drag-along right

secures the majority shareholders' position to sell 100% of the target company shares, thereby generally achieving a higher purchase price. The drag-along right is typically an undertaking of the minority shareholder vis-à-vis the majority shareholder. The majority shareholder may possibly seek to protect his drag-along right by obtaining a proxy from the minority shareholder in order to smoothly effectuate the trade sales process.

The minority shareholder may seek to obtain protection regarding the drag-along rights by the majority shareholder by agreeing that the disposal

- ▶ is being made according to the same conditions for the minority shareholder as the conditions agreed upon by the majority shareholder;
- ▶ (in certain scenarios:) contains a minimum price (e.g. EBIT or EBITDA-related) and
- ▶ may not be an intra-group transaction of the majority shareholder.

V. VC Transactions

In VC transactions, it is common that investors obtain a liquidation preference upon exit that secures a prioritized return allocation to financial sponsors (waterfall). Typically, the most recent financing has priority over prior financing by other financial sponsors or the original investment of the founders of the company. In detail, these provisions may be rather complex.

L. Litigation and Arbitration

I. Litigation

1. General Remarks

When investing in Germany, foreign investors sometimes get involved in legal disputes with third parties or public authorities. In this respect, it is reassuring to know that Germany has a reliable, truly independent and cost-efficient court system in place, which is capable of helping the parties resolve their disputes in a reasonable and timely manner. Hence, Germany is ranked in the Economic Forum's Global Competitiveness Report 2011-2012 among the top 10 nations in the category of Judicial Independence. In comparison, France is listed number 37 and the US number 36 in this report.

2. Structure of the German Court System

The Courts in Germany are structured in a three-tier system. Decisions made by a court of first instance may be appealed in appellate court. If, after this second instance, the outcome of the case is still disputed, the aggrieved party can petition the highest German civil court, the German Federal Court of Justice (BGH), provided that the appellate court or the Federal Court of Justice admits the petition. While appellate courts are concerned with the facts of the case and the hearing of evidence, the court of highest instance is mainly concerned with issues of law. Hence, the BGH fosters the continuous development of the law, while appellate courts assert individual interests.

Although the courts of first and second instance are, strictly speaking, not bound by the decisions of the Federal Court of Justice, it is common practice in Germany that they follow these decisions. This leads to a high degree of legal certainty, since the decisions of the first instance courts are foreseeable and not surprising or made arbitrarily. This degree of legal certainty is based on Germany's decades-long democratic legal tradition and also on the fact that all laws in Germany are codified and available to everyone. This legal reliability and the resulting planning dependability make Germany attractive to both domestic and foreign investors.

3. Court Conduct

Legal proceedings before courts usually begin with a claim filed by a plaintiff. In his statement of claim, the plaintiff must explicitly define what he is seeking. This motion needs to be substantiated by a presentation of the facts and by the legal norms deemed relevant. After the plaintiff files his claim, the court then grants the defendant the possibility to reply to the statement of claim. If the defendant

decides not to defend himself legally or not to respond to the claim, the court may decide in favor of the plaintiff simply on the grounds of default (so-called judgment by default). After both parties have presented their cases through written submissions, the court usually appoints a date for an oral hearing. The court prepares for this hearing by separating the disputed from the undisputed facts and by verifying whether the disputed facts are relevant to the case. Evidence is only gathered if the parties present the facts differently and the court considers such differences to be relevant to the outcome of the case. If so, both parties are granted the possibility to convince the court of their version of the facts through witnesses, documents, expert opinions, etc. Contrary to practice in common law countries, it is not possible to cross-examine witnesses and to question them about every aspect of the case. Questions directed at witnesses must be directly related to the facts the court is seeking to prove or disprove. In practice, this accelerates the gathering of evidence since questions concerning irrelevant facts are not permissible. By conducting legal proceedings in such a manner, both parties save a considerable amount of time and money. After evidence has been gathered and the parties heard, the court announces its verdict and provides extensive written justification for its decision. Many court decisions are collected in comprehensive court casebooks that are available to judges and lawyers, as well as to laymen. In short, Germany enjoys a very transparent legal system.

II. Arbitration

1. Advantages of Arbitration

As compared to court litigation, arbitration is advantageous – especially concerning complex M&A disputes – as the parties can influence the nomination of the arbitrators, thereby ensuring that the arbitrators have the particular expertise necessary for the dispute. Furthermore, arbitration proceedings are confidential. They are also more flexible, as the parties can determine the procedure themselves. The arbitral award can be enforced more easily than ordinary court rulings, especially abroad, since there is an effective international network of treaties and conventions in place which governs the recognition and enforcement of foreign arbitral awards.

Arbitration is generally faster than litigation because there are no stages of appeal. Standard arbitration proceedings take between one and two years in total; even complex M&A arbitration proceedings can be completed in about two years.

2. Legal Framework

Arbitration comes into play if the parties agree on ad hoc arbitral proceedings according to the German arbitration law or on institutional proceedings according to the arbitration rules (DIS Rules) of the German Institution of Arbitration (DIS).

a) The German Arbitration Law

The German arbitration law in the 10th book of the German Code of Civil Procedure (ZPO) came into force on January 1, 1998 and comprises 42 provisions. It is based on the modern and internationally recognized UNCITRAL Model Law, is independent of all other provisions of Germany's national civil procedure law and applies to all arbitrations taking place in Germany.

Parties can easily obtain the jurisdiction of an arbitral tribunal outside of the ordinary court system by concluding an arbitration agreement, by which all or certain disputes which have arisen or which may arise between them with respect to a defined legal relationship are submitted to arbitration. Such arbitration agreements must be made in writing. In the event that consumers are involved, it is also required that the arbitration agreement be concluded as an independent contract separate from the main contract. For multi-party arbitrations with several claimants and/or respondents, it is advisable to include a provision for the selection of arbitrators in the arbitration agreement, as German arbitration law does not provide a statutory mechanism for the selection of arbitrators in multi-party situations.

In German arbitration law, it is mandatory that all parties be treated equally and given equal opportunity to present their case. It is possible for both German and foreign attorneys-at-law to appear as counsel before arbitral tribunals. In total, the provisions of the German arbitration law bestow a maximum degree of autonomy on the parties with regard to the organization of the proceedings. Although the law stipulates three arbitrators, if the parties do not determine otherwise, they may agree upon a single arbitrator, e.g. to save costs. As there are no fixed statutory provisions regarding the arbitrators' fees, the parties and the arbitrators have to agree upon the fees (e.g. on the basis of the costs for court proceedings or on the basis of the DIS rules).

In Germany, the Higher Regional Courts determine whether an arbitral award may be reversed or not. However, the grounds for reversal must comply with comparable international standards.

b) The Arbitration Rules of the German Institution of Arbitration

The DIS, Germany's leading institution for arbitration, and its arbitration rules, which were amended on July 1, 1998, represent an efficient and proven system of regulations which may be simply applied by using the standard arbitration

clause recommended by the Institution. The DIS rules are currently available in seven languages.

The DIS rules are also based on UNCITRAL Model Law. DIS provides administrative support during arbitration proceedings, for example during the formation of the arbitral tribunal, during the transmission of party pleadings or in case substitute arbitrators must be appointed. According to the DIS Rules, the place of arbitration may be chosen at will, such that foreign parties can transport the rules of procedure to their chosen place of arbitration.

Unless the parties have chosen otherwise, three arbitrators determine the outcome of the case. In comparison to statutory German arbitration regulations, the DIS rules offer the advantage that they include a regulation for a case in which there are more than two parties involved in a particular dispute. Problems that often arise through such a constellation, for example when appointing the arbitral tribunal, are easily solved through the DIS rules.

It is worth mentioning that, according to the DIS rules, the arbitral tribunal has the discretion to order the production of documents. In practice, most arbitral tribunals will investigate the facts only upon request of at least one party.

In international comparison, the DIS rules are a cost-efficient alternative to the regulations of other international arbitration organizations, such as the popular regulations of the Swiss Chambers' Court of Arbitration and Mediation or the ICC. The costs of DIS proceedings depend on the amount in dispute. An administrative fee for the DIS is added to the fees of the arbitrators (e.g. for a tribunal of three arbitrators with two parties involved, the fees for the arbitrators and the DIS (exclusive turnover tax) for an amount in dispute of EUR 1,000,000 amount to approx. EUR 74,700, for an amount in dispute of EUR 10,000,000 to approx. EUR 221,200 and for an amount in dispute of EUR 1,000,000 to approx. EUR 452,200).

The DIS also succeeded in facilitating fast-track arbitration agreements by recently issuing the "Supplementary Rules for Expedited Proceedings". By shortening the time period for the nomination of arbitrators and by limiting the number of written submissions, it is possible to bring arbitration proceedings to a close very quickly.

Depending on whether a single arbitrator or a tribunal of three arbitrators is nominated, proceedings based on these rules can be terminated within six or nine months, respectively, after the submission of the statement of claim. Such fast-track proceedings may be suitable if the parties only want to obtain a decision on a specific legal question (e.g. if a material adverse change (MAC) has occurred).

3. Corporate Law Disputes

Germany also offers a reliable framework for arbitration proceedings involving shareholder disputes within a GmbH. When compared to the ordinary court system, this arbitration framework can be especially attractive to foreign companies with German subsidiaries who are involved in a dispute.

Although the ability to arbitrate such disputes had long been controversial, the BGH approved it in a recent and well-noticed decision. The court, however, also decided that arbitration clauses can only be deemed legally effective if strict conditions are fulfilled.

In particular, the arbitration agreement needs either to be embedded in the company's articles upon approval of all shareholders or to be concluded in an independent contract between all shareholders and the company. Furthermore, it is not only required that the company's executive bodies, but also each shareholder be informed about the commencement and the course of the arbitration proceedings, thus enabling them to participate in the proceedings. Last but not least, each shareholder must be given the possibility to participate in the process of electing and nominating arbitrators and all shareholder resolution disputes concerning the same subject matter must be settled jointly before the same arbitral tribunal.

Although the decision of the BGH entails a complex regulating mechanism, this does not have to be an obstacle for arbitration agreements. In order to better meet the needs of its users, the DIS issued the "Supplementary Rules for Corporate Law Disputes", which fulfill all the conditions set forth by the BGH. The supplementary rules are available in both German and English.

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