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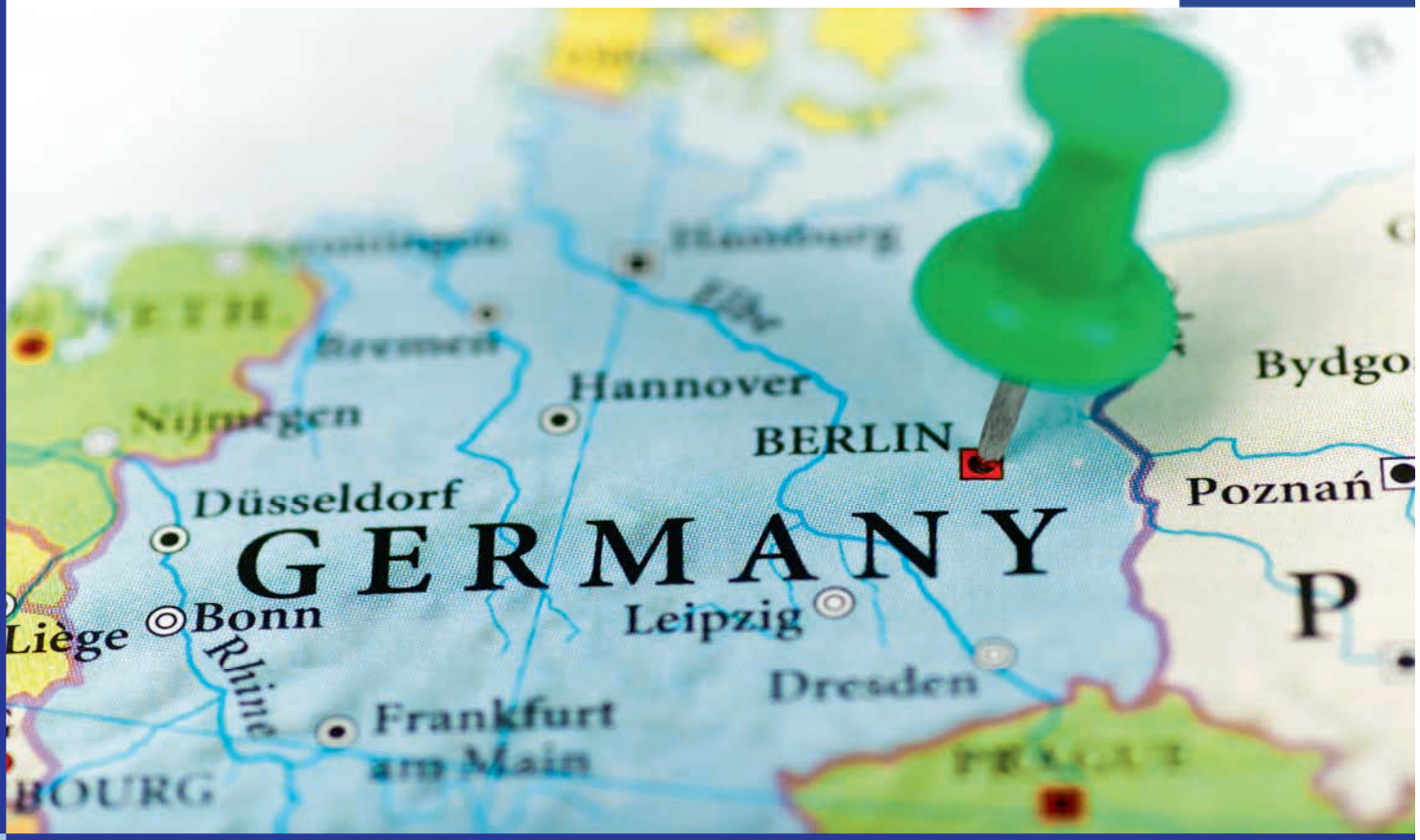

外商投资在德国

–与并购和房地产交易相关的法律和税务–

Foreign Investments in Germany

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

P+P Pöllath + Partners [编辑]
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Legal and Tax Aspects of M&A and Real Estate Transactions [chin.-engl.]
2. Ed., – Munich; Berlin; Frankfurt/Main: P+P Pöllath + Partners, 2012

Cover Picture: ©iStockphoto.com/contour99

ISBN 978-3-9815017-0-4

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2012

厓录

Table of Contents

A. 介绍

I. 德国 = 世界第五大经济体

德国是仅排在美国、中国、日本和印度之后的世界第五大经济体（根据来源于购买力平价计算的国内生产总值），被视为欧洲最大的经济体和位于中国之后的世界第二大商品出口领头羊，出口占其生产额的三分之一。德国在危机的起始、管理和结束方面影响着世界经济，包括欧洲货币联盟。“*德国制造*”是举世闻名的质量品牌。

II. 高效率的法律框架

德国更加努力地尝试过：完成与东德的统一进程并有力推动东德经济的现代化和整合，通过渐进地放松管制来解决国内劳动市场结构性问题，官僚化的规章制度被简化。由于成文法（非案例法）提供了法律上的确定性，德国的法律比通常报道的更有效率、成本更低且可预测度更高。2010-2011 年度世界经济论坛发布的“全球竞争力报告”甚至显示德国在“法律框架效率”和“司法独立”类别中名列前茅。

III. 投资机会

德国 360 万个商业体和 248 万平方米的地产提供了无数的投资机会。和盎格鲁萨克森国家相比，德国的并购活动还没有达到顶峰。本手册给想要抓住这些商机的人们提供了一个初步的概貌。个人、企业家、公司、金融投资者、经理人等可以了解在商业和房地产的收购过程中，德国人眼中的重要事项、挑战、风险和他们的商业习惯。

IV. 编写目的

本手册旨在就有关德国法律和税收框架方面为希望在德国投资的外商们提供一个简明清晰的指南。

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. 投资的可能性

I. 股份交易和财产交易

投资德国公司时投资者可以选择购买某个特定目标公司的股份或财产。一般来讲，购买股份更普遍，因为这种交易简单得多。另一方面，在某些情况下，购买财产则更加可取，如目标公司已经申请破产，卖方的股票所有权不能得到证实，或者买方只想通过分拆的手段来购买某个商业部门。

类似地，在房地产交易中也会出现这样的问题：进行财产交易还是股份交易。从税收优势等相关方面考虑，股份交易可能是正确的选择，比如，可以规避财产转让税。因此大宗房地产投资组合常常是以股份交易的形式进行的。然而除了这样的交易，财产交易在德国的房地产交易中还是比较常见。股份交易的一个主要缺点在于准备阶段需要更多法律建议，因此比房地产财产交易昂贵。股份交易的一大好处是交易速度更快，因为不需要花费时间去进行必需的土地登记。买方可以享受房产，而卖方可以更快地收到卖房款。没有土地登记费用，公证费可能较低。股份交易的另一好处是现存贷款可以用来融资，不存在预付罚款金。如果收购是以股份交易进行的，退出（出售）通常也要以此方式进行。股份交易采用现有的帐面价值；因为房地产会贬值，只有在由于某种原因房地产面值上涨的情况下，以财产交易退出才有利可图。

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.

II. 收购各种类型的股份

1. 私人有限责任公司(GmbH)

a) 一般性介绍

私人有限责任公司是目前在德国使用最为广泛的组建公司的形式。根据目前的统计，大概一百万个商业实体组建了私人有限责任公司。私人有限责任公司的一个主要优势是股东不再为公司债务承担个人责任。但是，私人有限责任公司的基金，无论是资本的增资还是股份转让，都要求由公证员公证。

b) 股本

名义股本必须在公司章程中决定, 金额应不少于 25,000 欧元。在 2008 年有限责任公司法改革以前，每个股东只允许在公司认购一股，每股至少要求 100 欧元，并能被 50 整除。2008 年有限责任公司法改革，在出资量上授予股东更大的灵活性。股东想认购多少就能认购多少，但这些股份以欧元为单位，最低值要达到 1 欧元。在一个股东打算只出售部分股份以及合资企业和管理参与项目时，这一新规定的灵活性特别简化了股份的购买。

c) 股本维护

私人有限责任公司法规定，如果公司的剩余资产（帐面价值）不够公司的股本和公司的债务，私人责任有限公司有责任维护公司的名义股本，不得将其分发给公司股东。换句话说，公司只能将其自由储备及累计利润分发给股东。

2008 年私人责任有限公司法的修改恢复了传统的以“资产负债表为依据”的做法，以确定股东和私人有限责任公司之间的交

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

易是否会影响其净资产。从而，产生了一个新的分配方法。新方法允许以资产负债表为中立的交易，如：现金汇拢法，以及以杠杆收购的上游证券交易等。2003 年德国联邦最高法院的决定对这些做法提出质疑。

但修改 2008 年私人责任有限公司法的立法者否决了这一决定，旨在确保现金汇拢法有一个稳固的基础。

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) 法定资本

2008 年德国有限责任公司法的修改使德国股份公司认为法定股本的资金得以启动。

法定股本的主要目的是通过对新的股权资本的分配来便利私人有限责任公司的融资。

现在，私人有限责任公司法使股东能授权管理公司的董事最长在五年的期限中，用现金或实物捐助发行新股，以增加该公司的注册资本。在授权期间，授权资本的面值总额不得超过现有注册资本额的一半。

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) 商业注册

一个重要的信息是只有在股东名单中登记的股东才被视为公司的股东。股东名单必须归档于商业登记册中。任何感兴趣的人都可以公开获取这份名单。

2008 年修改后的私人有限责任公司法阐明了对可信的私人有限责任公司收购股份的可能性，并列举了一份股东名单，以供参照。原则上，股民可以相信，名单所列的名字是公司的真正股东。然而，这只适用于如果对名单上某一名字的不正确性至少在 3 年内没有人提出异议的情况下。所以，这种可信收购理论上的可能性，实际上并不会使尽职调查程序显得多余。

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) 管理

私人责任有限公司由一个或更多的高级管理人员领导。和德国股份公司中的法律概念相反，适用法允许私人有限责任公司的股东在任何时候相对容易地指派和罢免高级管理人员。此外，高级管理人员受股东大会制定的说明约束。

通常，高级管理人员负责公司的业务管理并代表公司。法律实体不能担任高级管理人员。高级管理人员需要事先获得股东大会的同意才能进行某些商业交易。这些商业交易通常会在公司章程或管理程序规则中有详细说明。

g) 咨询委员会/监事会

此外，私人有限责任公司的股东可以选择建立咨询委员会或监事会。高级管理人员不能是监事会的成员。如果一个私人有限责任公司的雇员超过 500 人，劳动法强制规定必须成立监事会，雇员有权指派至少三分之一的监事会成员。如果公司员工超过 2 千人，监事会一半的成员由雇员指定。如果发生票数相同的情况，由股东委任的监事会主席可以投决定票。

h) 海外行政职位

2008 年有限责任公司法的改革取消了私人有限责任公司的注册地必须和它主要的营业地点相同的要求。

因此，公司可以在海外设立行政职位，而其注册机构仍在德国。这项修改条例允许以非常灵活的方式来管制私人有限责任公司，它可以在不受任何企业限制的情况下将其主要营业地点迁往任何其他国家。

这不仅仅限于欧盟国家，任何第三国皆可。但唯一条件是该国必须承认德国的法

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 tievote, 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.

律对该公司行之有效。

私人有限责任公司以熟知的法律形式在国外开公司的可能性，对德国的企业集团以及它们在国外的子公司来说是很有吸引力的。

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) 创业公司

2008 年政府修改私人有限责任公司法的的首份草案旨在降低此类公司的最低股本，从 2 万 5 千欧元下调为 1 万欧元。但立法机构最终决定维持原有的最低资本。

这一改革对于那些刚启动的，仅拥有少量名义资本的企业，或只需要少量资本就可以经营的新企业来说，提出了一个可取代已有私人有限责任公司形式的新方案，称为创业公司(Unternehmergesellschaft)。创业公司的最初股本只需 1 欧元。

创业公司大体上就是一个私人有限责任公司，但有其自身特征——公司四分之一的年利润必须用于资本储备，直到其股份资产达到 2 万 5 千欧元。

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 (Unternehmergesell-schaft) 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. 股份公司

a) 一般性介绍

和私人有限责任公司并存的第二种主要公司类型是为中型和大型企业而设计的股份公司。股份公司的股份可以公开上市，但不是必需的。实际上，大多数德国股份公司没有公开上市，而是由私人持有。

适用于股份公司的法律制度比适用于私人有限责任公司的法律制度严格得多。作为一条经验法则，股份公司章程只在德国股份公司法(AktG)明确允许的情况下，才能够包含偏离该法律的规定。然而有限责任公司章程可以包含任何条款，除非这项条款被德国有限责任公司法(GmbHG)禁止。因此，建构一个股份公司的灵活性非常有限，特别是在公司管治方面。

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) 公司管治

股份公司的三个必需机构是管理委员会、监事会和股东大会。

aa) 管理委员会

管理委员会负责公司的管理。管理委员会代表公司的职权并不局限于针对第三方。另外，管理委员会不服从于股东大会或监事会的指示。但是，根据监视会或股东大会的决定及管理委员会的程序规则，通过公司章程可以对管理委员会的代表权进行某些限制。

管理委员会成员由监事会指派，任期不超过 5 年，只有在有原因的情况下才能被解雇。

bb) 监事会

除非强制法要求监事会成员中必须有雇员代表，监事会成员由股东大会选派。如果股份公司雇佣 500 名以上的员工，作为一项一般性的规则，监事会 1/3 成员由雇员代表组成。如果公司雇员超过 2,000 人，监事会一半成员将由雇员选举产生。监事会要特别监督管理委员会，并负责对特定的运作措施作出（内部）同意的决定。

cc) 股东大会

对于法律或公司章程明确规定要由其处理的所有事宜，股东大会将予以解决。除非管理委员自己要求股东大会作出某项决定，否则股东大会不被允许向管理委员会发出有关公司运作管理的指示。然而，根据德国联邦高等法院在所谓的“Holzmüller”判例中建立的权威说法，对在物质上影响股东会员权利的事件，股东大会应作出同意

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.

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

决定，特别是在有意出售和处理物质财产的事件上。

c) 德国公司管治准则

德国公司管治准则于 2002 年通过。它不构成德国成文法。它包含了一些推荐信息和建议，供德国上市股份公司参照执行。其颁布目的在于使德国公司管治系统透明并易懂，从而提高国际与国内投资者、客户、员工和公众对所有上市股份公司的管理监督层的信任。

管理委员会和监事会每年须对准则提出的要求做出说明，指出哪些已经执行并还在执行，哪些还没有或将不会落实，并说明原因（“遵守或解释”）。“准则”中的一些重要规定，主要是涉及管理委员会成员的总体补偿额，管理委员会和监事会成员个人持有公司股份状况，以及通过中期报告反映出的有关该财政年度股东和第三方的信息。

即使管治准则不构成成文法，但根据德国联邦最高法院的决定，如果管理委员会和监事会的行动已由股东大会讨论通过，但决议中有些措辞与准则规定有不吻之处，法院可以将其驳回。同时，法院也指出，如果准则中的有些条例已不再适用，应马上修正。

d) 股份资本、股份、股份的出售和转让

股份公司的最低股份资本是 5 万欧元，每股最低面值 1 欧元。可以设立优先股。股东大会可对与授权资本或应急资本有关的事宜作出决议。

与管治私人有限责任公司的法律相反，股份公司股份的出售和转让不需要特别的形

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 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

式。然而根据公司章程，注册股份的转让——和记名股份相反——需经公司同意。同意的决定通常由管理委员会在考虑公司的最佳利益的基础上作出。

任何有关上市公司股份的行为都必须遵守内幕交易法。违法内幕交易通常构成犯罪行为。

正如 G. III. 1 条款规定，持有上市和非上市公司的股份，则必须满足某些公告要求。违反这些规则会导致相关股东权利的暂停，尤其是在股东大会上的投票权。

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. 参股的有限合作伙伴公司(KG)

a) 一般性介绍

一个德国有限合作伙伴公司由至少一个普通合伙人和一个有限合伙人组成。有限合伙人不对合伙企业的债务承担责任，除非他们尚未支付其用于商业注册的固定资金份额。付款前，责任仅限于约定的固定供款金额的上限。普通合伙人个人承担无限责任。

普通合伙人一般不参与有限合作伙伴公司固定资本的投资，而仅负责管理并代表有限合作伙伴公司。除非在某些合伙协议中已说明，不然有限合伙人不得参加管理，也不能代表有限合作伙伴公司。有限责任合伙人一般只能听取有关年度财务报表的相关信息，但有权对普通合伙人作出的超越日常业务范围的决定提出反对。

b) 私人有限责任公司有限合作伙伴关系

作为普通合伙人来运作一个私人有限责任公司是法律允许并很常见的，这为投资者提供了一个通过私人有限责任公司来管理有限合作伙伴公司的机会，从而避免了普通合伙人的个人责任风险。这样，投资者

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.

既能受益于有限合作伙伴公司，又能受益于私人有限责任公司。

c) 有限股份合作伙伴关系(KGaA)

德国股份两合公司的法律形式由两部分合并组成：其一是有限合作伙伴公司（见上文）；其二是股份公司（见 B.II.2）。对股份公司而言，有限合伙人的权益是股票，它们可以通过交易市场进行交易。但对有限合作伙伴公司来说，股份两合公司的股东可分为有限合伙人和普通合伙人两种。因此，除了股份公司法中专门对股份两合公司的一些规定外，股份公司法中有关股份公司的一般规定以及德国商法中有关有限合作伙伴公司的规定都适用。股份两合公司十分适合以家庭为主的企业。实际上，它们也常用于制药业和医疗业。

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. 其他合伙制

4. Other Partnerships

a) 隐名合伙关系

隐名合伙关系适用于那些希望投资并参与公司，但不想将他们的参与行为透露给第三方的投资者。

由于没有具体的法律法规，隐名合伙者与公司间的内部关系基于双方在隐名合伙关系协议书中达成的协议。此类协议通常要求隐名合伙者承担一定的资金义务，以分享公司的利润。从法律上来说，隐名合伙人没有任何管理权（“典型”的隐名合伙关系）。当然，这样的一种（内部）管理权可以在隐名合伙关系的协定（“非典型”的隐名合伙）中有所阐明。

涉及第三方，公司只能由非隐名合作伙伴进行管理。因此，从表面来看，隐名合伙关系的法律地位与（次级）贷款十分相似。

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) 公私合作伙伴关系(PPPs)

在公私合作伙伴关系中，私人投资者和公众机构通过合作来发展、运作或维持某些长期的项目。公司合作伙伴关系最典型的例子是一些基础设施项目，如高速公路、收费站、垃圾或废水处理厂的修建。

公私合作伙伴关系在德国不受任何特定的成文法约束。因此，公私合作伙伴关系需要书面提供详尽的合资企业合同书。一般来说，私人投资者负责规划、立项和融资，但必须遵守合同当事人之间的协议。作为交换，私人投资者可涉足一般由公共部门从事的新的业务领域。

5. 欧洲公司

除了前面提到的为成立公司或建立商业组织而存在的法律实体，还有两种在欧洲法律基础上建立起来的法律形式已经或将要出现在欧共体成员国和欧洲经济区域，包括德国。它们就是欧洲股份公司和欧洲私有公司。

a) 欧洲股份公司(SE)

欧洲公司(拉丁文名称为 Societas Europaea, 简写作“SE”)是一个欧洲股份公司。欧洲股份公司的法律框架建构在区域法的基础上，该法律直接适用于所有欧盟和欧洲经济区域会议的成员国。同时，更具有实践意义的是，对相应的、在不同的司法权限内为规制欧洲公司而颁布的国内法，该法律也同样适用。欧洲股份公司可通过五种方式组建：

- 两个股份公司的合并
- 欧洲股份公司联合控股公司
- 欧洲股份公司联合子公司
- 德国股份公司的转型，以及

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

- 一家欧洲股份公司与另一家欧洲股份公司的子公司合并组成公司

因此，欧洲股份公司可以当作跨境兼并的工具，因为欧洲股份公司可由两个或两个以上的分属不同的欧盟成员国的公司通过兼并的形式组成。但是，自从 2007 年欧洲跨境兼并的指令得到实施后，受德国法律约束的某些公司也可以直接与其他欧盟成员国的经济实体实行合并。

欧洲股份公司允许更为灵活的公司管治，在雇员参与方面也有更多灵活性(如下所述)。

欧洲股份公司有以下主要特征:

- 一旦注册，欧洲股份公司即具有法人资格。
- 欧洲股份公司需持有最少 120,000.00 欧元的认购股份资产。
- 欧洲股份公司的股份可在股票交易所买卖。
- 欧洲股份公司的注册办公地点和它的总部，即对欧洲股份公司实施有效控制的地点及其管理层所在地，必须在同一个欧盟成员国，但是可以在不解散或关闭公司的条件下，将总部从一个成员国迁到另一个成员国。但是，欧洲股份公司须购买那些反对迁出国境的股东的股份，并以现金支付合理的补偿。
- 欧洲股份公司的章程可适用于单层结构的公司管理体制，即一个管理委员会同时负责公司的管理（包括选举公司经理）和公司事务的监督。它也可适用于双层结构的公司管理模式：即公司中既有管理委员会，又有监事会，例如德国的股份公司。
- 欧洲股份公司不受一国之内的雇员参与法或共同决策法的约束。相反，除遵从某些特定的限制之外，雇员的参与与共同决策由管理层和雇员之间的协议来规

- 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.
- 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-

制，并由所谓的特别谈判机构来代表。这些谈判是成立欧洲股份公司过程中强制性的组成部分，是公司注册的先决条件。

called special negotiating body. The negotiations are a mandatory part of the process of establishing an SE and a prerequisite for its registration.

- 欧洲股份公司必须被欧盟成员国视作一个股份公司来对待，比如，适用于某一成员国股份公司的法律，在德国即德国股份公司法，同样适用于在该国注册的欧洲股份公司，除非欧共体规章或该国实施的法律提供了另外的规定。

- 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.

欧洲股份公司的行政管理、股东权利和公司的管治主要受治于公司章程和国家成文法。实质上，在对欧洲股份公司的管治方面，德国法律较之欧洲法律框架在实践上有更大的影响力。

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) 展望：欧洲私有公司(SPE)

2008 年 6 月，欧洲委员会发表了关于欧洲私人有限责任公司的法律草案 (拉丁文名称为 Societas Privata Europaea)。和欧洲股份公司相反，欧洲私有公司除少数例外，完全由适用于所有成员国的欧洲区域法直接管治，以期较大程度地便利跨境贸易，并降低在另一个成员国建立和维持业务的成本及复杂性。然而，自 2008 年以来，有关此事的法律进程已经停止。2011 年中期，一些会员国已拒绝匈牙利作为欧盟轮值主席国所提出的最后折衷方案。这些国家担心员工事宜，特别是担心本国适用于私人有限责任公司的法律赋予员工的共同决策权（见 B.II.1.g)）可能会被改写。所以现在实际上还不清楚欧洲私有公司是否能够存在，何时能够存在。

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. 合资企业(JV)

两个或两个以上的企业能够以合资企业的形式合作。建立合资企业的原因是合资企业中的一个参与者正试图打入新的市场，或者拥有特殊的技术秘诀，而另一个合资企

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

业的合伙人对此很感兴趣。通常两个合资企业的合伙人都能从中获利。

合资企业能够以不同的形式存在。如果是合同制的合资企业，合作仅仅基于双边协议，而不是组建一个独立的机构。在实体合资企业中，合伙人为了合作而设立一个有单一目的的工具实体。这样的实体经常采用德国有限合伙公司(KG)或私人有限责任公司(GmbH)的法律形式。

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. 房地产收购

III. Acquisition of Real Estate

1. 房地产介绍及房地产所有权

1. Description of and Title to Real Estate

a) 地籍图

a) Cadastral Map

在德国，土地要在土地管理办公室和土地登记处进行登记。所以查找房地产所有权既快又可靠。

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

每一块土地都被分割成几块地籍土地。每一块土地至少包括一块地籍土地，但是也有可能由几块地籍土地组成。每一块地籍土地都有一个对应的土地号，并在土地管理办公室登记。地籍图包含与地籍土地的确切边界、分割线和地理位置相关的有价信息。检查地籍图，确保可以从公共道路进入这块土地至关重要。另外，地籍图还包含有关开发状况和上层建筑的信息，比如越界的建筑。

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) 土地登记

b) Land Register

地籍土地还登记在土地登记册中。土地登记册存放于地区法院，由一个库存表和三个部分组成。库存表包含土地号码。第一部分记录土地所有权的信息，如土地所有者，在存在几个共同所有者的情况下，还登记有共同所有者的份额，有时还附有地役权登记的说明。第二部分包含土地抵押的信息，包括地役权、有限个人地役权、用益权、转让优先通知和对房产处置的限

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

制，如继承建设权的限制(见 B.III.2.d)。第三部分包含如房屋贷款、土地费和土地年金等留置权的信息。在土地登记册中登记的权利有不同的优先权/顺序。通常，优先权取决于登记的时间，比如较老的权利的排序比较近权利的排序高。

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) 诚信

c) Good Faith

任何人都有可能出于善意而相信土地登记册上的内容，并在土地登记册规定的范围内受到保护，无论土地登记册的内容是否真的正确, 都会被认为是正确的。因此，从一个并非真正的合法物主，但在土地登记册中被登记为物主的人手中购买土地是有可能发生的。另外，对购买者来说，没有在土地登记册中登记的土地抵押被视为不存在。这里需要高透明度来确保房地产交易可靠、安全。

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.

和商业登记不同，土地登记只能由公证员在网上查看。另外，只有在能证明存在正当购买兴趣的前提下，才可能从土地登记册中获取信息。当然，房地产购买者往往也具有这种正当的兴趣。地籍图是可以向公众提供的(在有些城市，地籍图可在网上查阅)。

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. 房地产拥有权的种类

2. Types of Ownership in Real Estate

每个个体，每个公共或私人法律实体(比如德国联邦州、市政府，股份公司或有限责任公司以及合伙制公司或民法合伙制公司)都可以成为土地拥有者。土地拥有权有不同种类。

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) 单一、共同及联合拥有权

a) Sole, Co- and Joint Ownership

最普遍的拥有权形式是单一拥有权，即一个人或公司拥有一块土地。如果土地由几个人或公司拥有，他们就是共同拥有者或联合拥有者。共同拥有是更常见的情况，意为每个共同拥有者享有一定比例的土地

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

所有权，比如二分之一的所有权。每个共同拥有者都可以单独出售其享有的土地而不需其他拥有者的同意。如果是联合拥有权，每个拥有者和其他拥有者联合拥有整块土地，因而受到其他拥有者权利的限制。整个地产只能由所有联合拥有者一并出售，不能单独出售。

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) 建筑及其他组成部分

土地拥有权包括所有紧紧依附于土地上的存在物，比如房屋和车库。依附于土地上的存在物包括建筑的所有组成部分。在特定情况下，如果房屋的固定装置和配件是根据房屋的结构而特制的，和房子构成一个整体并对房屋的外观有较大影响，它们也作为房屋的组成部分被包含在内。因此房地产的出售总是包括建于其上的房屋。与之相对，在德国新成立的州(勃兰登堡州、梅克伦堡—前波莫瑞州、图林根州、萨克森州、萨克森—安哈特州)和 1990 年以前的东柏林地区，所有权只包括建筑物的所有权，建筑物所处的土地只能被租赁。在两德统一后这项规定继续执行，所以独立拥有房屋权的概念在东德仍然存在。

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) 共管公寓

aa) 一般性介绍

德国法律也承认个人对公寓的所有权，其中也包括对停车场、地下室或阳台的绝对使用权。个人的公寓所有权本身包括对公寓楼内所有公用场所的共同拥有权。共同拥有的财产既包括土地本身，也包括所有不属于个人拥有公寓楼的其它部分和设施。一项基金被设立用以维护公用财产，其在出售公寓时不能被返还。

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) 改造成共管公寓

将房产改造成共管公寓和公用财产需要拟定经公证的产权分割书，该文件须包括对每间公寓的描述以及公寓楼的彩色图纸，并标明归个人所有的公寓场所。通常，公用财产的共同拥有权份额是与个人拥有的公寓面积占整个公寓楼面积的份额挂钩的，但可能因为后来的扩建(如阁楼的扩建)而改变。这样的改造需要政府颁发的执照以确认独立的单元。每一个共管公寓都独立登记在土地登记册的一个单独的部分中(共管公寓登记表)，因此根据适用法是独立于建筑在同一块土地上的其他共管公寓的。

cc) 转让

象土地一样，共管公寓可以单独转让、单独收费或被单独抵押。因而法拍一个公寓不会影响其他的公寓。然而在特定情况下，出售一个公寓需要得到居住于同一土地的其他公寓拥有者或公寓管理员的同意。

d) 继承建设权

继承建设权最终可由德国法律来制定。继承建设权使人们有资格在一定的期限内，比如 99 年，在一块土地(或地下，如地下停车场)上修建和拥有一栋房屋。修建的房屋被视为继承建设权的一部分，而不是土地的一部分。为了既能保留土地拥有权，又能收到相当于土地价值的 4% 到 5%的年土地租金，市政府或教堂经常使用继承建设权。如房屋租金一样，土地租金受指数制约，比如会随着特定的指数，如消费者价格指数的增长而增长。继承建设权是土地拥有者和受益人之间签署的合同，必须记录在土地登记表中。另外，受益人会得到一份单独的继承建设权登记册，并在此

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. 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

登记为继承建设权的拥有者。与土地一样， 继承建设权可以买卖，可能被追加地役权，以及被征收土地费。不过土地拥有者通常保留批准交易的权利，比如任何交易都需事先征得土地所有者的同意。继承建设权失效后，土地拥有者自动变为物主，因而须向受益人支付报酬。由受益人完成的租赁协约自动移交给土地拥有者。受益人也有可能与物主达成协议，获得购买土地的权利。

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. 留置权和收费

3. Encumbrances and Charges

a) 优先通知

a) Priority Notice

优先通知确保有关房产的权利诉求能够得到执法保障，如转让权。优先通知记录在土地登记表中(见 B.III.1.b)并在登记之时起立即生效。如果受益人权利诉求受到损害，随后发生的任何有关同一土地的交易都将被宣布无效。因此，对于在受益人权利声明之后对该地产提出的任何权利声明，受益人都保留优先权。任何以法拍、扣押令或破产程序方式进行的房产处置以及由卖方以合同方式进行的房产处置，对于享有优先通知权的受益人来说，都是无效的。如果卖方破产，优先通知权将使受其保护的买方有资格要求履约，即使破产程序正在进行，也不受破产配额的约束。因此，德国购买协约书通常规定在房产转让优先通知被登记在土地登记册之前，(买方)不必支付购买金额。

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 insolvency 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) 地役权

b) Easement

地役权使得被加置地役权的土地拥有者有义务对他人(地役权受益者)在他或她的土地上的特定行为保持容忍，或为了他人的利益在自己的土地上对自己的某些特定行为加以避免。地役权的登记可能对特定的个人/公司有利并且只限于特定的个人/公司，

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

如有限个人地役权，即佃客开零售店或对居所的永久权利。更多情况下，地役权是为个别物主而定，如确保道路或管道使用权。由于地役权确保对地产的适当使用，对使用权有所限制，因此它对地产的价值有物质影响。所以，在尽职调研阶段应审查所有现存或被要求的地役权。

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) 用益权

土地用益权使受益者有资格拥有土地和收取土地及其附属物所产生的收入酬金，如房租。

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) 土地费

一块土地也可能以某种方式被加置某种留置权，以至于留置权的受益者能重复地从这块土地中得到好处(土地费)。关于土地费的内容可以达成协议，对土地的征收行为可在不作通知的情况下随情况改变而做调整，土地留置权的类型和范畴根据协议中规定的要求来决定。征收土地费对特定的个人/公司或另一块土地的物主有利。通常征收土地费是为了确保信贷资金得到偿还，这是当事各方达成的协议。

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) 其他土地费

德国法律提供了几种房地产抵押权。最重要的抵押权是房屋抵押和土地费。两者之间的差别是房屋贷抵押用以担保某种债务，而土地费不是这样。因此，在大多数交易中土地费是更受欢迎的抵押权。两者都给予受益人(主要是银行)强制出售土地的权利或强制管理抵押土地的权利。发放证书可以增加房屋抵押和土地费的可转让性。

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. 房产权和租约转让

a) 转让房产权

德国法律的一个特殊之处是除购买协约外，还要求有一项关于转让的特殊协约。这项协约通常包括在购买协约中，比如买卖双方同意房产权由卖方转让给买方（见C.IV.4., C.IV.5.)。

如果有关转让的协约是单独签定的，不包括在购买协议书之中，它必须和购买协议书一样经过公证。无论如何，有关转让的协议必需在公证之前达成，公正时买卖双方须均出席，或由其代理人代替出席。协约只能是无条件的，不包含任何时间上的限制(然而这项规定不适用于购买协议书)。卖方必须是具有无限制权利来处理该房产的物主，或是由具有无限制权利的房产拥有者授权的第三者。只有在这种情况下整个协议，包括有关转让的协约才有效。如果卖方无权处理房产，但卖方在土地登记册中注册为物主，而买方对此具有诚信，只有在这种情况下，买方才能取得房产权(见 B. III.1.c) 。

转让只有在土地登记册中登记才能有效，而土地登记需要很长时间。当然，当事人应使买方能尽快使用该房产。在房地产交易中的一个常见方法是不管土地登记是否进行，先转让经济拥有权(房屋转让)，但通常不会发生在转让优先通知登记和付款前。这种转让包括收取房租的权利转让。

然而，由卖方向买方合法转让租赁协约要在买方土地登记时依法办理。然而自动转让只有在卖方，即物主和租赁协约中的房东是同一个人的情况下才能发生。如非此情况，则不足以在购买协约中达成转让协议，而是需要所有当事三方——买方、卖

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 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

方和佃客——签定合约。如果租赁协议已经完成，但房地还没有移交给佃客，买方须行使购买协议书中房东的义务，以保证租赁转让能够进行。由于买方承担房东的所有义务，包括对佃客的押金负责，应该确保所有押金实际上都转让给了买方。

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. 认购杠杆贷款

IV. Acquisition of Leveraged Loans

1. 吸引人之处

1. Attractiveness

尽管最近德国的经济状况有较大改观，一些私人投资者的投资组合公司仍在遭受经济危机爆发前信贷崩溃及过度杠杆借贷之苦。除了去违反贷款协议的金融公约，他们别无选择，尽管他们也在艰难地寻找新债主，以期进行必要的重新融资。结果这些公司的杠杆贷款价格下滑到远远低于票面价值。然而，另一方面，(价格下滑)也吸引了投资者购买杠杆贷款。

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. 银行执照的必要性

2. Necessity of Banking License

根据德国银行法(KWG)，购买杠杆贷款不需要银行执照，因而甚至私募基金通常都可以购买这些投资组合公司的贷款。只有从事诸如发放贷款的“信贷业务”的实体才会需要银行执照。购买杠杆贷款、贷款偿还和提出诸如此类的诉求不属于信贷业务。然而，如果对贷款进行重新融资，或者贷款协议给予贷款人特定附加权利，如决定新的利率，情况就不一样了。因此，建议在认购杠杆贷款时，应针对每一个案例，检查是否需要银行执照。

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. 贷款转让

3. Transfer of Loans

根据德国法律，贷款转让不需要使用特定

Under German law the transfer of a loan does not have to meet any specific form requirements,

的法律形式。比如，贷款转让协议书可在当事人的私人场所签定，不需要公证。然而对于贷款转让，借款人总是应该得到通知，以免再让贷款转让人偿还贷款。

4. 转让条款

有关认购杠杆贷款的另一个法律事项是贷款协议中的转让条款。转让条款是否允许将贷款协议中规定的贷款人权利分配给个别杠杆贷款收购人？在这方面，一些贷款协议将潜在的收购人圈子限制在银行和金融机构内，并明确排除任何基金和其他类似实体的参与。另外很多贷款协议要求贷款人的更换得到公司的同意，然而公司不会无理阻挠。

5. 专门条款

如果杠杆贷款收购者同时是借款人和贷款人的股东，从德国法律的角度来看就会出现两个主要的问题：首先，一旦借款人破产，认购者提出的偿还要求排在其他债权人的要求之后。第二，作为股东，其利益冲突在于他既是借款人，也是债权人的拥有者。

a) 隶属地位

根据德国破产法，任何未偿还的股东贷款或类似的贷款在破产偿还要求中总是处在隶属地位。在破产申请提出前一年或之后一年中，股东贷款或类似贷款的偿还款可由破产管理者收回。如果股东是(或曾经是)债权人，他持有的任何贷款都被看成是股东贷款，因而必须受这些规则约束。因此投资者应了解，在投资组合公司破产时，他(在申索权方面)处于隶属地位。然而，如果股东持有股份少于借款人登记资金的10%，以上提到的规则不适用。

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) 利益冲突

如果杠杆贷款由集团公司贷出，股东仅购买投资组合公司获取的一部分贷款，该股东可能会遭遇重大的利益冲突，有可能对其他债权人不利：一方面，股东代表借款人的拥有者，另一方面, 他又是集团公司的一份子。由于这个利益冲突，存在物质风险，即股东在贷款集团公司的投票权根据德国法律可能被收回。

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. 交易程序

I. 认购程序

在德国，买卖过程通常是私下买卖或拍卖过程。在这两种情况下，卖方在与一个或更多的潜在购买者开始交易前都必须做好充分准备，包括事先发现风险和机遇，以及对已经发现的缺失提供可行的补救方法。在某些情况下，卖方决定自行展开尽职调查，以获取以上提到的有关目标公司的信息，为即将到来的交易做准备，也为了加快买卖进程。

1. 私下买卖过程

a) 典型程序

私下买卖的特点是只有一个潜在买主。在德国，私下买卖通常是买卖双方以信件/谅解备忘录的方式开始表达购买意愿，实质上没有约束性。然而潜在买主在开始昂贵的尽职调查工作前，通常有兴趣通过谈判，设定一个具有约束性的“排他期”(卖方在此期间不能与第三方谈判)。在签署过单独的保密协议书，或购买意愿书、谅解备忘录中的保密条款后，潜在买主有可能展开尽职调查工作，包括与目标公司的管理层面谈。在对公司进行仔细考察后，双方基于购买意愿书或谅解备忘录达成的“协议”条件，根据在调研过程和管理层的介绍中发现的问题，进行买卖协议谈判并对协议做适当的调整。

b) 卖方的劣势

卖方选择通过私下买卖的程序来出售其公司，有两个主要的弊端：一方面，如果潜在买主因为某种原因决定终止与卖主的谈判，认购过程就宣告结束。另一方面，卖方基本上不能够争取到最高价格及最好的

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. 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

条件。

c) 卖方的优势

然而从交易费用来看，私下买卖的程序可能比拍卖便宜。另外，只有一个潜在买主可以获取目标公司的绝密信息。

2. 拍卖过程

a) 典型过程

为了获得更高价格，通过多位潜在买主竞标而拉高价格的拍卖过程很常见。咨询者(如并购咨询或投资银行) 向许多潜在的金融和战略竞标者提供他们的商业合同，并准备一份含有待售公司一般性信息的公告，有关目标公司的任何个别的信息在此不被提供。如果潜在竞标者有兴趣通过信息备忘录获取更多有关目标公司的信息，他们首先必须签署一份单独的保密协议/不对外公布协议。

与此同时，卖主与其咨询人完成数据库组建(通常情况下是虚拟的)，该数据库含有关于该目标公司的所有信息。所有的潜在竞标者都受邀提交一份不具约束力的出价书。出价书中包含最初的购买价格建议以及对卖方提出的特定问题的回答。卖方特别关注各竞标者如何融资，以及他们如何确保这个购买价。在第二阶段，卖方决定对一小部分潜在购买者开放已经组建完毕的数据库并与目标公司管理层接触。在进行了调研工作和与管理层面谈后，所有(对购买该公司) 仍感兴趣的潜在竞标者受邀提供最后标书(也不具约束力)。在评估了所有的最后出价书和潜在竞标者对买卖协议的评论后，卖方决定哪些潜在竞标者进入拍卖过程的第三个阶段，哪些潜在买主有机会和卖方就个别买卖协议进行谈判。有

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 . 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

时，竞标者会在最后的阶段要求卖主给予自己一个排他期 (卖主在此期间不能与其他潜在竞标者谈判)，以增强他们的竞争地位。

b) 买方和卖方的劣势

拍卖过程是一个非常费时费钱的过程。通常，卖主必须在拍卖过程的最后阶段同时谈判两份买卖协议。由于(多个)潜在购买者有收购要求，为了获得目标公司，每个购买者都必须对出什么样的价钱、对买卖协议做哪些主要的修订做出决定。

II. 开始阶段

1. 信息备忘录

在拍卖过程中，潜在竞标者会收到一份信息备忘录，这是第一份有关目标公司的详尽信息资料。信息备忘录通常包括公司的商业、财经、法律信息和与税收有关的信息。对购买者来说，(目标公司) 的业务介绍和组织结构是最重要的信息。通常信息备忘录由卖主和其咨询者 (并购咨询或投资银行) 共同准备。

2. 早期协约

a) 意向书/谅解备忘录

意向书/谅解备忘录是私下出售过程中把卖方和潜在买主拉拢在一起的工具。这些声明 (有时是单方面的) 通常是卖方和潜在买主宣布他们对于交易执行最初意向和目前谈判结果的第一份书面文件。除非明确提出，意向书/谅解备忘录中的大多数声明都不具约束力。

通常这样的意向书/谅解备忘录包含一些具有约束力的条款，如有关给予排他期的具

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

条款，违反行为的法律后果，保密条款，在买卖不成交的情况下的费用支付的条款(如散伙费或报销费用) 及不劝诱、不竞争的条款。

b) 保密协议/不公布协议

无论是私下买卖或拍卖程序，卖主都有兴趣与潜在购买者或竞标者达成广泛的保密协议。保密协议将保护卖方和目标公司，防止潜在购买者由于具有获取所有交易信息 (特别是数据库中的文件) 的渠道而使信息被转让。在这种情况下，制定关于绝密信息、公布 (信息) 的目的以及公布和接收信息的特殊条款，对卖方而言非常重要。

III. 尽职调查

1. 尽职调查的目的

尽职调查是一个旨在评估目标公司在商业、财经和法律方面业务的调查过程。尽职调查的主要目的是为（潜在）购买者提供所需信息，以决定是否完成或如何构建交易。

尽职调查还为买方就购买价格、代表权和担保方面更好地谈判提供足够的材料保障。此外，尽职调查还为买方提供有关关键人员和公司文化的信息，这些信息对成交后公司的整合措施至关重要。

根据德国法律，卖方有义务公布所有能影响买方决策（完成或避免收购）的重大事实。如果风险已经被认定，买方和卖方通常需要协商由哪一方来承担这些风险，买方可以决定他在哪些条件下可以继续进行交易。

大多数尽职调查过程由买方发起。然而，

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

近几年来，由供方发起的尽职调查的数量有所增加，如卖方及其顾问对目标公司进行的尽职调查。卖方发起的供方尽职调查有很多好处。首先，它能使卖方在售前意识到问题的存在并对之作出相应反应，这些问题可能影响到代售资产的价值。此外，在时间安排很紧凑的拍卖活动中，供方对尽职调查的准备也能帮助他们节省宝贵的时间。

2. 尽职调查的组成部分

尽职调查通常由财经、法律、税收和商业元素组成。根据目标公司的业务，尽职调查过程也包括环境审查、技术事务、人力资源或保险事务。一般而言，尽职调查由买方本身和他的法律、税务、商业和财经顾问展开，如果可行，也可由其他咨询机构来进行。

3. 法律尽职调查的重点

法律尽职调查的内容因交易而异。但是法律尽职调查范围通常包括目标公司的公司文件和商业文件、目标公司的财务、物质合同 (特别是租赁契约及供应商和顾客的协议书)、人力资源、房地产、知识产权和信息技术、诉讼、公共关系、环境事务和保险条款。

4. 税务调查的重点

税务调查旨在获取关于目标公司的税收风险的信息。这些风险可能在德国税收机构随后进行的税务审计中为目标公司或买方带来纳税负担。这些税务事务不仅与股份交易有关，与财产交易同样有关，买方在特定情形下会需要缴纳财产交易税。另外，对于在税收方面高效用的认购结构和收购后重组的问题，税务调查也能提有关供目标公司的细节信息。

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 commercial 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. 尽职调查过程

如上所列，尽职调查过程通常由几个参与者合作完成，如目标公司的管理层、外聘财务顾问、律师、税务顾问及其他咨询人员等。

尽职调查不可避免地会使卖方和买方产生利益冲突。在确定买方确要购买之前，卖方一般不希望把对方拟购公司的详细信息透露出去。但是，买方从开始调查起，就想方设法地搜集到所有与目标公司相关的信息和文件资料。

因此，为了满足双方的需要，在多数拍卖过程的开始阶段，只提供基本的信息，到后来阶段才公布更多保密信息给入围的投标人。然而，无论是私下买卖还是拍卖程序，一个成功的调查过程总是需要参与的每一方，包括管理层和目标公司关键人物的紧密配合。

通常，咨询人员，特别是税务顾问和律师会针对具体交易准备有针对性的需求清单及供转交给目标公司的管理层的尽职调查问卷。被要求提供的材料会放入数据库以供查阅。现在，特别是在通过拍卖过程来进行交易时，卖方会建立一个虚拟的信息室。这样的虚拟信息室让买方和其顾问之间通过国际互联网进行的联系与合作能够轻松地实现。在不同外国管辖区的专业顾问同时参与到尽职调查过程中来的时候，这点就尤其必要。

6. 尽职调查报告

根据买方的要求，合法的尽职调查或产生一份全面的尽职调查报告，或产生一份红旗报告。一份全面的尽职调查报告将细述顾问审查过的各种文件。

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.

此外，它还会包括一份经营综合报告，集中反映一些重大风险和法律问题。这对最后的买卖、销售协议的准备和谈判、以及设想交易的结构会产生重大的影响。相反，红旗报告不会详述每一个已公开的文件，而只是对有关条款、收购的结构和完成过程以及成交后的措施中存在的重大法律风险和法律问题做一个概述。

原则上讲，调查报告根本上是为客户准备的。报告只能用于设想交易，未经相应的顾问批准不得提供给第三方。报告通常包含对顾问有利的责任限制。限制额取决于设想交易的规模。

如果是杠杆交易，出资银行在给买方提供所需的资金前，通常也会要求提供一份尽职调查报告。一般情况下，银行宁可要求为买方准备的尽职调查报告被转发审查，也不愿委托其内部和/或外部顾问对目标公司进行尽职调查。顾问和出资银行之间签署一份信赖书，从而允许向出资银行转发调查报告。

IV. 买卖协议书

1. “德国”与“盎格鲁—萨克森”合同

在传统上，根据德国法律签署的商业合同比那些盎格鲁—萨克森投资者在他们自己的法律管辖区内惯用的合同短很多。在某种程度上，这一特点也适用于有关兼并收购的买卖协议书，尽管盎格鲁—萨克森法律文化在过去二十年有很重要的影响。“盎格鲁—萨克森式”的买卖协议书在大中型私人资产交易中被普遍使用 (并已经成为市场标准)，在这些交易中，对债务或资产工具国际联合运作的需要在很大程度上影响到市场实践。另一方面，相对较短的

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

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

“德国式”文书则多见于全额融资的交易(甚至很大的交易)、典型德国中型企业参与的交易以及涉及破产接收人的交易中。正如一位希望完成一项中型收购的德国企业的总裁对卖方五页纸长的“德国式”买卖协议草案所作的陈述：“我们只在非常小和非常大的收购中使用这种类型的合同。”

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. 成文法的关联性

德国式文书的简洁不应该被误解为草率。相反，应该注意到德国公司及合同法的绝大多数关键领域都由数量众多的条文组成，比如于 1879 年 5 月 10 日开始执行的德国商业准则，以及德国民事准则的 2385 个部分。此准则的大多数部分可以追溯到 1900 年 1 月 1 号。成文法使得盎格鲁—萨克森式合同中的许多定义和解释性语言在德国法律中显得多余 (或者在很多情况下甚至有误导性)。诸如关于违反保证的补救、损失计算、共同过失之类的事项，德国合同经常依赖成文法 (包括存在已久的诠释性的判例法) 。一方面，这使德国合同比盎格鲁—萨克森合同更简短易懂；另一方面, 因为对合同用语的理解需要联系成文法的上下文和普通的法律原则 (合同执行者可能有或没有这些知识)，有时合同用语在实际操作时几乎没有指导作用。

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. 合同解释：实质重于形式

德国法律规定的合同解释原则与普通的法律原则有根本的差异。特别是 (制定) 一个条款的目的和意图在释法时经常是首要考虑的因素 (如果从字面上理解，甚至可能产生与用词相反的结果)。这解释了为什么一些惯用语，如仅做为参考之用的标题、可涵盖阴性的阳性名词、可涵盖单数的复数名词等在典型的德国买卖协议书中不存在。在很多情况下，当事人选择德国法律

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

却把英语当作合同用语。这要求当事律师要特别小心，因为很多英语中用于买卖交易的标准用语，如“representations and warranties”、“best knowledge”等，其代表的意义和德语直译不完全一样，或者根据德国法律，这些用词意思模糊。这些用语需要根据德国法律的分类在协议中清楚地定义出来。

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. 公证要求和费用

4. Notarization Requirements and Fees

德国法律的一个特点是公证员在交易中起重要作用。任何涉及转让私人有限责任公司股份或实际财产的德国法律协议都必须经过公证。也就是说，整个文件，包括任何相关附加协议和协议书中重要的图表 (不是清单和表格，它们属例外情况) 必须由公证员大声宣读或在公证员面前被大声宣读。因此，签署一份详细的有很多图表的协议书需要一整天时间！为了避免这种情况，外国投资者经常委派他们的德国律师去处理此事。值得注意的是，在某些条件下 (如私人有限责任公司股份资金的增加和购买房地产)，律师的权力本身也需要公证。

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.

德国的公证费有专门的收费标准，必须交纳，不能讲价，根据交易额来计算。费用从 10 欧元 (如以 1 欧元收购一家有高负债额的私人有限责任公司，公证一份长 200 页的买卖协议书) 到最高约 5 万 5 千欧元 (交易额在 6 千万欧元以上，尽管协议书只有 5 页) 。公证费习惯上由买方支付。

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.

为了免交昂贵的德国公证费，当事人过去常常“逃”到瑞士，让瑞士公证员公证买卖协议书 (瑞士公证员被允许根据实际的工作量来议价，通常收费只有德国公证费的一小部分)。但须注意，这种操作方式不能用于房地产交易 (所有权的转让必须由德国公证员公证)。在 2008 年 11 月有限责任公

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

司法被进行某些修正后，在有关私人有限责任公司股份的问题上，这种方式也已变得不太常见。

shares following certain amendments of the GmbHG in November 2008.

5. 实质标准和市场实践

5. Substantive Standards and Market Practice

在实质上 (尽管在格式和用词上常常不是这样)，德国法律框架下的买卖协议和在其他地方遵循的标准相似。在阅读德国买卖协议书时，外国投资者可能对出售和转让之间的区别感到糊涂，它们被描述成两个独立的交易。“出售”包括转让股份的义务，“转让”则是实际上的所有权转移。这也同样适用于财产的出售和转让。转让 (不是出售) 通常受制于付款前的条件。在反垄断审核要求适用的情况下，转让 (不是出售) 必须在反垄断审核通过后才能进行。一份典型的德国买卖协议书既包含出售，也包含转让，但针对转让可能有某些特定的成交条件。因此，“德国式成交”包括相互承认这些条件得到满足，但是在成交时不会实际转让所有权。

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. 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.

须注意，根据德国法律，只有股份公司才能发放股份证书；私人有限责任公司的股份或合伙人公司利益权只能通过协议的形式来转让。这对很多外国投资者来说是不寻常的，会使他们有某种不自在的感觉，因为按照法律，既没有商业登记册中的记录，也没有一系列经过公证的、在法律尽职调查中被审查过的先前的交易，可以为私人有限责任公司中的股份所有权提供结论性的证据。在 2008 年 11 月通过的有限责任公司法修改条例改善了具有诚信的买主的境遇，他们所依赖的股权登记信息可以通过上网查阅商业登记册而得到。如果自称业主的人已注册为公司业主三年以上，而且人们对其注册没有异议，那么一场基于诚信的收购就成为可能。

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. Amendments 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.

与在其他法律环境下的情况相同，购买价

As in any jurisdiction, purchase price and adjustment clauses are core elements of the

格和调整条款是德国买卖协议的核心部分。自从次贷危机在 2007 年开始以来，在成交之前对净金融债务和运作资本做调整变得更加频繁。“上锁盒子”计划 (购买价固定根据过去的数据决定，在签约和成交之间的空档期，买主仅通过限制使用财产协定得到保护) 已越来越少地被使用，并作为例外而非规则被保留，即使在 2010/2011 年度收购市场复苏以后也是如此。

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.

(德国) 的代表声明书和担保书和大多数其他法律环境下的代表声明书和担保书一样详尽、全面。在金融危机期间，市场标准已经改变，更全面的担保的项目已经变成了一般性的情况 (这种现象只有在破产交易中例外，因为在破产交易中，接收方通常不提出任何业务担保)。在 2010/11 年度，担保项目和计算机辅助产品检索等标准都已经发展到了一个“中间地带”，处于 2008/09 年间出现的极度向买方倾斜，和 2005/2007 年间出现的更向卖方倾斜之间。

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. 公开招标收购

V. Public Tender Offers

1. 一般性介绍

1. General

获取对上市公司掌控权的一个特殊方法是通过公开招标收购。在不能通过市场外交易购买大宗股份从而获得掌控地位的情况下，公开招标收购经常是用来获取上市公司主要股权，而不在开放市场上购买的唯一可行办法。另外，如果一项私人交易或在开放市场上的认购使得认购人得到或超过 30%投票权，该交易就使得认购人有义务做一个公开的收购 (所谓的“强制收购”，见 C.V.2.)。对上市公司的认购在操作上经常采取结合认购的方式，既在开放市场上购买, 又通过私人交易收购一宗或更多的股份，同时公开收购。

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. 公开招标收购的种类

公开招标收购有两种主要类型，叫做自愿收购和强制收购。自愿收购旨在获取对上市公司的控制，是所谓的“接管收购”。相反地，强制收购必须向外部股东提出，可用任何但不能是接管投标的方式来获取控制权，如通过市场外交易认购股份、在开放市场上认购、认购增加资本或兼并。

“控制权”是通过拥有 30%或更多的投票权来直接或间接实现的。计算是否达到30%这个分界线，股东直接拥有的投票权和他被赋予的某项投票权必须结合起来计算。比如，由股东各自的下属拥有的投票权，由在股东帐户下注册的第三方所享有的投票权，都应该被算做其股东的投票权。特别是在有关公司事宜上协调行动的两个股东所享有的投票权应累积计算在双方名下，但在个别的情况下签定的协约是例外(*“合作行动”*)。如果两个股东对行使投票权达成共识，或为了对公司的经营战略产生永久和重要的影响进行合作，就应该认定股东双方的“协作”存在。

3. 认购和开价发行

a) 认购程序

一旦投标者决定进行接管收购，或达到30%的控制权界线，投标者必须立即发布其接管决定或声明控制权界线已被达到。这项声明必须在互联网和信用金融机构广泛使用的电子信息传播系统中发表。之后，做为一项规章制度，投标者有四个星期的时间来准备认购文件，文件中包含认购的所有条件，然后递交给德国金融监督权利机构确认。一旦得到该机构的批准，投标者必须立即发表认购声明。声明的发

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 acquisition 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.

表代表接受期开始。接受期不短于四个星期，但不超过十星期。在接受期间及接受期后，投标者必须分别发表各个阶段的进展情况。在处理接管申请时，为了保护那些在正常的接受期内没有接受该声明的股东，通常有两个星期强制性的“延长接受期”。在此期间，申请仍然可以得到批准。接受期或延长接受期过期后，交易以支付目标公司股份约价的方式终结。

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) 开价

不管是接管还是强制收购，投标者通常可以选择以现金或以流动股份的形式向其他股东提出一个合适的约价。约价必须至少等值于(i) 投标者、其合作者或他们的下属在发表认购文件前六个月提出或许诺过的用于收购目标公司股份的最高约价，或 (ii) 在投标者发布接管认购的决定之前，或投标者取得 30%投票权之前的三个月内这些股票的国内加权平均市场价格。然而如果投标者、其合作者或他们的下属在接受期购买了更多目标公司的股份，或在接受期过后一年之内通过市场外交易购得更多股份，且提出或许诺的约价超过在认购时开出的价格，约价就会被相应地向上调整。对认购而言，一项例外与为目标公司的股东提供赔偿的法律义务相关，例如在控制及利润损失转让协议被执行之后，或在其他股东被排挤出局的情况下。

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. 德国的典型接管策略

接管收购和强制收购基本上都遵循相同的法律管制条例。一个重要的不同点是，强

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

制收购可能不受条件约束，而对自愿收购以及接管收购设定条件通常是被允许的。特别是接管收购可能会受制于收购被接受的程度。因此，为了确保取得一定百分比的投票权，投标者通常会根据收购中股票的相关数量确定其投标条件。大多数投标者试图取得至少 75%的投票权。这样高比例的多数投票权对于目标公司的结构调整，如改变公司章程，兼并，转型，达成控制协议及利润损失转让协约时，是必需的。

基于自愿收购可以不受限制的事实，投标者通常试图避免达到 30%的分界线。接管收购受制于某种接受程度，通常可以通过在宣布认购申请之前签署私人交易协议，在宣布之后关闭私人交易的方法获取 30%以上的投票权。这样做买方可以确保这不是强制收购，而是可设置条件的接管收购。另外，价格可采用在私人交易中达成的价格。这样一来由于股票价格上涨而使认购变得更加昂贵的风险得到缓解。

代替私人交易的另类办法是买卖双方以所谓“不可取消任务”的形式签定合约。卖方在将要进行的接管收购中对其股份向买方 (未来投标者) 进行招标。和私人交易主要的商业差别在于，这样做，卖方将是招标出售股份的股东中的一份子，会得到所有适用于这项交易的规则的保护，最主要的是上文提到的那些在收购程序结束以后潜在的价格调整的规则。

坐拥至少 75%的投票权而成功接管后，投标者能够完全掌控公司，比如通过执行控制及利润损失转让协议，通过兼并——如果投票权达到了 90%到 95%的分界线，可通过与兼并相关的手段（90%时）或常规手段（95%时）把剩下的股东排挤掉。

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. 从德国的角度看认购融资

I. 介绍

德国机构投资的认购结构，以及单独的战略投资的认购结构一般要求一个收购工具，这个工具以一个德国私人有限责任公司收购目标集团的法律形式存在。由于收购工具不能拥有基本的财产，为了能够向卖方支付购买价格，必须由股东资产 (如规定资产、资本储备资金以及股东贷款) 和银行债务 (如优先债务、第二留置权贷款、次级债务以及高收益债券) 来出资。

债务/资产额主要依赖于(i)市场总体情况，(ii)投资者的战略，以及(iii)目标集团的现金流动，因为接下来的债务偿还金必须由目标集团的商业运作来产生。另外，银行要求为收购工具、目标集团——目前主要在战略投资中——还要求为投资者提供足够的担保。

II. 融资过程

融资过程一般有三个阶段：在这个过程开始时，通常有一份概括融资 (经济) 基础的条件清单，接下来是信用协议的谈判和最后的结论。在成交当天，担保协议得到执行，借款人得到资金。

III. 文件

1. 条件清单

如果银行有意提供资金，它会向买方建议认购融资的结构，详情记录在条件清单中，通常包括债务/资产额的认定，贷款的数额和基本情况，贷款的到期日以及金融条款。

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. 融资协议

欧洲的融资协议一般是根据伦敦贷款市场协会颁发的标准融资协议(*LMA*)。自从2007 年以来，贷款市场协会甚至开始发行一份特殊的德国法律版本的贷款市场协会文件。标准贷款市场协会文件被专门融合到德国法律和银行操作 (见 D. IV.) 的要求中，与之相适应，然而同时又保留贷款市场协会英国法律文件的形式和基本要素。

在过去，除担保协议外，德国目标集团的收购融资主要是由英国法律来管治。借方意欲把英国法律所坚持的信贷运作集团化，因为英文的贷款市场协会文件在欧洲被日常使用，因而人们认为，它对集团化的顺利发展是必不可少的。由于存在一套适用于德国法律的贷款市场协会文件版本，如果目标集团的总部在德国，越来越多的收购融资协议仍以德国法律为基本法律。只有较大的交易仍然由英国法律来管制。然而，英语仍是草拟财经文件的主要语言。

一个为收购提供融资的银行或银行集团在正常情况下也对向目标集团提供运作资本的融资 (再融资) 感兴趣。收购融资的提供者可以避开其他借款机构，因此也避免了花光钱或在执行权方面处于附属地位的风险。因此，所谓的*“循环贷款”*也经常是高级融资协议的一部分。

3. 担保

借方一般期望获得贷款担保。在融资协议中担保协议的细节通常只会被简短地提及。担保文件本身提供非常详尽的记录。

以下担保结构的执行对贷方有利：收购工具通常只以其在目标集团控股公司中的股

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 documents, 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 financer 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

份作担保，因为这是它仅有的主要财产。目标集团用附属公司的任何股份，以及银行户头，待收款，知识产权及现在的财产来承保。贷方也更频繁地要求投资者以付款保证的形式提供担保，目前只针对战略投资者，但是由于金融危机，金融投资者也被包括在内。然而，这样的做法在纳税方面给居住在德国的金融投资者带来了严重的负面后果。

如果收购融资存在几个层次，如高级和次级贷款，这些贷款通常和所谓的*“交叉拖欠”*条款联系起来。如果借款人违反了贷款协议，在其他信用协议中也被视为未按时付款，所有的贷款方都会 (给一定的宽限期) 要求顾客加快偿还贷款。因此，贷款人之间的关系，特别是有关从担保执行中获得收益额的排序，一般需要通过一个债权人内部协议来管治。

IV. 德国企业法的特别议题

若投资位于德国的目标集团，或处理受德国法律管制的金融文件，在德国法律环境下，收购融资面临以下特别事项（税收议题除外，这个部分 D 没有讨论，但在 E 部分会讨论）：

1. 禁止累积利息

根据德国法律，合同各方不能达成协议同意累加利息，也不能累积过期未付的利息。这样的协议是无效的。然而贷方可以就拖延支付利息而产生的损失提出赔偿要求。如果借款人没有在到期当日付利息，贷方将从到期之日起直到实际偿还之日止，向借款人收取一笔损失费。损失通常包括银行利润损失——以银行将应支付的利息投资到市场中可能赚取的利润来计算。然而，借款人可以证明损害并没有发

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 D. 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

生，或者相关数额的损失并没有发生。

2. 禁止由股份公司提供资助

德国的股份公司不可以提供上游或交叉流保证金或担保，用以帮助对其股份的收购。根据德国企业法，股份公司 (或其下属机构) 对帮助收购其股份而提供的担保、贷款或提前支付的任何资助方式，无一例外都是受到禁止的。甚至对收购股份的贷款进行重新融资都会构成不当的支持。因此作为一条规定，任何目标 (公司) 对收购德国股份公司的股票提供的帮助都是无效的。所以，以个别目标集团的股份所做的担保，如股份公司自己及其附属机构的股份，或由于收购融资、为任何债务产生的房地产留置权都不能作为担保提供给借贷方。

然而，由于禁止仅限于对收购融资的支持，以股份公司的法律形式存在的目标公司可以——受制于“资本规则的维持”(见 D. IV. 3.)——为运作资本贷款，如循环贷款，开出付款担保或上游保证金。因此，如果目标公司是股份公司，收购融资和运作资本融资是分开的。

有别于德国股份公司的其他类型的德国商业实体及几乎不被使用的股份合伙公司 (KGaA)，如私人有限责任公司，并不在禁止金融援助之列。

3. 资本规则的维持和限制语言

任何提供上游或交叉流担保或保证金的企业实体必须遵守德国的“资本维持规则”。这些规则 (间接地) 限制目标公司的资金援助。由于这些规则与国际标准相比相对严格，因此从德国人的角度看，这是收购融资中最重要的法律问题。

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.

相较于那些适用于德国私人有限责任公司或以私人有限责任公司为普通合伙人的有限合伙制的规则，针对股份公司的资本维持规则的影响更深远。股份公司被禁止向其股东分配任何财产，除非是正规分配或股份公司与股东已经达成控制协议和利润损失协议。换言之，在提供上游和交叉流担保或保证金时，股份公司必须收到相等的好处或以公平市场价计算的担保费，或者必须是控制协议和利润损失协议的主导公司。

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.

适用于德国私人有限责任公司或有限合伙制公司的资本维护规则是不同的。如果他们只是分发财产给股东而没有提供注册股份资本的保存，这些商业实体不必遵守资本维护规则。如果担保或保证金的提供和执行会导致公司净资产低于注册股份资本，执行董事可能不会提供上游或交叉流担保或保证金。只有当借款人是提供上游或交叉流担保或保证金的私人有限责任公司或有限合伙制公司的直接、间接股东或股东的下属时，德国资本保存规则才会适用。

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.

由于违反私人有限责任公司或有限合伙制公司的资本维持规则会潜在地提高公司管理层和股东的个人责任或刑事责任(见D.V.)，标准的做法是在担保文件中以所谓的“*限制语言*”来处理这些规则。鉴于个人责任的风险，贷款人愿意接受具有合同效力的有关担保和保证金的限制语言，以便把随后对上游或交叉流担保和保证金的执行限制到某种程度，使之不受严格的资本维持规则的约束。但是，德国的贷款市场协会标准中没有这样的语言，因此签定合同的各方必须针对个案，就限制语言的条款和条件进行谈判。虽然特定的实践方式在过去已被建立起来，鉴于最近对德国

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

有限责任公司法做了修正，不能确保这种实践方式依然适当。

4. 过度抵押

根据德国民法，如贷款方被过度抵押，保证金的提供会因为违反公共政策而无效。因此，德国标准担保协议包括一个有关担保金发放的条款：任何时候如果由借款人和目标公司提供的，在执行担保过程中预期会实现的担保金的合计总价值超过担保债权的 110%，贷款人会应借款人的要求，放弃部分担保金以便使担保金的可实现价值等于担保债权的 110%。

V. 责任风险

1. 投资者

投资者应对危及公司存在的行为负责。如投资者故意通过掏空子公司的财产，如支付管理费或提供上游保证金，而使直接或间接子公司破产，并且投资者之前注意到破产很可能发生，这可能导致股东对破产公司的损失负责。

2. 管理

借款方的管理者(将要违反贷款协议的金融公约) 因为违反如下董事职责将面临重大的(个人) 责任风险：

- 禁止向股东支付(部分支付)公司注册资产；
- 违反簿记要求，如误导性的簿记；
- 公司风险管理不足；
- 未能及时向其他现金投资者通报对公司财政状况的消极物质影响；
- 在公司失去 50%股份时没有召集股东大

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

会。

如果公司破产(由于欠债未还)，管理人可能有个人责任，特别是对以下几种情况：

- 因支付公司股东而明显地、不可避免地造成公司资金流动不足；
- 在发生资金流动不足或发现公司过分负债后仍不在意，继续付款；
- 由于拖延破产程序申请或其他不干净利落的行为而失掉债权人。

在发生欠债未还等难以处理的情况下，管理人应特别注意以下几个犯罪要素，以避免刑事责任：

- 欺诈，如确认符合证明书中的虚假金融约定条约，特别是当公司有可重复使用的信用额度时；
- 违反计账要求或误导性的财务报表；
- 当公司失去 50%的股份资产时未能及时通报股东；
- 拖延申请启动破产程序。

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. 税收

I. 德国税收制度简介

德国税收系统因其复杂性而声名远播——其包含多达 40 余种税收。但是，它同时又遵循非常严格而系统的条例。而且德国的实际税务负担在不同情况下比初看时所预料的要更低，经济实体还经常可以从众多的免税和折旧规定中获利。

德国的税收制度通常与纳税人的居住地相关。如果纳税人的居住地或惯常居留处在德国，则其需要按无限纳税责任条例缴纳税收，其在世界各地的收入都需纳税。然而，对那些非常住德国的投资者，他们只需按有限纳税责任条例，对他们来自德国的收入缴纳税收。同样，这一规则也适用于公司。谈到企业税及市政贸易税，相关企业注册的办事处和管理层所在地是否永久在德国，会决定它们在德国是按无限纳税责任条例还是按有限纳税责任条例纳税。

按无限纳税责任纳税的纳税人一般分为两种：他们的收入来自营业性利润，或来自非经营性利润。然而，有一点应该强调，在某些条件下，非经营性利润可理解为经营性利润。

II. 商业税收

1. 法人实体

a) 企业所得税税收

私人有限责任公司和股份公司等德国企业的全部收入需缴纳企业所得税，其所有收入始终按营业收入核算。而外国公司只需对其在德国的收入交纳企业所得税（除非其注册办事处或管理层所在地是德国。如是这样，它就须按无限纳税责任条例纳

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

税）。企业所得税税率为 15.8%（包括盈余收费）。

德国公司分配的股息一般代扣所得税为26.4%。这在股东层面是可称誉的（标准征税），相当于在股东层面按统一税率所收的预扣税。对于从所持的另一家公司的股份中获得的股息和售出所持股份所得的资金，在企业所得税方面，德国政府为持股的企业提供 95%的免税。

如果外国公司在德国需按有限纳税义务纳税，那么，如果达到一定资产条件的要求，其预扣税可以降低到 15.8%。豁免预扣税适用于欧盟的外国企业（最低需持有10%的股权）。此外，他们可根据各自的免交双重税协定，将他们的预扣税降低到一个更小的百分比，甚至免税，或索回已纳税款。然而，在这些情况下，外资持股的公司需要有足够的资产来证明自己符合条件以享受这些条例带来的好处（见 E.V.2.）。

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) 贸易税

在德国，企业实体也有义务缴纳市政贸易税，因为公司总会有业务收入。如果一家企业在德国没有注册办事处或管理层所在地，但其在德国的常设机构有收入，那么，这一企业也需缴纳市政贸易税，税率从 7%至 17.2%不等（平均税率约14%）。这主要取决于其常设机构所在地的位置。

对于从所持的另一家公司的股份中获得的股息和售出所持股份所得的资金，德国政府同意将其从贸易收入中剔除，从而免交贸易税。这就使得该项收入的实际税额仅约为 1.5%（参与免税）。然而，如果希望免交所得股息的贸易税，纳税人需要在一个财政年度开始时，拥有最低不少于15%的股权。

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.

企业所得税和贸易税的整体总税率大约为29.8%。

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

2. 合伙公司的征税

2. Taxation of Partnerships

a) 所得税

a) Taxation of Income (EStG)

在德国，合伙关系指 GbR（非特许公司的民间法律协会），OHG（普通合伙关系）和 KG（有限合伙关系）三种。合作伙伴所有与税收相关的资产、债务和收入均按他们合伙关系的利益比例予以分配（合伙关系的透明度）。然而，在有限合作伙伴关系中，因有限合作伙伴关系而产生的弥补亏损的可能性一般不超过各自承诺的股本金额范围。

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.

合作伙伴关系可以有业务收入或开展私人资产管理。对于营业收入，适用于一般规则。每一笔与营业相关的收入都被视为业务收入。只进行私人资产管理（产生利息、股息收入，租赁收入和资本收益）的合作伙伴关系没有业务收入，不算入因结构关系而产生业务收入的合作伙伴关系（普通合伙人是公司，不存在负责管理的有限合伙人）。

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).

股息收入和资本收益税可豁免。40%的股息收入和因出售公司股份而获得资本收益可免税，而 40%的相关费用是不可减免的（部分收入纳税）。利息收入不可免税，但相关费用可全额减免。

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.

合作伙伴的税率相当于个人税率（见 E.III.1.）。

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

b) 贸易税

b) Trade Tax (GewStG)

如果合伙公司进行商业活动，合伙公司的所有收入都被视为营业收入 (也包括非商业收入)，需缴纳贸易税。贸易税在很大程度上可以根据合伙人的出资比例从其个人收入税中抵消。

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

3. 反避税条款/CFCs（AStG）

为了防止滥用法律形式、使用代理、避税港和条约购物，德国已通过外汇交易税法。总体而言，该法允许税务机关无视因滥用法规和人为因素而造成的免税情况。

III. 个人税收

1. 无限纳税义务

凡在德国居住或惯常生活在德国的居民须无限缴纳税收。这意味着该居民在世界其它各地的收入都需在德国纳税，并按“冲转盈余”核算。应纳税内容完全按德国所列的所得税法来办理，如：业务收入、租金收入、个人服务收入（自营或受雇）、其他列入该法的应税项目以及资本收入。

个人所得的收入目前 (2011 年) 的税率起自 14.0% (可征税收入从 8,005 到 13,469 欧元)，按比例上升至 23.97% (可征税收入从 13,470 到 52,881 欧元)。52,882 欧元至 250,400 欧元的可征税收入的边际税率是 42%；高于 250,400 欧元的可征税收入的税率是 45%。5.5%的盈余收费被增加到各自的税率上。

对某些种类的利息收入、股息收入和资本收益征收 26.4% (包括盈余收费) 的固定税（资本收益税——“确定的”税）。和资本收益有关的费用和支出不能从固定税税基中扣除。在以下几种场合，固定税不适用，只能征收标准税：

- 金融资产产生商业收入，因而被视为商业资产；
- 利息收入：借款人是公司，贷款人持有至少 10%股份或是与借款公司相关的一方；

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. Fat 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.

- 资本收益：股东持有最少 1%的公司股份；

在以下情形，对于股息收入，纳税人可选择标准税率而非固定税率:

- 持有至少 25%股份或
- 持有至少 1%股份，且为公司雇员（典型的 MBO 构架)。

2. 贸易税

个人 (独资) 商业收入需缴纳贸易税。然而，大部分贸易税可从个人收入税中抵消。

3. 有限纳税义务

凡不在德国居住或惯常生活的个人不需无限纳税，但如果其在德国有收入来源，则应在德国纳税，因为其有有限纳税义务。下列各项指明哪些人在哪些情况下应缴纳有限税收：

- 在德国有一个常设机构或永久代理人，并从那里获得的商业收入；
- 从当地房地产租金中获得的收入；
- （如尚未列入业务收入中）从当地房地产交易中获得的收入。如果所售房产不属企业资产，并且归为个人或者非商业伙伴机构已超过十年，则不按此办理；
- 因个人服务所得的收入，这些服务用于德国，并由个人（自营或受雇）或公司提供；
- 出售德国公司的股份而获得的收入（在最近五年间，在某个时间点上至少持有1%的股份）；
- 从德国企业获得的股息和偿还资金；
- 由德国债务人支付的与绩效相关的利息

- 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

收入以及通过出售这些债券而获得的资本收益；

- 某些其他（非绩效相关）的利息收入（包括资本收益），这些债券须在德国注册，或由德国国内房地产担保。

这种情况有时会造成双重征税。如何解决这个问题将在处理双重征税（见 E.V.2.）一节中予以讨论。

IV. 间接税

德国房地产转让税 (德国房地产转让税法)

a) 房地产的直接收购

直接购买德国房地产 (及对房地产的特定权利，如遗传建设权)需缴纳房地产转让税。一旦买卖双方签定具有法律约束力的有关转让房地产所有权的协议，房地产转让税就会产生 (买卖协议见 B.III.4.)。

在财产交易中，卖方及买方都需缴纳房地产转让税。事实上，当事人通常以合同方式达成协议，即房地产转让税只由买方承担。

b) 房地产控股公司股份的收购

如房地产控股公司 95%或更多的股份掌握在“*一只手*”中，也需交纳房地产转让税。例如，这些股份由一个收购者及其控制实体与依附实体直接或间接获取，或由依附实体单独直接或间接获取。然而，合伙人的合伙权益根据合伙人的数量而不是合伙人持有的资产权比例来计算。

如果收购者持有中间人公司 95%或以上的股份 (间接投资)，通过中间人公司间接持有的房地产控股实体的股票只能分配给该收购者。

如果收购者购买了房地产控股实体 95%以上的股份，收购者需缴纳房地产转让税。

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

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

依具体情况，有时为了避免产生房地产转让税，可以建构一个特定的房地产控股公司股份交易模式，比如，通过中间人合伙公司或该合伙公司的第三方小投资者来达成这一目的。

c) 房地产控股合伙公司资产权的收购

在五年间，如房地产控股合伙公司 95%或以上的资产权被直接或间接转让给新的合伙人，需征收房地产转让税。根据这一原则，合伙人资产权根据转让者 (合伙人) 持有资产权的比例来计算，如一经济实体持有合伙公司的资产权，且该实体 95%或以上的股份被新股东收购 (间接收购)，资产权则需要转让给新的合伙人。

房地产控股合伙公司承担缴纳转让税的责任。

通过推迟最少 5%的合伙权转让，可以进行房地产控股合伙公司股份交易而不被征收房地产转让税。

d) 税率和税基

根据房地产的位置，房地产转让税一般是 3.5%到 5%。买卖协议书中的税基指达成共识的价格，如收购价。支付的购房价格全包括在税基中。

与房地产控股公司有关的房产转让税基是根据税收价值法所决定的房地产的纳税价值。纳税价值通常比房地产的市场价值低。

e) 收购成本

收入税/公司收入税/和贸易税将房地产转让税当做收购成本的一部分，必须资本化。如其他资本化的收购成本一样，房地

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

产转让税根据房屋的标准使用寿命来分摊，是分摊到建筑物的合理折旧，而不是土地征税。

2. 德国增值税（德国增值税法）

德国增值税是交易税。商品和服务的交付及供给需支付此类税收。增值税符合理事会指令 2006/112/EC 有关增值税共同制度的阐述，因此在德国没有对增值税作具体的解释和规定。

德国的增值税税率为 19%。但对某些特殊的基本商品（如：食品和书籍），其税率则降为 7%。此外，另有一些商品则免纳交易增值税（如：转让股份或转让房地产）或免税（如：通过资产交易转让整个业务单位）。如果不属免税或部分免税的交易，在交易时所缴纳的输入增值税一般可以退还。出口不需纳税，企业对此类交易支付的输入增值税也可申请退还。

V. 特别税收问题的讨论

1. 收购业务

a) 基本考虑

商业收购通常有两种可能性：

- 购买 (所有) 目标资产 (财产交易) 或
- 购买目标公司的股份 (股份交易)。

在股份交易和财产交易两者间选择其一时，必须同时考虑到卖方和买方的利益。因此，找到一个合适的交易结构是一项挑战。然而更具挑战性的是设计和实施一个最优化的收购结构，将买方的年度税收负担以及随后退出时的合理税收考虑其中。

从买方角度看，有关税收的以下几个方面

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:

至关重要：

- 降低购买价格中对税收有效的部分
- 高效的退出税收策略
- 利用收购目标的损失进行结转
- 从目标公司的税基中扣掉收购债务利息费用
- 将交易成本降低到最小 (房地产转让税)

- 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) 合伙公司股权的财产交易/股份交易

b) Asset Deal/Share Deal of Partnership Interests

aa) 财产交易

根据目前的税收政策，通过财产交易收购模式比通过股份交易收购对买方更有好处。买方可以直接压低购买价格，(直到)不能压低为止。被收购财产在购买之日的市场价，包括商誉（如有），都被记录在收支平衡表上，其收购价根据财产使用寿命(商誉：15 年)分摊，然而土地只有在市场价永远低于收购价时才能被勾销。

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 goodwill – 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) 购买合伙公司股权

在税收问题上，购买合伙公司股权 (见 B.II.3.) 基本上等同于向卖方购买财产。由于在税收问题上合伙公司具有透明度，同样的税收原则也适用于购买合伙公司的股权。

购买合伙公司股权允许在做税收计算时把投资者的某些费用加进合伙公司的收入中，如合伙人的收购融资利息费用。从德国的税收角度来看，这样的利息费可算入合伙公司。然而在外国合伙人的管辖区，此类利息费也可能被算入外合伙人的身上，因此在德国和外国合伙人的管辖区形成了

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

“*双底*”利息费用。当人，在特定情况下，判例法和税务机关会质疑这样的结构。

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) 退出场景

从德国商业投资中退出，卖方要缴纳收入税和/公司收入税，在多数情况下，还要缴纳贸易税。如果特定要求得到满足，卖掉整个生意或合伙公司股权的个体可以得到税负缓解 (较低的收入税率)。在下列情况下不产生贸易税：

- 个人或合伙公司卖掉所有财产或一个单独的商业部门 (公司出售其业务需缴纳贸易税)；
- 个人出售合伙公司的整个股权。

由于退出时对卖方的税收影响 (满税率赋税)，财产交易与股份交易相比通常是不利的，投资更可能以股份交易而非财产交易的方式来转让。

退出合伙投资，从税收效率方面考虑，将合伙公司转变成股份公司可能更受欢迎；然而为了完全利用随后的股份转让，需“*冷静*”下来并持股 7 年。

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) 股份公司的股份交易

转让德国公司的股份时，如果卖方是股份公司，资本收益的 95%可以免税，如果卖方是持有至少 1%股份，或以商业财产的形式持有至少 1%股份的个人，资本收益的 40%可以免税。如果卖方是合伙公司，合伙人缴纳收入税/公司收入税，税收的免除取决于合伙人的地位 (个体或公司)；合伙人须缴纳贸易税 (如股份可分配给当地的常设机构)。然而对外国投资者，根据个别的双重税收条约 (如股份不属于当地的常设机构)，资本收益税在德国全免。因此

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

卖方更青睐转让公司股份，对投资者来说，随后撤资也更便利。

(买方) 不会通过购买公司股份进而获得该公司的财产权，但是股份必须以收购价进行资本化。股份不能折旧；只有在股份的公平市场价持续低于收购价的情况下，股份才能被例外勾销。如果股份作为企业资产由个人持有，或个人是持有股份的商业合伙公司的合伙人，并且股份属于德国商业财产，在这种情况下，60%的勾销额在税收方面才是有效的。否则，这笔勾销就不会对税收产生影响。因此，股份交易的结果是买方不能通过折旧的方式来利用所购商业财产的隐藏储备。

如果被收购公司可以作为单独纳税人，还要进一步考虑到目标公司的运作利润要与买方的收购融资成本匹配。

d) 亏损结转(可抵扣亏损)

根据德国规则，一个财政年度的税收亏损可以结转到前一年，金额上限至 511,500 欧元，只适用于收入税/公司收入税(不能用于贸易税)。亏损可进一步结转 (*亏损结转*)，不受时间限制 (收入税/公司收入税/贸易税)。然而，亏损结转的利用只限于 *"最低税收规则"*。根据这一规则，每年可以不受限制地使用 1 百万欧元的亏损结转基本额，超过此额度，本财政年度余下的正税基只有 40%可以结转。

如果一法律实体在下一财政年度有利润，这样的亏损结转是很有价值的。然而，在出售交易过程中，亏损结转通常停止存在或至少被降低。通过改变所有权来降低亏损结转额的重要规则如下：

- 财产交易：亏损结转不能转让；

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.

- 直接转让合伙公司股权：合伙人的贸易亏损结转将根据合伙公司股权转让的比例被降低。如果不是所有合伙公司股权都被转让，只有在合伙人留在合伙公司的情况下，其余的亏损才能被结转(贸易税亏损结转是“个性化”的)；

- 公司股份转让：如果在五年时间内，公司 25%到 50%的股份被转让给一个买主、和买主有关的当事人或购买集团，公司的亏损结转(公司收入税/贸易税)会按比例被降低，如超过 50%的股份在五年间被转让，整个亏损结转额都会被消除。两个规则适用于直接或间接的公司股份转让；

- 如果持有合伙公司的股份公司被(直接或间接)转让，同样的规则适用于合伙公司的贸易税亏损结转。

- 重组：对于大多数重组程序，如合并、分拆、捐出一个部门、从股份公司变成合伙公司和相反的情况，被转让部门的亏损结转将会被消除。

对重新资本化的公司或集团没有豁免。由于对集团没有特殊规则，即使高层股东结构没有间接改变，股东的直接改变也可能是有害的。集团内的结构改变或重组措施对利用亏损结转有负面影响。

为避免这种结果，卖方可在交易前利用亏损结转来实现隐藏储备，然后通过股票交易的方式出售，从而使财产的帐面价值增加。这里需要考虑到的税收规则最少。

在税收方面进行有效的亏损利用也有可能通过设立纳税集团来实现(见 E.V.1.e)。在

- 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

纳税集团中，利润、亏损税是向最高实体征收的，因而可以达到平衡。当然，必须考虑到纳税集团(附属公司)在集团纳税时间之前的亏损(上几个财政年度的亏损结转)不能与纳税集团的利润进行平衡。只要纳税集团存在，其附属公司的亏损结转将会被“冻结”。

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) 收购结构

收购债务利息费的可扣除性是股份交易收购税收结构中一个至关重要的事项。如果收购公司融资购买目标实体的股份，银行贷款和股东贷款加上投资者的股本将会被提供给收购公司，以便取得杠杆效应。为了获得尽可能低的净税基，收购债务的利息费将从目标公司的运作利润中扣除。通常，德国收购工具(公司)被用于确保目标实体和收购公司都向德国纳税。特别推荐以下税收结构：

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:

- *合并*：收购公司和目标实体以税收中立的方式合并。结果是，利息费由目标公司直接支付。
- *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.

- *纳税集团*：纳税集团建立在收购公司和目标公司之间，要求是(i)目标实体是股份公司，(ii)大股东(收购公司)是从事商业活动的个体或合伙公司或股份公司，(iii)至少为期 5 年的利润和亏损转让协议已签定。在纳税集团中附属公司的(统一纳税公司) 的利润可以转让，由股东纳税。
- *Tax group*: Between the acquisition vehicle and the target, a tax group (*Organschaft*) 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).

- *目标公司是合伙公司*：目标公司是商业合伙公司，或将以税收中立的方式转变成一个合伙公司(法律形式的改变)。为收购目标合伙公司股份产生的融资利息费被计入合伙公司的收入中。相应地，
- *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.

利息费是合伙公司税基的一部分。

Accordingly, the interest expenses are part of the tax base of the target partnership.

f) 扣除利息(利息限制)

从商业收入中扣除利息受限于资本弱化规则，特别是在 2008 年以来被所谓的 *"利息障碍"* 所限制。

普通的规则是净利息费(与利息收入平衡后)在费用产生的财政年度可以被扣除，扣除额上限是基于税收会计规则扣除利息、税收、折旧和摊销之前公司收入的 30% (EBITDA)。

不能扣除的利息费用被结转到以后的财政年度并且只能在利息障碍规则的限制范围内被扣除。根据丧失亏损结转的规则(见 E. III.1.) 利息结转也会丧失。

在以下情形，利息障碍不适用：

商业部门净利息费用(利息费用减去利息收入的余额)少于 3 百万(门槛)欧元，或

- 商业部门(尽管包含多个法律实体，纳税集团仍可被看作一个单一的商业部门)没有(或仅部分) 被合并在集团的统一财务报表中，或

- 商业部门被完全包含在集团的统一财务报表中，但是单独计算商业部门的股东权益比率，其不低于集团股东权益比率的 1% (GAAP 对股东权益所作的某些与税收有关的修改必须被考虑到)。

对于股份公司或股份公司的附属合伙公司，上文最后两个豁免只在无害于股东融资的情况下适用。如果持有多于 25%股份的股东、该股东的相关方、对该股东或其相关方有追索权的第三方 (如银行) 贷款给一个商业实体，而这些贷款的利息费用超

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

过这个实体净利息费用的 10%，为这样的独立商业实体融资是有害的。对于一个集团实体，如果没有合并，但持股超过 25%的集团股东或有关方，或对股东及其有关方有追索权的银行向属于其集团的任何一个实体(国内或国外)发放贷款，其利息费用超过这个实体净利息费用的 10%，这样的融资也是有害的。

从实际的角度看，逃避(税收)的要求很难达到，因此仔细制定纳税计划是值得推荐的。

利息费用可以从收入税/公司收入税中扣除，在同样的程度上反加 25%至贸易税基也是适用的。

g) 向外国附属机构下放债务

在某些情况下，利息障碍规则可能限制在德国的利息扣除。在此情况下，应该考虑将融资债务下放给外国集团是否有利。可通过跨境公司间贷款、分配和第三方注资外国集团来达到这一目的。

2. 德国防止双重征税条例

在德国以及在外国司法管辖区，双重征税现象由 70 多个国家（双边解决方案）联合制定的双重征税条约的落实而得到缓和。如果某一个案不能按双重征税条约办理，德国允许其在国外支付国外税收，计入其所得税纳税申报表（单方面解决方案）。如果有双重征税条约，营业收入和租金收入通常在该常设机构或房地产所在地征税；而资本收入（利息、股息、出售金融资产获取的资本收益）一般在外国投资者居住地的管辖范围内征税。在某些情况下，德国有权对资本收益征收预提所得税。

由于股息对投资者来说颇为重要，在下一节中，我们将重点讨论这一方面的法规。

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 Subsidies

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

a) 股息

aa) 通则：预提所得税

由德国公司分配的股息通常要交 26.4%的预提税，计入所得税/公司所得税中。如果bb)条款描述的三个测试通过，获取股息的外国公司的预提税可降低到 15.8%。另外，多数双重税收条约规定 (i) 这样的股息所得税只在股东居住的管辖区内征收，(ii) 预提税通常是较低的 15%的税率，或 (iii) 如果特定条件 (股东应是外国公司，持有最小量的德国公司股份)被满足，预提税甚至可以为 0%。另外，如果股东是非欧盟区的公司，持有 10%的最少量股份，不必缴纳预提税。

bb) 采购条约

根据 2007 年由德国议会制定的税法，如果控股公司没有满足基本条件 (条约覆盖)，预提税仍然将以全税率的标准征收。根据德国这些反条约/反指令采购规则，如果一个德国公司的外国股东本身是由其他股东拥有，而这些股东如直接收取股息，根据税收条约或欧盟指令，不能享受相应的好处，该股东在收到股息分配时所应缴纳的预提税不能降低为 0%。另外，如果以下三个测试中的任何一个适用，外国股东则不能减免预提税：

- 商业目的测试：没有物质经济或其他与税收无关的原因以干涉外国直接控股实体。
- 总收入测试：股东相关财政年度的直接总收入中至少 10% 不是由其自身的经济活动产生。商业股息通常不算作其自

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

身的收入，除非控股公司是一个活跃的公司(参与到附属机构的商业活动中)。

- 基本条件测试：外国公司不具备从事贸易或商业活动的适当的商业基本条件。

根据这些规则，如外国直接股东只单纯从事财产管理，或其商业活动由相关方或第三方代理，则不能享受德国预提税的减免。

这些限制不适用于公开上市的外国控股公司或投资基金。

为利用预提税减免的优惠政策，需仔细考虑外国股东的基本条件和活动。

b) 转让价格定价

aa) 一般事项

下面提到的转让价格定价指在附属公司或相关方之间进行的跨国交易价格的定价(有形和无形资产、服务、基金等)。对转让价值的估计对税收有特殊的意义，因为附属公司或相关方需分别在不同的管辖区纳税。通过第三方建立公平价格的典型市场机制，在这样的交易中不适用。

bb) 公平交易原则

根据公平交易原则，转让定价的方法已经成为处理公司间跨境交易的可接受方式。公平交易原则要求公司间交易的原则与类似情况下与不相关(第三)方进行交易时的适用原则一致。然而不同的国家接受不同的方法来计算合适的转让价格 (如*“不受控制的价格比较法”*，*“转卖价格法”*，*“成本添加法”* 或 *“利润分割法”*)。

their own income, except when the shareholding 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.

交易 (国内和国际) 没有达到公平交易原则的要求，相关的德国实体的税基可能被调整 (在最近的税收审计过程中)，产生额外的收入税/公司收入税/贸易税负担 (被调整的税基) 和额外的预提税 (隐藏利润分配)，还可能产生罚款。

德国税务权利机关一般接受最常见的公司间转让定价标准，特别是不受控制的价格比较法、转卖价格法、成本添加法。

cc) 隐藏限制

2008 年德国的转让定价法规有了很大的改变：如果一实体从事的业务被跨境转让给另一集团实体，即便是部分或临时转让，都会被视为发生了“功能转移”。在这里，“功能”被定义为由企业的特定部门执行的、一系列相似的操作任务的集合，包括相应的机会和风险。另外，“功能转移”一词也包括功能重复。在特定情况下，会根据供应商的最低价和接收者的最高价来设立一个合适的转让价格。

dd) 转让定价文件

德国税法规定在进行公司间跨境交易时，纳税人应保留合适的转让定价文件，文件涉及与相关方关系的类型和内容，包括转让价格计算的详情。对于物质商业交易，公司必须及时完成有关文书的要求 (财政年度结束后 6 个月)，在其他情况下，只需应税务机构的要求提供文件。如果不能提供或不能提供足够的文件，税务机构有权认定 (估算) 一个更高的公司税基。另外还要评估罚款金额。

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. 德国房地产投资信托基金税务法（房地产投资信托基金）

和其他许多国家一样，现在德国也设立了房地产投资信托基金。2007 年的德国房地产投资信托基金法给控股房地产的公司和投资者在德国房地产领域带来了很好的发展机会。房地产投资信托是房地产控股公司作为上市股份公司（AG）的法律形式。房地产投资信托基金的业务目的是有限地收购房产、持有房产、通过出租和租赁来管理房产、销售房产（或房产使用权），以及在房地产商业伙伴关系中，有限地收股、持股、管股和售股。此外，先出售后租回的经营方式也是允许的。

房地产投资信托基金的收入免征所得税 / 在公司层面，如果它符合某些条件（如：最低自由浮动率为 15％（上市时为 25％）；最大个人持股为 10％；以及最低利润分配为 90％），也免征公司所得税。然而，在投资者层面，房地产投资信托基金的盈利分配是完全要纳税的（不免税），预提所得税为 26.4％。

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. 管理

I. 兼并收购交易中的利益冲突

经理不管做什么，无论他是否节制行为或容忍某些措施，他或她必须行事谨慎。经理们必须权衡利弊和平衡利益冲突。在这方面，和普通的英美法律原则不同，德国法律具有独特的实践方式。股东的首要地位并不存在于法律规则之中——公司经理可以不仅仅考虑公司股东的利益。然而，目标公司经理对公司本身有责任，他必须考虑公司和所有股东的合法利益 (不仅仅是股东的利益) —— 即雇员、债务人和普通大众。尽管倍受争议，但目标公司经理甚至在公开招标的场合 (见 C.V.) 都没有被严格要求象拍卖员一样为股东争取尽可能高的价格。经理有广泛的自由裁量权，这个权利受到商业评判规则的保护。只要经理对企业事务做出决定，并能够基于适当的信息认定他们在为公司的最佳利益行事，法官不会事后评判经理做出的决定。然而，法官可能考虑经理是否合法地决定了公司的最佳利益，比如，是否将企业所有的组成部分都纳入考虑，是否错误地被股东的利益驱使 (或更糟糕，为了自己本身作为现在或将来参与持股人的利益)。

从经理人的角度来看，兼并收购交易通常意味着失去有利可图的位置：或下岗，或被迫在更差的条件下工作。这种“结束游戏”的局面使得经理们去考量自身就业情况的改变，从而放弃他们对公司的某些忠诚。结果，忠诚的转移甚至可能导致对整个交易的阻碍。因为这个原因，管理层成员经常被当作交易的“第三方”。从其他当事人的角度来看，要求管理层在合同中表明对公司的忠诚看起来是合理的。

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. 对管理层的激励

1. 目标公司发放的交易奖金

在兼并收购交易中，目标公司的管理层在离职时通常会得到奖金。奖金额在一年和两年的毛收入之间，根据达成的购买价格，奖金可能会增加。奖金通常在交易成交时发放。奖金可能在完全自行决定的基础上发放，或者取决于兼并收购交易中某个阶段的完成，比如，信息备忘录和数据库的建立，调研或管理层报告的准备等。作为交换，管理层通常被要求提供“董事证书”或“担保契约”。在这些文件中，管理层必须向卖方保证管理层没有在调研报告中发现任何错误的事实陈述或在与潜在购买者签定的股份购买协议时，不会发生卖方利益未被适当代表的事实。证书中的责任可与奖金的发放挂钩。

通常，雇佣公司发放的交易奖金必须与经理的职责履行和公司的具体情况相适应。还有，这些奖金只有在雇佣协议书中明文规定才有牢固的法律基础。没有这样的合同，奖金的发放只有符合公司的利益才有正当性。通常会认为如果领取了奖金，经理就和公司绑在一起，或者接收奖金者或其他雇员为从公司拿到相似的奖金，而被激励努力工作。

2. 卖方发放的交易奖金

根据德国法律，公司监事会负责管理委员会成员的委任、撤销和决定薪酬。然而在某些情况下，股东愿意给管理委员会成员一些经济上的好处，以便使经理们能够为公司商业运作创造里程碑式的业绩。由于这些好处不是由雇佣公司直接发放，它们通常被叫作“第三方奖金”。由于这些奖

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,

金与表现挂钩，因此可以使得经理在开展业务时与提供奖金的第三方保持一致的目标。从经济角度看，在兼并收购交易中，由股东发放的奖金使得经理和相关股东的利益协调一致，那就是为公司争取较高的企业价值。然而，德国法律是否允许由第三方而不是公司向管理人发放奖金仍存在争议。要求监事会批准(奖金的发放)或至少通知监事会是应当的。

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. 公开投标收购中的奖励

3. Incentives within Public Tender Offers

在公开收购时(见 C.V)，经理的薪酬也要与其职责和目标公司的情况适当挂钩。卖方向管理人发放奖金需要得到公司监事会批准，或监事会须知晓此事。为了取悦管理人，在与其他投标者的竞争中战稳脚跟，投标者可能倾向于允诺或发放奖金给管理人。若无特殊理由，接受这些好处违反经理对目标公司的受信义务，因此根据德国收购法这是无效的。然而，某些好处，只要是正当的，可以被允许。虽然“正当理由”的确切涵义在这里相当模糊，但一般认为，能让管理者继续任职的奖励是可以被允许的。

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.

在公开收购中，管理人有义务向公司股东陈述出标的情况。如果奖励引起管理层的利益冲突，合理的做法是要求管理人要么不参与陈述，要么解释冲突的性质并聘请专家证人。另外，投标人必须在招标文件中详细陈述向管理人或监事会提供的任何以非货币或现金形式提供的好处，即使这些好处根据前面提到的条件被看作是正当的。

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. 交易奖金的税收和社保费

奖金作为普通收入要悉数纳税。税率是经理人的个人税率，最高达 45% (附加教堂税和额外收费)。只要经理的普通收入高于最高上限，他们就不该缴纳社保费 (现在的最高上限是 49,950 欧元和 66,600，2012 年将增至 50,850 欧元和 67,200 欧元)。

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 66,600 increasing to EUR 50,850 and EUR 67,200 in 2012 for the Western part of Germany).

III. 管理层的参与

私人资本投资者的目标是使自己的，同时也是管理人的利益和公司的利益相一致。为此原因，执行一个最新的“管理人资产计划”(*MEP*)是管理人买断(计划)中最为重要的事，是不可缺少的条件。因此，以下原则特别关系到私人资本投资。如果战略投资者实施管理人参与计划，也应遵守类似的规则，因此以下政策在某种程度上可以比照适用。

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. 构架

1. Structuring

a) 参与比率和数量

管理人通常通过一个中间信托工具，或收购公司中的合伙关系，与投资者一起投资。投资额取决于交易的种类和大小，可能在 3% 到 25%之间。第一线经理人要投资其一年至两年的毛工资再加上可能发放的奖金。第二线经理人被允许，但不是要求，投资 1 万到 10 万欧元，投资额也是根据交易的大小和可供管理人支配的投资额而定。在二次交易中，管理人被要求至少将税后销售收入的 50%进行再投资。

在常见的投资场景中，管理人可期望资金翻 10 倍，羡慕比为 3。资金翻番的意思是如果未来五年的业务计划兑现，公司的售

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

价翻倍数与最初的翻倍数一样，管理人可获得 10 倍于他们投资金的收益。羡慕比是管理人预期收益倍数与投资者预期收益倍数之间的比率。

通过平衡由管理人收购的股份可形成羡慕比。管理人不成比例地认购股东贷款、优先股或没有追索权的贷款均可取得这一杠杆效应。

b) 股东协议

股东协议或共同投资协议对经理人和投资者的权利和义务做了规定。这样的协议，其他除外，包括对退出和所谓离场计划的规定。退出时管理人有义务和投资者一起共同出售股份(拖带权) 。反之，如果金融赞助者出售其部分股份，管理人有资格要求尾随，共同出售股份(尾随权)。如果公司采取行动，管理人的权利(优惠认购权、维护资本结构等)得到反稀释条款的保护。收购公司股份持有的分配先于退出(销售)收益的分配。然而，当事人可协议使用其他的清算优先权。

c) 离职情形

在经理人的雇佣合同终止或经理人停止担任目标公司的常务董事，以及在其他特别规定的情形下，私人资本投资者可以要求该经理人出售和转让他的股份 (看涨期权)，经理人和其继任者在特定情况下 (如死亡、残疾、退休) 可分别要求出售其股份(看跌期权)。在这两种情况下，回购价格取决于特定的 (雇佣) 终止情况。当事人将好的离职情况 (如死亡，失去行事能力，职业残疾，经理人以正当理由离职) 与坏的离职情况 (如经理人违反职责，雇主公司为公司利益中止与经理人的合同) 加以区分。在好的离职情况下，回购价格

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

等同于股份当前的公平市场价，取决于股份授予时间表。在坏的离职情况下，经理只有资格接受公平市场价和其收购成本中较低的那个价格。股份授予可能取决于时间 (如每年 25%) 或目标公司的表现 (如取得特定的税收/利息/折旧/摊销前收入和自由现金流动目标)。回购价格可在执行特定的期权交易时支付或推迟到经理人离职时支付。

另外，经理人的参与受制于金融赞助者设定的有关金钱翻倍数 (如投资额的 2.5 倍) 或内部收益率 (如每年 25%) 的障碍。

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. 税收事宜

在德国，对管理人实施奖励的方式在相当程度上是从税收方面考虑的：股票期权计划的纳税标准和奖金计划的纳税标准一样，如管理人离职时获得的收益被当作普通收入，需全部纳税。相反，拟定管理人资产计划 (MEP) 可以为经理人创造有利的资本收益。

以前的税制适用于 2009 年 1 月 1 日前购买的股票。如果经理人持有少于 1%的公司股份，在最少持有 12 个月后出售不必交税。25%的新资本收益单一税率 (附加教堂税和团结附加费) 适用于 2009 年 1 月 1 日后购买的股票，且持有量应低于 1%。如果持有量高于 1%，资本收益将会被部分当作收入，例如，只有 60%的收益需遵从个人税率(附加教堂税和和团结附加费)。

低于公平市场价的股份收购要全数缴纳普通收入税。相同的规定也适用于管理人资产计划 (MEP) 的收益，如果由于对经理人股东权利的严密限制，如授予、回购和转让限制，使得税务机关否认了其对所购股份的受益所有权。

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 surplus 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. 兼并和收购中经理人的个人义务和责任风险

经理人在兼并收购交易中有个人义务，违反义务引起个人责任。这种 (义务关系) 不仅适用于私人资产交易 (管理人参与其中一方或两方)，而且存在于目标公司和经理人之间。卖方或买方经理及其顾问可能会承担其自身的义务和责任，如果他们导致或诱导目标公司的经理人违反义务，或者他们参与违反义务的活动 (包括欺诈、侵权或刑事犯罪)，或者他们没能发现或披露这些违反义务的活动。

经理可能因为泄密而违反义务，向他人披露公司的数据或秘密可能构成违反保密 (义务) 的行为。向竞争者披露信息肯定是一种违反义务的行为。甚至金融赞助者都有可能是，或通过另一家被投资公司成为竞争者。发布信息可能违反第三方权利，如对顾客、供应商或雇员明示或暗示保密信息。披露信息还可能违反数据保护法律——这些法律要么使用于特定行业中，如金融和通讯行业，要么是普通保护法，如联邦数据保护法。

拒绝披露信息也可以构成违反经理人义务的行为，使其承担责任。一般来讲，利益冲突必须被披露，比如，即使没有特别的协议，经理和投标者之间的直接接触 (或在卖方代表缺席的情况下接触) 也是被禁止的，除非目标公司和卖方被告知此事。

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. 第三方的参与

I. 反垄断事宜

1. 竞争限制

为了使国家法律与欧洲立法更一致，德国竞争法经历了显著的变化。

德国反竞争限制法不仅涉及竞争公司间的传统垄断集团（横向协议），也涉及到其他，如彼此具有供应商—顾客关系的公司间签定的反竞争协议(纵向协议)。如果特定条件得到满足，公司间的反竞争协议不受或可以不受禁止。如为了平衡与强势大规模企业竞争中的劣势，中小型企业可能会被获准进行特定的合作。没有遵守欧共体豁免规则的协议或特定条款无效，在任何情况下都不能被执行。

除此之外，权威机构可以采取两种方法来对抗反竞争协议。权威机构要么在行政诉讼中施加命令，结束遭反对的行为，要么在行政犯罪诉讼中征收罚款。普通罚款的最高额为 1 百万欧元。某些违反行为可以通过罚款来惩罚，罚金上限至相关企业年营业额的 10%。根据其对揭露垄断集团的贡献，一个配合调查的垄断集团成员可得到罚金减免，上限至罚金的 100%。

2. 兼并控制

兼并控制禁止通过收购的方式建立市场寡头垄断或市场垄断。当一家公司或个人打算在市场上购买一个他已经参股的公司时，他们可能会申请兼并控制程序，如果这家公司的营业额超过一定的阈值。如果满足了欧洲委员会兼并条例的阈值门槛，则只适用欧洲兼并控制程序，德国兼并控

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

制机构的通知未必需要。一般来说，兼并控制监管局的批准或许可是并购交易收盘的先决条件。一个无视悬停义务或不提交通知仍然进行的兼并，暂时无效，直至它得到批准为止，且相关公司可能会被罚款。

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) 德国的兼并控制

只有营业额超过特定界线，欧洲的兼并控制不适用时，德国的兼并控制才会得到实施。具体地说，(涉及兼并的) 公司上一财政年度在全世界的营业额总和加起来必须高于 500,000,000 欧元并且须有至少一个公司在德国的营业额高于 25,000,000 欧元，而另一个公司在德国的营业额在 5,000,000 欧元以上。营业额包括目标公司及其附属公司，以及买方和其附属公司通过销售产品和提供服务得来的收入。如果一个公司的业务包括货物交易，将只有 3/4 的营业额被考虑进来。媒体公司 (报纸、杂志、广播等) 营业额的 20 倍金额计入营业额中。金融机构和保险公司根据他们的业务有不同的界限。

所有在德国境内产生影响的合并，不管在什么地方完成，都要受德国兼并控制的管治。

如下情形中， 兼并不受控制：

- 兼并发生在一个公司和一个不受控制的公司之间，后者全球营业额低于 10,000,000 欧元 (微量条款)，或
- 兼并涉及到一个市场，在此市场，商品贸易或商业服务已经进行了至少 5 年，每个产品市场上一年度的销售量低于 15,000,000 欧元。

即便以财产交易方式收购单一的、已建好

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

或未开发的房产在原则上都需要达到所谓的财产收购的兼并要求，然而，联邦垄断集团办公室认为在目前，只要买方在所购不动产的 20 公里范围内的销售收入、租赁和租金收入加起来的总营业额在上一营业年度没有超过 30,000,000 欧元的界线，其收购的不动产的总价值在相关营业年度低于 5,000,000 欧元的界线，这个财产交易不算作所谓的财产收购。

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.

一旦完成相关的法律要求，当事方必须发出一个合并前通知。

In case the respective legal requirements are fulfilled, the parties must file a pre-merger notification.

此后，设在波恩的联邦卡特尔局应在一个月内决定是否需要执行主要的合并控制程序。如果一个月内，该局没有要求执行主要的合并控制程序，则被视为批准。如需要执行主要的合并控制程序，联邦卡特尔局会根据市场和公司结构的情况，或禁止，或允许这一合并。

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

(在必要情况下需履行义务)。4 个月的截止期限过后，(兼并) 可以被认为得到批准。在得到批准后，兼并不必在特定的期限内完成。

(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) 欧洲兼并控制

b) European Merger Control

与德国兼并控制相比，受欧洲控制兼并规则管治的兼并程序是作为预防程序来设立的。

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

如果参加兼并的公司的全球营业额 (如上所述) 加起来高于 5,000,000,000 欧元，参与兼并的至少两个公司中，每一家公司在欧盟的总营业额均超过 250,000,000 欧元，这样的兼并受到欧洲控制兼并规则管治。

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.

另外，如果参与兼并的所有公司的全球营业总额高于 2,500,000,000 欧元并且以下条件被同时满足，欧洲控制兼并规则适用：

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:

- 参与兼并的至少两个公司中，每一个公司在欧盟区的总营业额均高于 100,000,000 欧元；
- 参与兼并的至少两个公司中，每一个公司在至少三个欧盟成员国中的每一个国家的营业额均高于 25,000,000 欧元;
- 参与兼并的任何一个公司在至少三个欧盟成员国中的每一个国家的营业总额加起来高于 100,000,000 欧元。

如果所有当事公司在欧盟营业额的 2/3 是在一个成员国产生，这样的兼并不受欧洲控制兼并规则管治。

在发出通知后，兼并控制委员会将作出决定禁止兼并或宣布兼并与共同市场是相容的 (在必要情况下需履行义务)。

II. 外国投资的批准

收购在德国有业务地点的公司受到部分限制：一方面是公司主要业务地点在欧盟/欧洲自由贸易区之外的投资者，另一方面是有关对德国军工企业的收购。

1. 普通投资许可

自从 2009 年以来，主要业务地点在欧盟/欧洲自由贸易区之外的收购者直接或间接收购德国公司至少 25%投票权的每一笔交易都要由联邦经济与技术部 (FMoET) 在三个月内进行审查。首先查看有关收购义务的结论 (见 C. IV. 5)，然后分别审查进行接管收购投标决定的声明或获得控制权的声明。如果联邦经济与技术部要求 (公司) 提交有关收购的文件，它还有另外两个月的时间来发布规定或在收购危及到德国联邦共和国的公共秩序或安全的情况下禁止收购交易。

如果 (联邦经济与技术部对收购) 没有顾虑，每一位收购者都有权利获得由联邦经

- 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

济与技术部颁发的批准证书。申请批准证书需提交收购安排的说明和有关收购者及其业务的信息。如果德国经济部在收到申请的一个月之内没有启动审查程序，可以认为批准证书已颁发。

2. 国防工业的收购批准

如果收购涉及到生产或开发军事武器、加密系统或其他与国防有关产品的德国公司，这笔交易必须向联邦经济与技术部声明。如果外国人持有德国收购母公司 25% 以上的投票权，这样的间接收购也需通报。

如果禁止 (收购) 是保护德国联邦共和国的安全利益的根本手段，联邦经济与技术部可以在收到声明的一个月内禁止这样的收购。

III. 公共财政控制

投资德国公司，投资者受制于不同的监管要求。这种要求特别取决于投资的种类和数额，以及他们所投资的公司的类型。一般的规则是，如果公司设在德国，这些要求是适用的。然而，在某些情况下，这些要求也适用于获准在德国市场中交易股份的公司。

1. 收购股份：通知要求

收购或出售获准在德国市场交易股份的公司之股份，以及收购或出售认购权证、金融工具或其他工具，它们赋予 (投资者) 无条件权利以购买这些公司有投票权的股份，如果超过或低于特定投票权的比例界线 (3%, 5%, 10%, 15%, 20%, 25 %, 30%, 50%, 75%)，投资者不能无故拖延，必须最迟在 4 个交易日内通知 (被收购) 公司和德国金融监管委员会。如通报要求没有得到遵守，一般不能行使投票权。

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.

任何收购者收购的上市股票达到或超过10%或更高的分界线，他必须在 20 个交易日内向股票发行人披露收购的目的和资金来源，如是否或在何种程度上使用贷款或资产。公开要约收购以及受 UCITS 指令管治的投资公司进行的收购被免除这样的信息披露要求。股票发行人需发布被披露的信息和违反信息披露要求的所有案件信息。发行人可在其自己制定的规则内排除披露要求的应用。

在购买股份公司未在规范市场上市的股票时，如果超过 25%以上的股份分界线，购买者必须通知该公司，而公司必须发布这样的通报。购买其他种类的公司的股份和股权，如私人有限责任公司，不必遵守类似的通报要求。

2. 公开要约收购

投标人以公开要约收购的方式(见 C. V) 收购获准在规范市场交易的公司之全部或部分股份，则其受制于特定的通报和发布信息的要求。使用德文的收购文件必须提交给监察局并得到批准。在接管收购和强制收购案中，如投票权达到或趋向于达到至少 30%，投资者会受额外要求的约束。在收到投标者的书面申请后，监察局在特定情况下可能免除强制收购要求。如与外国规则发生冲突，(投资者)在跨境收购中可能会享受一些宽松政策。

3. 银行或金融机构的控制

在打算购买银行或其他受监察局管监督的金融服务机构的股份时，如果资产或投票权比例超过一定界线 (最低 10%)，购买者必须知会监察局和德国联邦银行其购买及控股的意图，包括提供收购者诚信证据。监察局可在三个月内禁止收购，之后可能会对掌控者行使投票权设定限制，或者要

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

求买方出售其股份/股权。

4. 其他事项

有关买卖上市股票的一般行为规则是禁止内幕交易和市场操纵。

根据贷款的数目和数额，向总部设在德国的投资组合公司发放贷款可能需要申请执照。

根据交易和投资组合公司的类型，可能会有进一步的监管要求，如对投资者进行反洗钱检查。

IV. 优先购买权

1. 股票优先购买权

在很多情况下，某些公司在公司章程中包含有利于其余股东的优先购买权。通常，公司章程规定行使优先购买权的时间框架。在意向交易前或股份公司收购协议刚刚签署后，受益人必须得到 (有关) 通报。因此，在进行尽职调查的过程中，有关优先购买权的条款必须被仔细审查。另外，建议尽早与相关的优先购买权人讨论此事。在很多情况下，很容易通过谈判免除相关的优先购买权。

2. 房地产优先购买权

只有市政府确认不会行使优先购买权后，房产购买者才能登记为新的房产所有者。如果房地产位于重建区或该房地产被征用以进行其他公共活动，市政府可能有法定的优先购买权。因此，所有涉及德国房地产 (财产交易) 的购买协议书都规定在市政府开出放弃优先购买权证明前，购买价格不会下滑。

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.

还有另外的法定和及同性质的优先购买权存在，如佃户的公寓在租赁期内被改建成一个独立拥有的共管公寓 (见 B. III. 2. c) 并首次被出售，佃户有购买该公寓的法定优先购买权。另外，可以自由地通过与第三方，包括政府，签定合同来制定优先购买权。需要注意的是，优先购买权必须登记在土地登记册中才能对交易产生影响。如果优先购买权没有登记在土地登记册中，因而未能引起潜在买主的注意，在此情况下，另一当事人只能承受损害。注册的优先购买权不仅对房产的所有者，而且对其任何继任者都具有强制执行力。

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. 投资的一般法律框架

I. 劳动法

1. 一般的雇佣条件

德国没有制定一个统一的劳动法法规。德国劳动法的规定是由各种不同法规、法律条文衍生而成，并由雇佣合同、欧洲法规、集体劳务协议和谈判协议的规定作为补充。雇员权益的保护在德国受到高度重视，已存大量法规对有关工作时间、产假保护及工作场所化学物质侵害的保护等议题都作出了相关规定。简而言之，可以说德国劳动法是高度规范的、以保护雇员权益为中心的 (照顾雇员利益)。

2. 就业

a) 雇佣合同

大多数雇佣合同的适用期是无限的。当然，雇主可以自由提供固定期限合同。德国劳动法对这项权利作了几个限制。一般来说，固定期限合同的适用期最高至两年。如果超过两年，雇主需有特殊理由来证明设定这个时间限制的正当性。没有这样的理由，雇佣合同无限期有效。

b) 临时工作

临时工作在德国是允许的，临时工作存在于几乎所有的产业部门和所有工种中。对雇主而言，临时工作的主要优势是相较于正常的雇佣工作具有更大的灵活性。临时工作合同的终止不受劳动法限制，只受制于雇主和临时工作机构之间签定的合同。

c) 社会保护

对于疾病、丧失工作能力、年老和失业等状况，德国雇员受到法定社会保险的保户。通常，雇主和雇员平摊费用。除了强

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

制法之外，雇主可以自由提供附加福利（主要是指养老金计划），由雇主单独出资或由雇主和雇员共同出资。

d) 终止雇佣

aa) 解雇保护和终止雇佣的原因

为雇佣五个以上正常雇员的雇主工作，雇员可以享有解雇保护：终止雇佣合同需有特定的原因。因此，雇佣合同只能因为个人的、与 (工作) 行为有关的或公司运作方面的原因而终止。因为个人的、与 (工作) 行为有关的原因解雇员工，雇主需事前提出警告，解雇应该是最后的手段。因公司运作方面的原因解雇员工，是基于公司的业务决定。劳动法庭无权审查这个企业决定。

如果雇员严重违约，没有理由再被雇用，那么雇主不需要事先告示，就可作出特殊的解雇决定。其理由在专项劳动法中已有解释。

bb) 社会选择

如果公司内没有某雇员可以胜任的其他空缺职位，那么以公司运作方面的原因解雇该员工是允许的。最后，社会选择必须得以实施，这就意味着可能受到影响的雇员的个人需要和的社会状况必须加以考虑。社会选择在劳动法法庭的控制之下。

cc) 通知期限和所需表格

发出终止雇佣通知的期限可在雇佣合同、集体劳动协议书或成文法中找到，通常取决于雇员为雇主工作的时间长短。终止通知应采用书面形式。

e) 财产交易中的雇员转让

在财产交易中，被售部门的员工如不反对

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

工作转换，他们会被自动转让给买方。法律中没有规定，在何种情况下雇员属于被售部门，这需由德国联邦劳动法庭和欧洲正义法庭进一步裁决。对于认定被转让给新所有者的雇佣关系，基于个案做仔细的评估是必需的。

3. 集体劳动法

a) 集体劳动法协议

工会在德国劳工界起着举足轻重的作用，特别是在决定薪酬和其他劳动条件方面作用非凡。在最近几年，德国工会越来越愿意制定灵活的集体劳动协议以适应特别的经济状况。通常的情况是经济体中每一个主要的部门都有一个工会，一般也有一个对应的雇主协会。两边分别代表雇主和雇员就集体劳动协约进行定期谈判。如果雇主和雇员是同样一个雇主联合会或工会的成员，集体劳动法中列出的工作条件对雇主有约束力。如果雇主面临经济困难或其他危及工作的情形，一些集体劳动协议允许制定新的规则，使之偏离于原协约中制定的规定。不是雇主联合会成员的雇主可以自由地与雇员就不同的劳动条件达成协议。

b) 劳工会

在雇佣五个以上员工的企业工作的雇员有权成立劳工会。如果企业有一个以上的部门，可以有一个以上的劳工会。劳工会的大小取决于雇员的数量。劳工会有相当多的咨询权和信息权，比如有关解雇、机构调整、工作条件和休假安排等事项。另外，如果目标公司的出售需要至少 30%的投票权，公司管理层必须在拟定买卖合同的前期阶段向劳工会通报有关情况。通报必须适时进行，即在任何有关交易的决定

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

作出之前。但如果通报会危及公司的运作和商业秘密，管理层就没有通报义务。

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. 共同决策制

监事会的选举使较大公司中的共同决策权得到进一步落实。股东代表和雇员代表的比例取决于所处的部门和公司雇员的数量。代表比例在 1/3 和 1/2 之间 (见 B. II. 1. g)) 。有投票权的监事会主席总是股东代表。

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. 公共法的有关事项

II. Public Law Issues

1. 修建和规划法

在对房地产作尽职调查的过程中，必须检查修建和规划法是否得到遵守。当然，任何投资者都需要确保有关修建和规划法的风险不存在。特别是有些对房产使用的限制会影响投资决定，比如，对改造成“奢侈品”房地产的限制或对在特定的“欠发达”地区房租收取额度的限制。规划法的一些方面可能不会构成风险，但是对交易的进程本身会造成一定的物质影响 (如市政府的优先取得权，见 G. IV. 2)，或者甚至对价格也有影响。

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) (重建)开发区

市政府可能会决定某个区域需要被首次开发或者一个旧区需要重建。(重建) 开发的目标会在具有法律约束力的 (重建) 开发计划书中列出。在受其影响的房地产的土地登记表中，(重建) 开发的通知会被一个一个登记在案 (因此可能在尽职调查中被发现)。(重建) 开发区的影响在于特定的交易需要得到市政府的事先同意，如以下情况：

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:

- 加盖楼层，摧毁或改变房屋的使用，以及对房屋的物质投资；
- 房地产的出售或继承建设权的设定或出售(见 B. III. 2. d))；
- 留置权的设立：如为融资银行或地役权受益人收取的土地费；
- 租赁协约的签署或将房屋用作他途，固定期限达一年以上。

因此，投资者的所有交易基本上都要求市政府的事先同意。

由于所有城市 (重建) 开发的举措都是以改善特定地区为目的，这样的措施多半会使受影响的房地产的价格上升。然而，上升的价值会从物主处以所谓的补偿支付的方式来收取。支付款的数目等同于房地产价值上升的额度。因此，投资者应该在作投资决定时将这些成本考虑进去。

b) 建筑物能源效用指令和绿色建筑

建筑物的能源使用效率和再生能源在现代建筑中的使用变得越来越重要。强制规则和自愿标准同时存在。

在加高房屋或改变房屋结构时，根据建筑物能源效用指令，需要向物主发放能源许可证。房屋能源效用指令是德国建筑法的一部分，它规定在居民楼和办公楼以及一些工业楼房中有效使用能源的技术要求。

自从 2009 年 1 月起，物主通常必须向潜在买方提供房屋的能源许可证。具体内容和格式要求在能源节约法中已有阐述。目前有两种不同的状况（基于建筑物的状况和基于现有建筑物的实际使用状况）。只有有资格的人才能发放证书（如：建筑师、建筑工程师等）。

- 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).

如果出售或租赁协约中没有相关的文件，物主可能会被罚款，罚款额最高至 15,000 欧元。然而，如果现有建筑物的物主无意出售或租赁房产，则没有必要提供能源许可证。

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.

2009 年建筑物能源效用指令的目标是，与 2007 年的指令相比，降低 30%的房屋能源需求。2012 年将进一步收紧 2009 年房屋能源效用指令的规定。

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.

可再生能源取暖法（EEWärmeG）已于 2009 年 1 月 1 日生效。根据这一法律，新建筑物的业主有义务使用一定比率的可再生能源来取暖（或降温）。这一规定适用于 2009 年 1 月 1 日以后启用或公示的住宅楼及非住宅楼。

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.

楼主可自己考虑决定使用哪种类型的可再生能源。但重要的一点是，供取暖和降温的能源，必须有一定百分比的可再生能源。该百分比的多少取决于所用的可再生能源的类型。如果楼主不想使用可再生能源，那么，他/她要从各种所谓的“补偿措施”中选择一种予以补偿。修订后的可再生能源取暖法（EEWärmeG）于 2011 年 5 月 1 日起生效。

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 chose from a variety of so-called “compensation measures”. The EEWärmeG was amended with effect as of 1 May 2011.

此后，不仅新建筑，就是已有的公共老建筑也得承担使用可再生能源的义务。公共权力机构所拥有的任何建筑都必须遵守这项典范的规则。此外，任何租赁给公共权力机构的建筑也必须按这一要求办理。

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.

除了这些成文要求，所谓的“绿色建筑”成为时尚。绿色建筑通常比标准建筑消耗更少的能源，对环境的影响更小，其将特别的设计方式与特殊材料及设施系统 (通风、供暖、水等) 结合起来，建立一个对环境影响很小或没有影响的结构。确切的定义或许不同，但不断增加的绿色解决方案和手段的出现，造成了绿色建筑国家标

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 und 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

准的建立，如“在能源和环境设计中的领导作用”，美国绿色建筑委员会在 2000 年建立的绿色建筑评级制度，澳大利亚绿色建筑委员会在 2002 年建立的绿色之星评级制度和英国绿色建筑委员会在 2007 年 2 月开始制定的系统 (BREEAM)。

相似地，德国可持续建筑委员会在 2007 年成立并在 2009 年开始给房屋颁发证书。德国可持续建筑委员已经制定了德国标准，也参照了欧盟的要求。它提供三种证书：“铜质”、“银质”和“金质”。

2. 环境法

a) 操作许可

一件重要的事件在于确认某一公司是否取得了所有的操作许可——无论是现在需要的还是适用于将来的。如果投资是以财产交易方式进行（见 B.I.），将会对公司获得许可证的情况进行严格审查。操作许可使企业所有者有资格运行设备，几乎在所有的情况下，交易后新的业主都必须再次获得许可证。最普通的许可证是有关污染控制、水权和废物立法以及存放和排放有毒物质的许可。权力机关发放的许可证大多包括补充规定，比如，所有者必须遵守的有限价值或最后期限的规定。公司管理者还应该注意去遵守补充要求。否则，权力机关有权收回许可证并停止公司的业务运作。在没有获得法律所要求的许可证的情况下运行特别的设备，甚至可能会遭到起诉。

b) 对环境的义务

在造成环境损害方面，很多法律规定了相应的义务。对继承污染的义务是最有实践意义的一种义务。被污染场地的使用者和这块地现在及以前的主人都有义务自掏腰

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

包进行土地开发、消除污染及采取保护措施。土地污染可能导致高成本的撤迁，也可能造成地上水的破坏，必须因此采取大量的保护和监测措施。

在进行商业交易时，建议获取特别的行政信息，如从登记表中了解污染场所，让专业的、在检查环境问题时遵循标准化的程序公司参与进来。在最初阶段，要求的文件会被审查，场地会被检验，相应的负责人也会被约谈。如果这些活动显示有破坏环境的风险，会在第二阶段进行技术和环境检查。

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 administrative 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. 公共收购法

由于历史原因，州政府是大片土地的拥有者，特别在德国的东部更是这样。因此，州政府经常以房地产的卖方身份出现。如果州政府被牵涉其中，某些合同必须拿出去招标。违反公共收购法会导致合同无效。只有在处理有关商品、建筑工作和服务的购买合同时才有这个义务。因此，只出售土地以前不需招标，今后也会不受此限制。但是，如果买方有进一步的义务，如修建义务时，这一结论可能改变。在这种情况下，整个交易在法律上可能被认为是核发建筑令或建筑特许证，因此受到公开招标义务的约束。

至本书最新版出版为止，由于所谓的“Alhorn 司法管辖权”，哪些交易必须要通过招标完成仍不确定。同时，这种不确定性在很大程度上被 2009 年 4 月 24 日生效的《反对限制竞争法》（GWB）第 99 条修正案予以更正。此外，它也受到了 2010 年 3 月 25 日欧洲法院（EuGH）对“赫尔穆特 • 米勒”的判决的影响。该判决确定第 99 条的新版本与欧洲法律一致。然而，与作为卖方的公共机构获得直

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 –

接经济利益的服务相关的购买合同的附件（即使只是部分）仍受到公共采购法规定的制约。

III. 投资资助金和补助

在德国有众多对所有投资者（不管是否来自德国）公开提供奖励的措施，在德国的投资者能从中获利。资金由德国政府、各联邦州和欧盟提供。资助包括现金奖励、和劳动有关的奖励以及对研究和发展的奖励。以不需偿还的补助金的方式提供的现金奖励是这个计划的主要组成部分。不同形式的资金可能会被结合起来。

资助金的等级原则上取决于企业大小和员工数目。但需要考虑到方案变化的情况。在德国，资助金和补助通常在特定条件下被批准或被允许，比如，留在受支持的工业部门，在一个确定的时期雇佣最少员工，所有相关的财产必须留在制造场地。制定这些条件的用意是使补助的目的不被改变。

1. 欧盟补助金

全欧洲关于公共基金的法律和财政框架由欧盟提供，这意味着公共基金必须遵循某种适用于所有欧盟成员国的标准。前东德各州 (勃兰登堡州、梅克伦堡—前波莫瑞州、萨克森州、萨克森—安哈特州和图林根以及柏林的特定地区) 作为一个“会合区”得到公共基金的大力支持。

2. 德国补助金

德国联邦政府和区域政府通常以如下方式发放资助金和补助：

- 补助 (有些补助在特定条件下需偿还)，
- 低息贷款 (由不同的公共信贷机构发放，十到二十年到期，根据资助计划，最高贷款在 500 欧元和 1 千万欧元之

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

间)，

- 资本资源援助 (同样由不同的公共机构发放) 和
- 担保 (为项目和投资和股份持有投资而提供)。

如果投资的目标公司得到公共资助金或补助，该公司被出售后，援助金不会被自动发放。另外，必须考虑到资助金或补助在某些情况下必须被偿还。如果补助违反欧盟公共基金法律框架，补助金可以在无限期内被收回。投资者可能被要求偿还资助金或补贴。因此，资助金或补贴是在做尽职调查时值得考虑的问题，因为在不同情况下，偿还金支付对投资者构成很大的风险。

如果房地产开发或重建得到任何公共资助金或补助，则一些特定条件必须被满足。条件的性质由投资的性质决定。这些条件可能对可收取租金的数量做限制。这些条件必须在固定期限 (5 到 30 年) 内得到满足。任何违反条件的行为都可能迫使投资者偿还资助金或补助。如果在固定期限内购买现存的受资助的房地产，现存条件通常适用于买方。如果买方没能满足这些条件，他可能有义务偿还资助金或补助，或被征收罚金。因此在做尽职调查的过程中仔细审查是绝对有必要的。

IV. 知识产权

1. 知识产权的状况

德国是所有重要国际知识产权条约的成员国，在有关可受保护的知识产权类型和知识产权权利的执行方面，德国的知识产权制度遵守国际标准。德国法律框架被认为是高效的、可预测和可靠的。在德国对无

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

形资产的保护总是非常重要的，这从一些事实中得到反映，比如，在 2011-2012 国际竞争力报告中，德国在创新方面，包括知识产权保护方面排在第 7 位 (共有 142 个国家)，欧洲专利局也位于德国慕尼黑。

多数无形资产只有在注册后才能享受专有权利的保护。如果符合德国专利法的要求，技术发明作为专利可受保护最高达 20 年，设施模型最高达 10 年，地形图最高达 10 年；只有在某些情况下，保护的期限可以得到延长 (制药、石化可延长 5 年)。可享受保护的非技术型无形资产包括商标 (每 10 年可延期，也可无期限保护)、设计专利 (最高 10 年) 及域名 (无限期)。

对没有注册的无形资产也有另外的保护措施，如著作版权保护，这也包括软件程序。

作者的版权，在其逝世后 70 年内，仍受到保护。对未经注册的作品，秘密知识根据不公平贸易行为法（按保密期限）进行保护，商标/商业名可在使用过程中（如驰名商标）得到保护。由于德国是欧盟成员国，“*欧洲*”知识产权 (共同体商标和共同体设计) 在德国自动提供保护，不需要进一步在德国注册。

2. 交易中的知识产权问题

在确定了目标公司所有知识资产后 (包括未注册的权利)，在收购中，需要对如下具体问题进行观察：

a) 发明

德国法律规定，发明原则上属于发明者(通常是雇员)。在过去，雇主需要在转让通告发出后的四个月的时间内书面向雇员提出转让要求。

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.

2009 年 10 月 1 日，相应的法律条文得到了修改。这一日期之后，对于雇员发明而言，如果发明者在 4 个月内未从雇主处了解到发明一事，那雇主将依法获得该项发明的拥有权。但雇主应对雇员/发明者支付一定的补偿（如果双方同意的话，通常是事先定好的小额奖金）。

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) 版权

b) Copyrights

根据德国法律，版权是不可转让的，但是作者可向（版权）购买者和受让人提供专有的使用和开发权。作者对其作品总是保有其人格权（精神权利）。

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.

在德国，除非在软件设计领域中，不存在雇员研发，但雇主享有著作权的情况。如果雇员有其他成果，那么该成果的经济权归雇主所有。这一点在工作合同中可写明（如果所处环境认允许，那么双方也可用隐形的方式对之予以确定）。

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) 权利和可用性的转让

c) Transfer of rights and availability

注册知识产权的转让应该向有关注册单位提出，即使这不是确定转让有效性以防备第三方侵权的必需手段 (但对今后权利的执行是有必要的)。在许多股票交易里的另一个问题是确保收购后有关技术或知识的可用性。对于软件，特别是信息技术，关键点是保障获取定制软件（源代码、文档）的途径和可用性，保证信息基础设施的持续可处置性以及在资产交易完成或某一商业部门被出售后，确保获取数据的途径（数据传输要严格遵守数据保护法）。

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) 许可证

d) Licenses

对于（独有的）许可证、科技转让和研发协议，许可证或注册登记不是必需的，但是有些特定的反垄断问题值得关注，因为它们可能影响协议的有效性。向买方转让

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

协议书（如果发生资产交易）需得到合同书上的另一个合伙人的批准。

asset deals) requires the approval of the other contractual partner.

V. 产品责任

在德国，如果产品导致死亡或人身伤害或损害其他产品，其制造商，相应的欧盟第一进口商要对其产品的缺陷负责。德国产品责任法根据欧盟法律而制定，规定了(责任方) 的严格责任，无论 (责任) 是事先规定还是以合同方式规定。责任方对三种类型的产品缺陷负责：设计缺陷、生产缺陷和市场营销缺陷 (不恰当的说明，对潜在危险没有提出警告)。根据法律，人身伤害的责任赔偿限制在 85,000,000 欧元之内；其他的责任限制（如一般条款）无效。

因此，做尽职调查主要是为了发现潜在的责任风险，(如果责任存在)，需建立储备金或出具保险证明，并且 (责任风险) 可能在购买价格中体现出来或在买卖协议书中以赔偿的形式体现出来。

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. 风险资本

I. 一般性说明

风险资本指用于公司初级阶段的发展而进行融资所需的种子钱、启动钱或增长钱。使用风险资本的公司通常是年轻的、富有活力的行业，它们被看好有很大的增长潜力（如：IT 公司或技术领域）。然而，它们最初没有足够的资金来满足它们创业的需要，或供它们发展的内部融资的需要。它们也没有能力获得负担得起的信贷，因为它们缺乏抵押物。

与一般的银行融资不同，风险资本投资者为公司提供无担保的长期融资，作为该公司的责任股权资本。一般债务融资和风险资本融资的另一个主要区别是有关投资者对目标公司的管理提供支持和管理的专门知识的条款。

投资者提供的风险资金使他/她通常能在目标公司的股本中分得少量的股权。在大多数情况下，公司采用私人有限责任公司的法律形式，股份公司（AG）要少一些。

收购少量股权的投资策略，其目的并不是想得到定期的股息或利息。相反，风险资本投资者仅打算将他/她持有的少量股权保持一定时期，并期待在这期间或在投资期结束时，将其交易出去，从公司内在价值的提升中得益（请参见下述 K 节中有关可能退出持股的阐述）。

II. 交易程序

1. 收购股份

为了避免现有股东转让应纳税的股份，从创始人处收购现有股份，从而来收购目标公司（少量）股权的方法不太有效，但风险投资者可以通过在目标公司增加现金资本，订购新发行的股票等方法，来有效地

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

达到这一目的。

根据私人有限责任公司法第 55 节以及下述内容和德国股份公司法第 182 节及以下所述内容，在私人有限责任公司和股份公司实现资本增长，需要召开股东会议，达成一个公证决议，并在商业登记处注册。

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. 合同的基础

2. Contractual Basis

在实践中，对目标公司的投资和收购参与权取基于投资和股东协议，该协议规定投资的条件，参与方的权利和义务，以及其他与参与方相关的法律关系等问题。

此外，大多数风险资本投资者要求修订目标公司的章程，如：为了落实对股份、不同类别的股份及投资者特殊权利转让的限制，为了遵守投资和股东协议中规定的公司管理准则等。修改的公司章程需通过股东决议才生效，这就需要公证，需要在商业登记处注册，并通常在通过后，连同增资决议一起存档注册。

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. 投资和股东协议

3. Investment and Shareholders' Agreement

a) 投资条款

a) Investment Provisions

投资和股东协议牵涉三方：现有股东、投资者、和目标公司。协议首先规定投资的条款及条件，因此包含了有关参与规模的规定、目标公司投资前估值、投资者能投资的数量和具体日期（如：基于某一营业额度的实现）。

为了让投资者参与，现有股东承诺增加必要的资金，发行一定数额的股票，并同意让投资者认购。此外，现有股东通常不能参与购买这些新股，不能享受任何有效保

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

护他们股票下跌的措施。作为回报，投资者会购置发行的新股（这些股份通常以面值发行），并进一步按达成的条款为目标公司的资本储备出力（通常以现金形式投入）（如：按要求达到里程碑的目标）（HGB 第 272 节第 2 段第 4 点）。

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) 投资者权益和公司管理

风险资本投资者为公司提供了充足的责任股权资本后参与该公司的成功发展，同时承担着与公司创始人一样的企业亏损风险。因此，投资者会坚持要求公司在投资和股东协议中阐明对投资者汇报公司管理情况的义务和投资者了解信息的权利。此外，公司管理准则中还应规定公司应为投资者提供足够的机遇对管理层进行消极控制，从而让他们兼管公司的发展。在投资和股东协议中一般应写明的公司管理准则是建立监事会（包括投资者的代表权利）和对股东作出的重大决定进行核准。此外，投资者经常要求现有股东、管理层和/或公司在他们投资期间能代表和担保公司的地位（如：某些业务事项，以及对公司现有股份拥有权的产权保证）。

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) 管理激励

管理承诺和管理激励对目标公司的成功发展而言是尤为重要的因素。为了确保公司管理的实现，投资和股东协议常常明文规定所谓的归属条款。根据这些条款，如果公司创始人从该公司总经理或常务董事的职位上御任，他/她有义务全部或部分地辞去公司股东的身份，并将持有的公司股份转让给（i）本公司，和/或（ii）本公司的其他股东。其股值的大小通常应按其辞职

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

的原因而定（例如，一个“合格的离任者”的转让股值通常会按公平的市价予以核算，而一个“不合格的离任者”的转让股值可能只按股票面值予以核算）。

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) 股值浮动

早期投资很难对目标公司的价值作正确的评估。其困难之处在于所谓的股指浮动或股值调整条款。根据这些条款，投资者有权以股票面值的价格，额外购进本公司的股票（没有任何保费）。如果该公司与第三方投资者作新一轮的融资，投资者所持股票会按较低的价值核算，而不按他/她当时投资的面值核算。

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) 与退出相关的规定

维护投资更重要的一环是所谓的清算优先权。根据这一条款，投资者如需退出，他/她将会优先于其他剩余股东，获得一定数额的退出收益。这种金额取决于议价结果。通常情况下，投资者有权一次退出他/她的总投资，但清算优先权条款有可能只允许按最低利率核算，但这也可能让投资者享受数倍于投资额的回报。投资回报可进一步按公司股权的比例，将清算优先款后剩余的收入再分配给其余股东（所谓非享受优先款者），甚至所有股东，包括投资者（所谓享受优先款者）。

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).

对那些只打算将公司股份持有一段时间的（少数者）风险资本投资者来说，在受到其他（大多数）股东的反对的情况下，强行退出交易权力也是非常重要的一个方面。投资者想做到这一点，可借鉴所谓的拖售条款。根据该条款，如第三方想收购该公司，而且投资者无反对意见，那么股东和投资者只能将他们的股份在公司内出

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

售。作为回报，股东往往可以享受这一拖延权（共同出售权），以防止投资者单方撤出的做法。由于在德国私人有限责任公司股份转让需要公证，所以，如果执行拖延权和跟随权，整个投资和股东协议也需要公证。

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. 收购财务不良的公司

I. 一般性介绍

对不良公司的收购通常被设计成财产交易。原则上，这种结构使买方能够只收购有价值的财产且丢弃债务。

在对不良公司的收购中，买方的一个主要目的是避免法律风险。交易在破产程序之外还是作为其中一部分进行，这一事实有重要的意义。

II. 破产程序外收购

1. 财产分处权

破产程序启动前，或开始处理前，卖方有充分权力将公司有价值的资产出售或转让给第三方。

破产程序启动后，或开始处理前，经常需任命一位官员临时负责处理破产事务。在此期间，该官员有权决定出售或转让公司的资产。

2. 买方风险

如以下任何一种情况发生，虽然卖方充分授权破产程序以外的资产出售和转让，破产管理人可能会在后一阶段以具有追溯力的方式影响到交易：

- (i) 不良公司的出售发生在破产程序之前三个月或三个月以下的时间内，(ii) 在出售时卖方没有能力还债且(iii) 当时买方对此是知情的；或
- (i) 销售在申请破产程序后完成并且 (ii) 在出售之际，买方知道卖方没有能力在债务到期时还债。

另外，交易很可能导致对债权人的损害。如果买方以即刻可用资金 (现金交易) 支付

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

公平市场价，破产管理人的影响会被排除。在这种情况下，买方必须立即向卖方支付全部收购价格；特别是，收购价格中不应有任何一部分因为代管协议无法由买方支付。

在例外的情况下，如果不良公司在申请破产程序前的十年内或在申请破产程序后被出售，只要另一方当时知道卖方意欲伤害债权人(利益)，破产管理人可以质疑这笔财产交易。

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. 责任的法定判定

原则上，如果(销售)采取财产交易的模式，不良公司的债务跟随出售公司存在。在如下情形中，卖方的债务可能被转交给买方：

- 如果买方购买一家公司并使用其原来的名字继续从事同样的业务，在法律操作上，其被假设应承担所有卖方开展业务期间欠下的债务。卖方和买方之间的协议可以排除这种假设。但是，这种排除只有在如下情况下才对债务人有法律约束力 (i) 如果他们已经被告知或 (ii) 排除通知已经在商业登记册中登记并正式发表。如果买方的责任没有被排除，买方的责任是无限的。
- 根据德国法律，整个公司或一个部门的收购者对所有业务和从收购前最后一个公历年之初开始累积的预提税负责。买方的责任限于所购财产。然而，有关责任的假定不能由卖方和买方之间的协议排除。
- 如果买方收购一个公司或公司的一部分，他自动享有/承担现存雇佣合同中的所有权利和义务。
- 购买房地产可能使买方对现存污染和清洁费负责。

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.

- 购买者可能有义务偿还由欧盟向不良公司发放的非法补贴。
- 买方可能对卖方违反欧盟竞争规则的行为负责。

作为规则，责任的法定假定不能在购买协约中被排除。然而，针对这些被假定的责任，买方可以要求卖方提供担保或赔偿。在实际操作中，买方必须知道，如果遭受财务危机的卖方没有支付能力，这些担保和赔偿可能是无价值的。如有必要，买方可以寻求银行担保或保留购买价格。

III. 破产程序完成后的收购

在破产案中，处置债务人财产的权利掌握在破产管理人手中。破产管理人对房地产有不同的利用方法，这些方法包括强制出售、强制管理或开放市场出售。投资者在强制出售或是开放市场出售的过程中有机会收购房地产。

在强制出售时，房地产被卖给出价最高的投标人，不需得到债务人同意。强制出售的成本从拍卖收入中减去，余下的收入按照债权人申索债务偿还资格的排序，分配给已经提出赔偿要求的债权人。一旦最高的投标被执行法官接受，该房地产的所有权就在那一刻被转让给最高投标者。所有对该房产的抵押和权利也在此时终结。有例外存在。

如果是开放市场销售，房产由破产管理人以“通常的”房地产交易方式出售。鉴于破产的具体事项，特定的规则必须被纳入到财产购买协议书中。另外，须与债权人签定一份规范诸如收益分配和取消土地费等事宜的协议。在上面提到的两个例子中，买方都有终止现存租赁协议的权利。有例外存在。

- 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

1. 财产分处权

如果某项破产程序已启动，负责处理该项事务的人员是唯一有权出售或转让公司资产的法人。如果交易在破产程序启动后进行，法律上的不确定性和风险性就可以避免了。

2. 没有被破产管理人挑战的风险

破产程序结束后进行收购的一个主要优点是没有破产管理人对交易提出挑战的潜在法律风险。

3. 责任的法定判定

破产程序结束后进行收购的另一个主要优点是破产前债务，包括破产程序结束前累积起来的由雇佣合同引起的债务，通常留给破产公司，不必由买方承担。甚至以公司以前的名字继续从事业务产生的债务和商业税债务都被免除。然而，前面提到的其他法定责任的假定 (见 J. II. 3.) 在破产程序结束时不受影响。

在收购协议方面，买方很难得到担保或赔偿。破产管理人可能会争辩他对破产公司的所知有限且现存的风险已经被低收购价涵盖。破产管理人的一个主要目标是避免他自己的个人责任。如果破产公司剩下的资产不足以支付收购合同中规定的担保或赔偿，就可能会产生这样的个人责任。

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 insolvency 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. 投资者退出的具体情形

I. 具体情形

退出的具体情形可能是多种多样的。公开上市公司的股份可在股票交易所出售或批量销售。私人控股公司的股票通常以(签定) 私人协议的方式出售，协定受公司章程和公司股东协议中特定限制的约束。

出售 (公司) 的潜在替代方案是通过一般法律继承的方式，通常以发行新股为交换条件进行真正的公司合并。

退出投资时，卖方基本上都需缴纳资本收益税。E 部分对税收引起的后果做了描述。

下面的内容大致概括了处理退出事宜的私人控股公司在公司章程和股东协议中的某些规定。

II. 退出过程的管理

主要投资者通常希望在股东协议或投资协议中与小股东达成共识，即大股东控制退出过程。一个重要的特征是在退出过程中股东顾问要留任的决定，特别是投资银行、公司财经顾问、律师、会计等等。大股东通常希望他的顾问们在这个过程中起领头羊作用。

III. 首次公开招股(IPO)

资本市场有效运行时，发行原始股可能是首选的退出工具。当事方可以以合同方式对这一首选方案达成共识。在股票持有方面，原始股允许投资者行事各异。某些投资者试图在特定的时间框架内处理掉他们的投资 (如私人资产投资者)，而他们的战略伙伴可能有兴趣与联合目标公司保持长期的股东关系。

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.

通常的做法是当事各方对发行原始股的时间跨度达成共识。当事方在准备原始股发行的同时，可能也希望通过交易销售的方式退出 (“双轨”；见 K. IV.) 。

如果进行首次公开招股，股东通常受制于某些针对股票发行银行或股票交易所的锁定义务，如义务期为 6 到 12 个月。如果销售不是以批量销售方式进行，而是通过股票交易所出售，在这种情况下，股东也可能对某些规则达成内部协议，这些规则针对如何限制销售和优先选择销售。当然，如果 (股东) 遭受抛售股票的重压时，所有当事方的主要关注点是保护股票收购价。

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-á-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. 贸易销售

发行原始股的标准替代方式是所谓的贸易销售，即通过有序销售/拍卖的方式出售目标公司所有或几乎所有流通股。另一个选择是公司和其附属机构的财产可在第三方交易中出售。还有一个替代方法是重新注资，通过这个方法，股东希望获得一个或更多的高额股息收入，从而实现投资回报。股息可能由目标公司通过再次贷款来融资 (对税收的影响，见 E 部分) 。

在私人控股公司，通常股份是不能自由转让的。股份的转让需要得到管理部门、董事会或股东大会的同意，相应地，也需考虑到优先购买权和首先拒绝其他股东的权利。

进行贸易交易时，小股东通常向大股东提出“携带”权利，这个权利允许小股东和大股东共同出售股票。

“尾随”权利的另一面是“拖带”权利。拖带权利确保了大股东能够出售目标公司100%的股份，因而通常获得更高的收购价。拖带权利通常是小股东和大股东之间

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 preemptive 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-á-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

的权利承诺。为了保护他的拖带权利，大股东会试图获得小股东代理权，以便让交易过程顺利地进行。

针对大股东提出的“拖带”权利，小股东可以寻求以协议方式获得保护。

交易是在小股东在取得大股东同意后而获得的同等条件下进行的。

(在某些场合：) 出售交易包含最低价 (与税前收入或利息、税收、折旧、摊销前收入有关) 且

不是大股东的内部集团交易。

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. 风险资本交易

在风险资本交易中，投资者一旦退出，普遍都能获得清算优先权，这保证了出资（现金流）优先得到回报分配。通常情况是最近期的出资优先于先前其他投资人的融资或公司创始人的原始投资。这些规定在细节上可能会相当复杂。

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. 诉讼和仲裁

I. 诉讼

1. 总论

在德国投资时，外国投资者有时会与第三方或政府机构发生法律纠纷。在这方面，令投资者放心的是德国具有一个可靠的、真正独立的和相对经济的法院系统。这一系统能帮助争议各方合理、及时地解决纠纷。因此，德国在经济论坛 2011-2012 全球竞争力报告中排在司法独立前 10 名的国家之列。相比而言，法国在这份报告中排在第 37 名，而美国则位列第 36 名。

2. 德国法院系统的结构

德国的法院分三级。由一审法院作出的决定可能会上诉到上诉法院。如果二审后，对案件的结果仍存在争议的话，受害方可诉至德国最高民事法院——德国联邦司法法院(BGH)，前提是上诉法院或联邦司法法院受理这一诉求。上诉法院关心的是与案件有关的事实和证据的听证，而最高审级法院主要关注的是法律问题。所以，联邦司法法院旨在促进法律不断的发展完善，而上诉法院维护和主张的则是个人权益。

严格地说，尽管一审和二审法院不受联邦司法法院判决的约束，但在德国，他们普遍还是遵循这些判决。这就保证了法律的高度确定性，因为一审法院判决不是任意作出的，而是可预见且不令人感到意外的。这种法律的确定性程度是基于德国数十年之久的民主法制传统，以及德国所有的法律被编撰并适用于所有人这一事实。法律上的可靠性和随之产生的规划的可靠性使得德国对国内外投资者都具有吸引力。

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. 法院审理

通常由原告首先提出法律诉讼。在起诉书中，原告必须很明确地定义他在寻求什么，他的主张是什么。而这一诉求需要提供事实和相关的法规为依据。在原告提出诉讼主张后，法院会给予被告回应申诉的可能性。如果被告决定不为自己辩护或对起诉不作回应，法院则仅依据缺席作出有利于原告的判决（即所谓的缺席审判）。在双方都以书面的形式递交案件后，法院通常会指定一个口头听证会的日期。在审判前，法院要先把有争议的事实和无争议的事实分开，并要证实有争议的事实是否与案件有关。只有在各方提出的事实不同，并且法院视这些差异关乎于案件的结果时，才需要收集证据。如果这样，原被告双方可以通过证人、文件、专家意见等使法庭信服他们各自提供的事实。与普通法系国家的习惯做法相反，盘问证人和就案件的每个方面对他们提出质疑的做法都是不可能的。对证人的质疑必须直接与法庭正在寻求证实或反驳的事实相关。在实践中，由于不允许对与不相关的事实质疑，这就加快了证据收集的速度。以这种方式处理诉讼，当事人可节省大量的时间和金钱。在收集证据和各方听证后，法庭宣布其判决并提供作出该判决的详尽的书面理由。许多法院判决都被收集在综合的法庭个案资料中，法官、律师和外行人都可以看到。简言之，德国享有一个非常透明的法律制度。

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. 仲裁

1. 仲裁的优势

与法院诉讼相比，仲裁是具有优势的，尤其在涉及到复杂的并购纠纷时。由于各方当事人能够影响仲裁员的提名，所以要确

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

保仲裁员具有解决争端所必需的专长。此外，仲裁程序是保密的。因为当事人各方能自己决定仲裁的程序，所以程序很灵活，可变通。仲裁裁决比普通法院的判决更容易执行，尤其在海外，因为有一个很有效的管理外国仲裁裁决的认可和执行的国际条约及公约网络系统存在。

仲裁一般比诉讼快捷是因为仲裁没有上诉阶段。标准仲裁程序总共需要 1-2 年，即使是很复杂的并购仲裁程序也能在两年左右完成。

2. 法律框架

如果参与仲裁各方同意按照德国仲裁法专设仲裁程序或按照德国仲裁协会（DIS）之仲裁规则（DIS 规则）所设的仲裁程序行事，则仲裁有效。

a) 德国仲裁法

在德国民事诉讼法典（ZPO）第 10 册中的德国仲裁法于 1998 年 1 月 1 日生效，包括 42 项条款。该法是以现代和国际公认的联合国国际贸易法委员会示范法为基础的立法，它独立于德国国家民事诉讼法的所有其他条款并适用于在德国进行的一切仲裁。

通过达成仲裁协议，在明确界定的法律关系下，将当事人之间已经发生或可能发生的所有或部分纠纷提交仲裁，当事人各方能很容易地在普通法院体系外获得仲裁法庭管辖权。

这样的仲裁协议必须以书面形式作出。在有消费者参与的情况下，要求仲裁协议作为与主合同分离的一个独立合同进行签订。对于有几个原告和/或几个被告的多方当事人的仲裁，明智的做法是在仲裁协议中含有选择仲裁员的条款，因为德国仲裁

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

法并不提供在有多方当事人参与的仲裁中选择仲裁员的法律机制。

在德国仲裁法中，各方当事人必须被平等地对待并被赋予同等递呈案件的机会，而且德国和外国的律师都可以作为顾问出现在仲裁法庭。总而言之，德国仲裁法条款在程序设置方面赋予了各方当事人最大程度的自治权。尽管法律允许有三个仲裁员，但如果当事各方没有另行规定，例如为了节约成本，他们可以同意只指定一名仲裁员。由于对仲裁员费用没有固定的法定条款，当事各方和仲裁员需就费用达成一致（比如以法院诉讼成本为基准或是基于 DIS 规则的规定）。

在德国，仲裁裁决由高等地区法院决定是否予以撤销。但是，撤销的理由必须遵循同等的国际标准。

b) 德国仲裁协会之仲裁规则

DIS 是德国首席的仲裁机构。其仲裁规则修改于 1998 年 7 月 1 日，是一个行之有效且经过验证的规则制度体系，可简单地使用由该机构推荐的标准仲裁条款。目前 DIS 规则有七种语言。

DIS 是在联合国国际贸易法委员会示范法的基础上制定的。DIS 在仲裁程序中还提供行政支持，比如仲裁庭的形成，当事方诉状的传递或候补仲裁员的委任等。根据 DIS 规则，仲裁地凭意愿选择，这样外国当事人能在他们选择的仲裁地适用程序规则。

除非当事人各方有其他选择，否则一般由三个仲裁员决定案件结果。与德国法定的仲裁条例相比，DIS 规则具有的优势是他们对拥有超过两方当事人的较特殊的争端案例都有规制。一些常见的问题，比如仲裁庭的设置、仲裁员的指定等，适用 DIS

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

规则很容易得到解决。

值得一提的是，根据 DIS 规则，仲裁庭可自行酌情下令出示文件。实践中，大多数仲裁庭只有在至少一方当事人要求的情况下才会着手调查事实。

在国际范围内，与其他国际仲裁机构，如瑞士商事仲裁和调解法庭或国际商会的条例相比，DIS 规则是一个相对合算的选择。DIS 程序成本取决于争端涉及的金额。除了支付仲裁员费用，还要收取 DIS 行政费用（比如：对于两方当事人三个仲裁员的仲裁庭，争议标的为 1 百万欧元的纠纷，要收取 74,700 欧元仲裁员和 DIS 费用（不包括营业税）；争议标的为 1 千万欧元，要收取大约 221,200 欧元；而争议标的为 1 亿欧元，两项费用约为 452,200 欧元）。

最近，DIS 通过颁布《快速程序补充规则》成功地促使快车道仲裁协议变得更便捷。这一规则通过缩短仲裁员提名的时长和限制书面材料提交的数量，使仲裁程序得以非常快速地结束。

在提交了陈述书后，根据仲裁员为一人还是三人，以这些规则为基础的仲裁程序能分别在 6 个月和 9 个月内终结。这种快车道仲裁程序很适用于当事人各方只是想就某个具体法律问题得到裁决的情形（比如发生重大不利变动的情况）。

3. 企业法纠纷

德国还为私人有限责任公司内部股东纠纷提供了一个可靠的仲裁程序的框架。与普通法院系统相比，这一仲裁框架对那些卷入纠纷的在德国有子公司的外国公司尤其具有吸引力。

尽管长期以来此仲裁框架在仲裁这类纠纷的能力上备受争议，德国联邦司法法院

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 100,000,000 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

（BGH）在最近很受关注的一个决定中还是给予了批准。当然，法院决定，如果严格的条件得到满足，仲裁条款只能被视为具有法律效力。

court, however, also decided that arbitration clauses can only be deemed legally effective if strict conditions are fulfilled.

特别之处在于，仲裁协议需要或者经全体股东同意写入公司章程，或者缔结在一份全体股东和公司签订的独立的合同中。此外，还要求公司的执行机构和每个股东都要被告知仲裁程序的开始和过程，以便于他们能参与其中。最后但并非最不重要一点是，必须给予每个股东参与选举和提名仲裁员的机会，所有股东对同一事项的争议，必须在同样的仲裁庭前共同解决。

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.

虽然联邦司法法院的决定意味着仲裁中有一个复杂的规范机制，但这不一定是给仲裁协议设定障碍。为了更好地满足适用者的需求，联邦司法法院颁布了《企业法律纠纷补充规则》，其能够满足了联邦司法法院设定的所有条件。补充规则有英语和德语两个版本。

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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ISBN 978-3-9815017-0-4