DOING BUSINESS IN GERMANY – some Legal Aspects

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THE LEGAL SYSTEM

Germany, with a population of 82 Million, is the biggest market in the European Union. Germany is a Federal Republic. This defines the levels of law that the country has: There is European law to the extent it is applicable directly, there are laws of the Federation, there are laws of the sixteen states that are members of the Federation and, for certain matters, there are local laws of municipalities. The country has a constitution created in 1949, containing a set of fundamental rights for citizens. The currency is the EURO. The Eastern Part of the country was, between 1949 and 1990 as a result of the Second World War, a separate state entity, the "German Democratic Republic", with a different constitution and separate laws. It was a centralized state. In 1990, the original states that had been abolished in the early fifties of the last century there were re-established and then joined the Federation.

The Federal law is under the civil law system, with codes in certain areas: the civil code, the code of commerce, the code of social matters, and procedural codes. These codes, in their core, are relatively stable. Administrative law and tax law, especially, is subject to frequent changes.

The principle that there is a general freedom to operate for everybody ("allgemeine Handlungsfreiheit"), which is contained in the Federal Constitution, that, combined with the long established system of freedom to do business ("Gewerbefreiheit") creates a climate that is business friendly. There is, of course, regulation, and the necessity to transform European Directives into national law increases the amount of regulation.

The court system is divided in several branches:

Civil Branch: The Amtsgerichte (local courts) are acting as small claims court up to a value of 5000 EURO. The Landgerichte (provincial courts) deal with bigger claims and as appellate bodies for the Amtsgerichte. The Oberlandesgerichte (Superior Courts) have, in civil actions, only the function of an appellate court for factual or legal issues of the decisions of the Landgerichte. The Bundesgerichtshof (Federal Supreme court) is an appellate court for decisions of the Oberlandesgerichte, but deals only with questions of the application of law, not with any factual issues of cases.

As a rule, all decisions are made by professional judges. In the provincial courts, there are chambers for commercial matters, which are presided by a professional judge, but flanked with two laymen coming from business.

Labour Branch: For labour disputes, there is also a system of several levels. It starts with the Arbeitsgerichte (labour courts), an appellate court for fact and law with the

Landesarbeitsgerichte (state labour courts) and an appellate court for legal questions, the Bundesarbeitsgericht (Federal Labour Court).

There also is a court system for tax matters (two levels), for welfare matters (Sozialgerichte) in three levels, for matters of administration (Verwaltungsgerichte) in three levels, a Bundespatentgericht (Federal Patent Court) for the validity of patents (not violations), and Constitutional Court (Bundesverfassungsgericht) for violations of constitutional rights of citizens and other constitutional matters.

ESTABLISHMENT OF ENTERPRISES

In General

As a rule, the establishment of an enterprise is at the will of the entrepreneur. That has its foundation in the liberty to do business ("Gewerbefreiheit") which dates back to 1869. The more recent foundation is the Constitution of Germany, which guarantees in its Article 12 that you can practice your profession. Whoever starts a business has to notify the authorities, and the procedures for that depend on the nature of the business. There are businesses where a notification is sufficient. For others there is authorization required, but the granting of authorization is mandatory unless there are specific reasons to deny it. There is the "Gewerbeordnung" (Business Code) that forms the legal core of this system, but there are plenty of specific laws for certain types of business.

For some of the business enterprises, there is an obligation to start insolvency procedures in certain situations of a financial crisis. This is established by the German Insolvency Act (Insolvenzordnung). This is important information, as failure to comply could not only lead to personal liability, but is a criminal offence. There are important rules to comply with when running a business, e.g. to have orderly business records and keep up to date books.

German law provides several vehicles to do business.

The simplest is to act as a sole proprietor. If a foreign corporation wants to do business, the simplest way would be a mere branch office of such corporation, which is, as a rule, perfectly possible. After some well known decisions of the European Court of Justice, it is now a possibility to use types of foreign corporations in Germany even if they have no business elsewhere (e.g. a British Ltd), but acceptance in the market is mixed and some legal framework is not yet completely clear. The classic way is to use companies where the models are contained in the German law. There are two types of companies: the so called companies of persons (Personengesellschaft) and the companies relying on a defined paid in capital (Kapitalgesellschaften). The latter type is treated as a legal entity (which has as a consequence that shareholders are not liable for obligations of the company). The second consequence is that these companies as separate entities are taxed for their business. The companies of persons are taxed on the level of the shareholders owning them, but with the respective amount of profit as established on the level of the company.

For those personal companies, there are two types available: the **General Partnership ("Offene Handelsgesellschaft")**, in which each member is liable for all obligations of the company, and the **Limited Partnership ("Kommanditgesellschaft")**, in which there has to be one partner liable for all obligations (the "Komplementär"), while all other members have a defined cap on their liability, and if they pay in this defined amount, their liability is settled with such payment. All German business companies are registered in a public trade register that is held at local courts. In this register, you can find the basics of each company. This register is accessible for registered users online.

The Limited Liability Company ("Gesellschaft mit beschränkter Haftung" or „GmbH").

This is the most common German „Kapitalgesellschaft", and has been established for a long time as standard legal entity for doing business. The rules for that company are found in a specific law, the law about GmbHs (GmbH-Gesetz). Not all rules contained therein are mandatory. Some only apply if not stipulated differently among the shareholders. The basic concept is that this company has a fixed share capital to be paid in by shareholders, which are not liable for the obligations of the company.

You can buy a GmbH off the shelf. An acquisition of such shell or the founding of a new company requires a notarial deed, and so does each transfer of shares. If founded, bylaws must be created which are the governing rules for shareholders and management. One shareholder is sufficient to establish the company. The nominal capital required is 25.000 EURO. 50 % of this amount must be paid in immediately. After a recent change it is now possible to establish a GmbH with a capital as low as 1 EURO, which then has to use profits to fill up the capital base until 25.000 EURO have been reached. Certain restrictions apply. The company comes into existence when first registered in the trade register. The company is legally represented by its managing director. In front of the managing director, it is represented by the shareholders. It can have several managing directors. The company is run by the managing directors. They have to follow orders given by the shareholders, unless such orders would violate mandatory law. Shareholders may, in bylaws or otherwise, establish a list of acts for which management needs to have prior approval of the shareholders. The laws for a GmbH allow for flexibility, as a lot of regulations in the law are not mandatory.

The concept of having a nominal capital is a guiding principle for a GmbH, though is has been modified somewhat in 2009. During the existence of the GmbH, the capital may not be returned to the shareholders, and non-compliance to that creates a personal liability for the management. This has some implications in cash pooling arrangements, where it must be secured that if money is paid out at least a corresponding claim of value exists against the shareholder.

The Stock Corporation ("Aktiengesellschaft" or "AG")

The Stock Corporation is designed for bigger enterprises. It also has to have a minimal capital, which is 50.000 EURO. The rules for the AG can be found in the law about stock corporations ("Aktiengesetz"). Most of these rules, in contrast to the GmbH, are mandatory, thereby allowing for hardly any flexibility. Shares in the AG can be transferred easily. The AG therefore is the entity common for listed companies. For listed companies, additional rules apply.

The AG is run by its management board ("Vorstand"). There is no legal power of the shareholders or the supervisory board to give directions to the management board. There are several types of shares, and no certificates are necessary.

(a) Shareholders meeting (Hauptversammlung).

The Shareholders' meetings are the event where the shareholders may execute their rights, mainly by voting. It is not possible for shareholders to pass written resolutions.

The Shareholders' meeting may vote on:

- the composition of the advisory board
- the use of yearly results
- discharge for managing board and supervisory board
- the appointment of the auditors
- changes in the bylaws
- increase or decrease of the nominal capital
- initiation of probes for special matters
- the dissolution of the corporation
- matters of management, if demanded by the managing board

The shareholders meeting is called in by the management board with a notice period of one month, with some formalities to be obeyed In the shareholders meeting, a shareholder is entitled to receive answers from the management board on questions he asks to topics on the agenda.

(b) the Managing Board (Vorstand)

The Managing Board (it may also be only one person) is running the company and legally represents it. Towards the Managing Board the company is however represented by the supervisory board. The members of the managing board are appointed by the Aufsichtsrat. An appointment may not exceed five years. There is a non-compete obligation mandatory for the members of the managing board. There is also by law a liability for members of the managing board should they violate legal obligations for their duties.

(c) the Supervisory Board (Aufsichtsrat)

The Supervisory board is the body by which some control is executed over the managing board, which has the obligation to regularly give reports to the Supervisory Board. The Supervisory Board may look into the books and records of the corporation. Its most important task is to appoint and dismiss the member of the Management Board, set their salaries and negotiate their service contracts. The Supervisory Board is elected (and can be dismissed) by the shareholders meeting, has at least three members and at most 21 members, the upper limit defined by the amount of nominal capital. The bylaw of the company has to define the number, which must be divisable by three. So a Supervisory Board could not have four members. A member of the management board is prevented from being a member of the Supervisory Board. The term of the Supervisory Board is defined in the bylaws, but may not exceed four complete business years.

DISTRIBUTION ARRANGEMENTS

Manufacturers often use distribution or agency arrangements to sell their goods in Germany. Typically the companies confer the risks and costs for their own distribution by distribution agreements upon commercial agents or distributors.

1. Commercial Agent (Handelsvertreter)

According to § 84 German Commercial Code ("Handelsgesetzbuch"), a commercial agent is one who, as an independent person in business, is regularly entrusted with solicitation in business for another (the Principal) or with conclusion of business in his name. He acts in the name and for the account of a third party and receives provision based payments by the Principal for his activities. Unlike the distributor, the commercial agent does not purchase products, but acts as a mediator between seller and customer. The commercial agent usually acts independently on behalf of one or several specific companies. In this way he is different to a distributor, who acts in his own name and account, or a commissioner, who also acts for the account of a third party but in his own name. The commercial agent may be entitled to sign agreements in the name of a company, but only, if agreed so between agent and principal. A written agreement with the Principal for acting is not required, but useful as documentation.

Rights and duties

The commercial agent has an obligation to make efforts towards the solicitation or conclusion of business, must act in the interest of the Principal and shall provide the Principal with all necessary information. Based on the duty of loyalty, the commercial agent is not entitled to act for a competing company in the Principal’s branch of business. Exceptions are only possible with Principal's approval. However, for a post-contractual non-competition clause, a mutual written agreement is required. This post-contractual non-competition clause is legally limited to a maximum term of 2 years after termination. The Principal on the other hand must pay a compensation to the commercial agent for the duration of the restraint of competition.

The Principal generally may still directly distribute his goods, but the Principal has to consider the interests of the commercial agent. In case of a customer protection or territorial protection clause a restraint of competition is assumed.

The commercial agent must register at the trade office (Gewerbeamt) prior to beginning his commercial activities.

Commission

Commercial agents are usually paid in performance-related commissions, only payable once the represented Principal concluded the referred business. Commissions are due for business, which can be attributed to the commercial agent’s activities. This also includes follow-up orders by customers previously solicited for the Principal. The local agent, if he has been assigned with a certain region or clientele, may also claim commissions for deals concluded

by the Principal within the assigned region or clientele, in which he did not take any part. The commission amount is to be fixed in the contract and can vary according to branch and product.

Compensatory claim

After termination of the commercial agent relationship, the agent is entitled to claim a one-time compensation for the customer base he has developed or intensified for the Principal. This compensation claim is set by law and can neither be excluded by the contracting parties before signing the agreement nor be limited in divergence from the law. Negotiations regarding the amount and payment of the compensation are however possible upon termination of the agreement. The claim is to be asserted within one year after termination of the agreement. Should the commercial agent himself have terminated the agreement, then a compensatory claim does not arise, excepted if the termination is due to the Principal's behaviour or if the agent's age or health does not allow him to continue his activities. Should the Principal terminate the agreement for severe cause, then the compensatory claim is inapplicable.

The compensation amount is calculated according to the benefits the Principal still has and equity criteria. Equity criteria might include the agent's commission deficits. It is to be determined, which commissions were obtained by the agent through deals with new customers made by him or intensified old customer relations during the last contractual year and for how many years he would presumably have been able to keep those commercial relationships. However, compensation may amount to no more than the annual average commission over the last five years of the activity of the commercial agent.

Tax considerations

The involvement of a commercial agent might be considered as a permanent establishment of a branch in Germany, if the commercial agent is entitled to conclude deals for the Principal (power to contract) and not only for their procurement. Should a permanent establishment exist, the foreign company has to comply with income tax regulations in Germany.

If the agent is a natural person, the Principal will also have to take into account the issue of abusive self-employment. If the agent acts only for one Principal and does not fulfil sufficient criteria of self-employment, then he can be considered as an employee or employee-like person. In order to avoid subsequent payment of social security fees and criminal proceedings, a clearing proceeding on the social security carrier can be initiated beforehand.

2. **Distributor (Vertragshändler)**

Unlike the commercial agent, the distributor himself purchases the Principal's products and resells them in his own name and for his own account to a customer. The advantage of this method for the Principal is, that he already receives the purchase price for the product before it being sold to a customer. On the other hand, this system prevents direct legal relations between the Principal and the customer, so that the risk of bankruptcy of the final customer as well as all commercial developments lie with the distributor.

If the principal wants to receive information about customers (or needs it for practical or legal reasons) this must be stipulated by contract.

The distributor is often assigned a protected area. In order to protect the distributor's position, the Principal may take responsibility not to appoint any other distributors in this area and not to distribute his products in the area himself or through a third party. Should the Principal breach a respective stipulation, he is to be held liable for damages. The distributor can then claim compensation for lost profit.

The distributor does usually not get commissions. Exceptions are however possible.
The distributor's bankruptcy is cause for dismissal.

Unlike the commercial agent, the distributor cannot claim from the Principal a compensation after expiration of the contractual relationship. The only exception is, if the distributor had been closely tied in the sales organisation and is contractually obligated to forward his clientele to the Principal upon termination. In this case the distributor is entitled to claim compensation upon termination for his clientele like a commercial agent. Further requirements for a compensatory claim would be that the Principal will benefit from these customer relations even after termination of the contract with the distributor and that the distributor will suffer losses due to this termination.

ACQUISITION OF REALTY

There is no limitation for foreigners, including foreign corporations, to acquire real estate in Germany. The acquisition always requires a notarial deed and is divided in two contracts due to the principle of abstraction, one creating the mutual obligation to transfer the land, the other executing the transfer of land. The notarized form is due to the acquisition of reality being considered as important business and the notary is under an obligation to render neutral advice to all parties to protect them and make them aware of risks. He also does prior research in the land register, assumes correspondence with tax and other authorities and, on demand, acts as escrow agent for the moneys transferred.

There is a land register administered by the local courts. It shows the size, location and owner of a piece of land, some contractual entanglements of the land (not necessarily all – e.g. simple leases are not shown), mortgages or other pledges. This register is only admissible if you can show a reasonable interest in receiving the information. As there might be a time gap between the contractual obligation to the transfer of ownership and its execution, the acquirer should agree with the seller to a note in the register (“Auflassungsvormerkung”) that blocks the transfer of the land to a third party.

If land is acquired for industrial purposes and has served for such purposes already in the past, it is advisable to receive a set of warranties that there are no environmental hazards or even demand some proof for it, as with the ownership of land also the responsibility for such hazards could become a problem of the new owner.

Also, it is always advisable to verify the status of the Land. Local zoning laws shall determine the permitted use, and for building and destructions permits are needed.

The transfer of ownership in land is subject to a transfer tax which is 3,5 % of the value of the consideration for the transfer. It is 4,5 % in Hamburg and Berlin. The tax does not require that the ownership actually changes for the land. It does also apply if the land belongs to a company and the ownership of such company is transferred, directly or indirectly, if 95 % of the shares come into the hands of an acquirer. Also, there is a yearly municipal tax for the owner of the land.

However, there are several legal instruments that create the possibility to use realty, some legally weaker, some stronger.

The simplest way is the lease. The lease is normally either for a undefined period with the possibility to terminate it in defined notice periods. Or it has a set term with the possibility to prolong it. A change in the ownership of the property does not affect the validity of the lease, which just by law changes the contractual partner. Leases are not registered in the land register.

You can have, by agreement, a specific right to use the property to be registered in the land register (Grundbuch), and certain types of use, e.g. the right to erect buildings (Erbbaurecht), are subject to a set of regulations in the civil code. Such rights normally have a longer life span (e.g. 99 years).

Taxation

Taxation of Businesses takes place on several levels. Taxation in Germany as in other countries is based on a complicated and ever changing set of rules. Below, only the most important taxes are listed.

a. Corporate tax

The corporate tax (“Körperschaftsteuer”) is the income tax of the corporation. The corporate tax is based on the annual profit of the corporation as derived from the trade balance sheet and corrected to some extent for tax purposes. The tax rate is 15 % thereof, plus the solidarity tax adding up to 15,825 % total. Taxed is the corporation. That makes Germany, in the international comparison, a moderate tax country.

b. Business tax

In addition to the corporate tax, there is also a business tax (“Gewerbesteuer”). While the corporate tax is distributed to the Federation and its states, the business tax is a tax for the municipalities. The business tax is not a deductible item when the profit is calculated for purposes of the corporate tax. As the business tax is local, there is not the same rate across all Germany, but variations.

c. the Value Added Tax

The Value Added Tax ("Umsatzsteuer") is a tax that is imposed on the revenues, that a business generates within Germany. Deducted from this tax base is the so-called pre tax (Vorsteuer) contained in invoices of third parties for deliveries or services to the business. The standard tax rate is 19 % of the revenues, with a reduced rate for some goods or services of 7%. There is a catalogue for these exceptions, and the rationale for some exceptions is unclear.

d. taxation of dividends

The dividends that are the result of an investment that belongs to business assets are taxed when such dividends are distributed. The tax base is only 60 % of the dividend to reduce the effect of double taxation. If the owner of the distributing entity is a corporation, then dividends are not taxed.

e. capital gains tax

Capital gains are taxed when the gain is realized, mostly by a sale. If the capital gain is realized by a corporation, the gain is not taxed. However, that then corresponds to the fact that a loss is no longer deductible.

CUSTOMS REGULATION

There are no customs within the European Union, and after the Schengen Agreement, even controls have been abolished at the borders of member states to other member states. The customs and tariffs remaining are monitored by the European Commission in their "Tariff Code", which dates back to 1993. There is now an amended code since 2008, which has not been implemented but will be so no later than 2013.

Additional import and export regulations are, however, still in place in national law within the regulation for the execution of the foreign economy law (Aussenwirtschaftsverordnung). There are detailed sections, which imports or exports are subject to approval or are simply forbidden or where reporting to the authorities is required. This law also contains a country list (e.g. North Korea, Iran, certain African countries) where restrictions are in place. This is all subject to constant change.

CURRENCY REGULATION, CAPITAL AND PROFIT TRANSFER, INVESTMENT INCENTIVES

The principles for those regulations are contained in the Outside Economy Law (Aussenwirtschaftsgesetz). This law has lost a lot of its importance as the members of the common market of the European Union are no longer considered as “outside” and the economic foreign policy is now a matter of the European Union. Obviously, the members of the EURO zone will also not have any currency regulations of their own. Beyond that, the principal is that capital and profit transfers are free after they have been taxed. However, there are obligations to notify authorities about transactions .

There is a big set of Investment Incentives and subsidies in place. For subsidies, the legal foundation is spread throughout a lot of special laws. There is a general law on subsidies, but it covers only fraud in that relation. Besides special laws, specific budget laws of the Federation, the states or communities are the legal basis for subsidies. Subsidies are also based on EU law. All that is subject to frequent change. Special research is recommended for each project. Chambers of Industry and Commerce and banks offer assistance and there are specialist consultants for these matters. As subsidies, there may be grants and loans or guarantees. The general rule is that applications must be made before the investment concerned is made. For subsidies, conditions apply regularly for their use and the investment subsidized remaining on its location.

As Germany still struggles to incorporate the states that became part of the Federation only in 1990, formerly belonging to the German Democratic Republic, there are specific subsidies described in a Federal Law (“Investitionszulagengesetz”) for specified investment in these states. That applies for Berlin, Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony Anhalt, and Thuringia. The volume ranges from 2,5 % to 12 % of the investment.

COMPETITION LAW

There is a specific law against unfair competition (Gesetz gegen den unlauteren Wettbewerb), which tries to word general rules of what is fair or unfair among competitors, but mainly is interpreted by a huge set of jurisdiction. The structural part of competition law is contained in another law, the law against reductions of competition (Gesetz gegen Wettbewerbsbeschränkungen), which deals with merger control for antitrust purposes, with the prohibition of cartels and the conduct of companies that are predominant in a market. This law is a product of a tradition that has been started only after the Second World War. There have been major changes in the law since, mainly to adapt it to the respective legal system of European law.

The law starts with a general rule that agreement by or behaviour of enterprises with the purpose to prevent, impediment or falsify competition are not permitted. It states some exceptions with a referral to EU “Verordnungen” that expressly permit and exempt typified agreements and certain agreements between small- and middle-sized enterprises. As this is thereby forbidden by law, this means that Agreements are void, if they are in violation of the law.

A section deals with the conduct of predominant companies in a market. Such companies may not abuse their position. It defines a predominant position as one if, when offering or

requesting services or goods on a market, there is no or no significant competition or if the position of an enterprise in such market is overwhelmingly strong. A predominant position is assumed if the market share is at least a third. The law also gives examples of the most significant conduct considered to be abusive. Examples are: to diminish without a factual justification the possibilities to compete for a competitor in the market if that affects the market; behaviour in pricing or in the application of terms and conditions, the refusals to share infrastructure if such share is necessary to let others enter the market, discriminatory practices, also in front of dependent enterprises (not only competitors) and boycotts.

Also, there is a referral that violations of Art. 81 and Art 82 of the EU treaty are also violations of this law. If there are violations, the cartel office receives permission to act and may also impose preliminary injunctions. It can confiscate relevant profits. Also, competitors that have been violated get a claim to force the violator to refrain from the violation and the claim to demand damages.

Merger Control

The law also regulates merger control. It clarifies that if there is an exclusive competence for the commission of the European Union stated in the EU (Verordnung) Nr. 139/2004 about the control of company mergers, the law does not apply.

A merger is if an enterprise acquires the whole or a substantial part of the assets of another enterprise, or the acquisition of the direct or indirect control about another enterprise – control being a determining influence by fact or law or both. Always considered as a merger is the situation if 50 % of the shares of an enterprise come under control by an acquisition, or 25 % of the capital or the voting rights.

The control takes place only upon a minimal value of the merger: if one of the companies taking part has revenues of more than 500 Million EURO worldwide or, within Germany, one participating company has revenues of more than 25 Million EURO and another participating company has revenues of more than 5 Million EURO. The defining period is the last business year before the merger.

The law, however, does not apply if a company that is not an affiliate and that has had in its last business year pre merger less than 10 Million EURO worldwide merges with another enterprise. Also exempted are mergers in markets that have existed for at least five years and that have had not more than 15 Million EURO total in the last calendar year.

There are rules on how to calculate revenues or market share – e.g., for the trade with goods only ¾ of the actual revenues are counted, and for revenues in the sale of a part of a company only the numbers of the sold parts are counted. .

The criteria to forbid a merger: the merger must not create or strengthen a predominant position, unless reasonable proof can be established that it also improves the conditions for competition that outweigh the disadvantages. If a participating company is an affiliate within a group, the above rationale for forbidding shall count the whole group as one enterprise.

The Federal German Cartel Office has to be notified of mergers for which the law is applicable, unless the European commission had all information already in German language and has forwarded it to the German Office. Also the completion of a merger has to be notified and such completion is forbidden (unless the merger has been cleared already) for the time frame the cartel Office has for their procedure according to the law. The procedures are indicated below. The cartel office can waive the obligation not to complete.

One month after having received the complete notification (there is a set of information defined in the law for completeness), the office has to alert the applying enterprise that it has started the main probe process in the procedure. Failure to do so means that the merger can no longer be forbidden. The office has to forward its decision to the applying enterprise within four months after reception of a complete notification. If no decision is forwarded, the merger is deemed to be approved. The decision to permit a merger may have conditions attached or may impose certain acts to be fulfilled, but may not imply a permanent control of behaviour.

Acts by the merging parties for completion against the rules of the law are void unless they have been recorded in public registers.

The Federal minister for economy and technology may permit a merger that has been disapproved by the cartel office, if there are advantages of the merger for the complete economy or it is in an outstanding public interest. In such decision, the ability to compete of the affected enterprises outside of Germany has to be considered. An application for such ministerial approval has to be made in writing within one month after the denial of the merger has been issued to the enterprises or, should such decision have been appealed, one month after the decision has become final.

A decision of the cartel office can be appealed; such appeal is to be filed in writing within one month after the decision has been issued to the parties. After another month, the reason for the appeal has to be submitted in writing. The competent authority where to file the appeal is a court: the Oberlandesgericht (Superior court) for the place where the legal seat of the Federal Cartel office is (that means: Bonn, and the Oberlandesgericht Köln). If the Oberlandesgericht confirms the denial, there is the possibility of the Oberlandesgericht to permit an appeal against his decision to the Bundesgerichtshof (Federal Superior Court) in cases of principal importance in law or to secure a uniform decision practice or to allow to develop the law. If this permission is not granted, failure to grant it can be the subject of a specific appeal to have it granted.

INTELLECTUAL PROPERTY

Germany has a long tradition in the law and the protection of Intellectual Property. It offers several types of protection, depending on its subject.

Patent protection

The patent law is twofold. There is the traditional national system that gives national and only national protection for inventions. The protection is for a period of 20 years, starting from the

first day after the filing. The filing for a patent can be effected by a corporation, and it must name its inventor, but a corporation cannot be an inventor. Patents can be transferred by simple agreement; however, it is advisable to have such a transfer registered in the patent register of the national patent office in Munich, which handles the filing and granting of patent, the revoking of a patent and is cashing in on the annual fees.

The other route to take is the European route with a filing at the European patent authority, whose offices are also in Munich, Germany. The protection is not really different, as legally, a European patent will denominate countries for which the protection is claimed and, when such protection is ultimately granted, it legally adds up to a bundle of the respective national patents, giving protection according to the respective national law with the possibility to have different fates. A patent gives a claim against a violator of ceding the violation and damages. Claims have to be made in front of ordinary courts, and the Germans states (“Länder”) in their judicial system normally concentrate those matters in one provincial court to increase expertise of the judges. It is necessary to mention a German specialty here: a violator may not use as defence that a patent he is accused to have violated is void. If he wants to void a patent for reasons of fact or law, there is a special procedure for that in a special federal court: The Federal Patents court (“Bundespatentgericht”) in Munich is the only competent court to void a patent and its decisions can be appealed to the German Highest Civil Court (“Bundesgerichtshof”).

The basic requirements to get a patent are: the invention must be new, it must be the result of an inventive activity and a use in business must be possible. There are explanations and examples in the law: important is the principle exclusion of software and some biological matters for ethical reasons. On demand, the Patent Office verifies if the requirements are met.

Important for employers: there is a law about the inventions of employees made in the context of their professional work, and a big percentage of inventions is of this type. Such inventions become not the property of the employer by default. The employee must notify the employer of his invention, then the employer has to decide whether or not he wishes to claim the invention – exclusively or with limitations. Should he claim the invention, he must pay a reasonable fee for the invention (mostly a percentage of revenues therefrom). Should he not claim the invention, it remains with the employee.

Copyright Protection

This is the second big core of intellectual property protection, the one with ever increasing importance. In the past, “copyright” was considered a matter mainly for the arts, but the lately with the raise of computer software, which is subject to copyright protection (and only in rare cases to patent protection), that has changed. Like most continental European systems, the copyright is not tied to the work but to the life span of the author, to survive this span for a period that is now 70 years. The protection is not gained by any formal procedure or registration but by the mere creation of what has the quality of a “work”, a creation somehow related to the personality of its creator. It is important to know that copyright, in the legal theory, cannot be completely transferred by contract, but only in the case of a universal succession, as to an heir. What can be transferred, though, is the non-exclusive or exclusive right to use a “work” in this or that way.

An important thing to know is that, in a question of doubt, the copyright has the tendency to remain with its owner. So when drafting a licence agreement, it is advisable to be specific for the types of usage that are permitted – otherwise you might not have the right. If you want to have the rights of usage in a way not yet known, such transfers must be made in writing.

Violations are subject to suits in front of the ordinary civil courts, and copyright can be concentrated by the states in specific courts, as is for patent cases.

Trademarks

The trademark system, like the patent system, is also twofold. There is still the national German law on trademarks which describes the type of protection and the filing procedure. The registration is handled at the German Patent office. It has lost ground, however, to the trademark that has a validity in all 27 EU countries and is, with the same range of protection, handled by the European Union Trademark office in Alicante, Spain, since 1996.

Protection is for commercial enterprises for trademarks that must have the power to be distinguished and go beyond mere descriptions. Protection may be acquired for pictures, words, a combination of both, to be attached to goods or services. Trademarks may be transferred, and they can be voided on demand of third parties if they remain unused for five years. They may not be used identically by third parties without a licence, but also the use of trademarks that may be confused with others that have older protection may be forbidden by the owner.

The protection is for 10 years; it can be renewed for several terms of additional ten years.

Small coin

There are also two additional systems that have some importance, but inferior to all above. There is the so-called “Gebrauchsmuster” (Registered Design), which is for technical inventions, which needs only a less inventive level and is registered with only formal examination at the German Patent Office. It is therefore easier to void compared to a patent.

Further, there is a design related intellectual property right called “Geschmacksmuster”, which is considered to be the small coin of the copyright. It requires a specific design that is unique and distinguishable from other designs. It may get protection for 25 years, and the registration takes place at the German Patent Office. Since 2002, there is also a European Union procedure for community wide protection, which is handled by the European trademark Office in Alicante.

Know How

All the above, with the exception of the copyright, describe protection that is granted in a formal way with at least some abstract description of the subject of such protection. Such protection is lacking for a matter commercially of huge importance: the know how. In itself, know how is unprotected; the protection therefore is to keep it secret. Business Secrets are protected by criminal law from theft.

EMPLOYMENT LAW

A unified codification of the German labour law does not exist. Statutory requirements are spread over many single Acts influenced by a diversified and strong jurisdiction. The German labour law is Case-Law divided into *individual labour* law regarding the relationship between employer and employee and *collective labour law* regarding the relationship between the employer / employers' associations and the works council / trade unions.

False Self-Employment

Employment is activity for a third party depending on directives. The differentiation from independent contracting is sometimes difficult. Whether a freelance activity or an employment exists is to be determined by a detailed examination on the extent of dependency on instructions, directives and integration into the organization. A freelancer shall be free to choose whether, where, when and how he carries out the work he was hired for. In order to avoid serious consequences of a false self-employment (payment of accrued social security contributions and eventual criminal offense for withholding of social insurance contributions), a clearing procedure with the social security administration should be initiated in case of doubt.

Individual Labour Law

The employer is to refrain from any discrimination when advertising positions, during the interviews and the applicants' selection. This includes a gender neutral job advertisement as well as any non-discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.

Though employment contracts may be verbally agreed, a written form is recommended. The employment commences not later than the moment when work is resumed. A written form is required, if the employment has a limited term or purpose. A limited term requires a justification, unless it is an initial employment with a maximum term of 24 months. Within this maximum term the contract may be extended three times. Should the employment have been set out for a limited term, it will then expire. Dismissal protection regulations are not applicable.
A probation period may be agreed on up to 6 months. Within this period, a termination is possible without justification under due observance of a two weeks' notice period.
A week generally amounts between 38 and 42 work hours. A part-time-agreement is possible without particularities. For at least 20 working days per year paid leave is to be granted. However, 26 to 30 days per year are common. Should the employee be absent due to illness, the remuneration is to be paid for an absence of up to 6 weeks for the same illness.

Termination

To terminate the employment contract a written dismissal is obligatory. According to German Civil Code, the termination notice period for the employer is 14 days during the probation period, afterwards 4 weeks up to 7 months, depending on the duration of the employment at the moment of dismissal. Dismissal on behalf of the employee can be given with a period of 4 weeks. These are minimum periods that can be extended by contract. It is usually agreed that the employee has to adhere to the same period as the employer. The right to an instant

dismissal for good cause is not affected by this. In this case the termination must take place within 2 weeks after the party entitled to terminate learned of the circumstances justifying the termination.
A termination by the employer usually requires justification, if the Protection Against Unfair Dismissal Act ("Kündigungsschutzgesetz") is applicable (i.e. the employment lasts more than 6 months and more than 10 persons are regularly employed be the employer). In this case, the employees might assert a claim (with a period of three weeks after dismissal) that his dismissal is socially unjustified e.g. that it is not due to reasons related to the person, the conduct of the employee or to compelling operational requirements.

Dismissal due to misconduct

A cause for behaviour-based dismissal is given, if the employee repeatedly breaches his contractual duties. Such dismissal however as a rule, should be preceded by a qualified warning.

Dismissal due to personal reasons

Where an employee is unable to perform the work due to illness or extremely far below average performance a dismissal might be possible as there is a negative prognosis regarding the ability for the future, serious detriments to business interests arise and the interests involved are weighed against the employee.

Dismissal due to operational requirements

Should the cause for dismissal lie with an operation restructuring or rationalisation, then the employee can be dismissed if his position is cut and after the employer has carried out a social selection. Social selection compares eligible employees based on the criteria length of employment, age, number of dependents and severe disability.

Special Protection against Dismissal

One must also keep in mind, that in addition to the above mentioned special protections exist in case of maternity, parental leave, for persons with disabilities, works council members and other officers under the Works Constitution Act ("Betriebsverfassungsgesetz"). In these cases, additional approvals by certain bodies are required, which must be obtained prior to giving notice. In order to avoid risks of legal proceedings it might be convenient to agree on a time limit at the moment of the contract's signature or to mutually agree on a resignation or termination agreement. The latter might however lead to a postponement or cutback of unemployment benefits for the employee.
If the employee files his claim within the given terms, the competent labour court will examine the causes leading to the dismissal. Should the court come to the conclusion that the termination was invalid, the employment will be reinstated with retrospective effect. This implies for the employer that wages are payable in arrears. For the procedure in front of a labour court, a time period of up to 9 months in the first instance and up to 2 years in 2 instances must be expected. In the case of an invalid dismissal, this represents a considerable risk of payment. This is why many legal procedures end in a settlement, which grants the employee a compensation for the loss of employment. Such a compensation is usually fixed between

0.5 and 1.0 monthly salaries multiplied by the years of employment, depending on the disposition of the risks in the proceeding.

Collective Labour Law / Codetermination Rights

With the exception of certain branches, for which binding collective agreements apply, collective agreements only apply, when employer and employee are members of the respective organizations or the applicability of a collective agreement has been contractually agreed. The existence of a works council on an operational level is common. Such a council can be elected already if an enterprise has 5 employees. The council holds extensive and differently strong codetermination rights. Essential parts are rights of approval with the hiring of new staff members or relocation, regarding social matters as introduction/order of overtime, compensation systems, new software, etc. These important determination rights lead to the necessity of obtaining the consent prior to any changes.
In case of dismissal the council also has to be informed and consulted in advance but at the end cannot prevent dismissal. However, failure to consult makes a dismissal invalid. Only in cases of economic matters of operational changes the council might negotiate a reconciliation of interests and a social plan pursuant to the regulations of the Works Constitution Act ("Betriebsverfassungsgesetz"). Especially cutback, shutdown or relocation of works (or parts thereof), split up or amalgamation are subject to strong determination rights. While the council cannot prevent the operational changes, it is advisable to seriously negotiate an agreement with the works council, as otherwise an arbitration body composed of employers and employees representatives with a neutral chairperson may render a binding decision.

Social Insurance

The employer is obliged to duly pay in social contributions and income taxes for the employee. About half of the total social insurance contribution (in 2012: 15,5 % for health insurance, 1,95 % for long term care insurance, 19,6 % for pension insurance, 3 % for unemployment insurance) is to be borne by the employer. Therefore in addition to the calculated gross salary the employer has to add about 20% for his calculation of total employment costs. In addition to that contributions for the employers' liability insurance are to be borne by the employer depending on the type of activity of the employee.

Residing and Working In Germany

Before sending foreign employees to Germany it is necessary to get familiar with the visa, resident and work permit regulations issued by the local foreigners' registration office.
For members of European Union countries the right to reside is unlimited. Work permit is not needed, though there is a seven-year transition period for the countries that joined the EU in 2004 and 2007.
If an employee comes from a non-EU country, a work permit is needed, and might be difficult to get depending on the skills of the employee as immigration laws are intended to make Germany attractive only to highly qualified personnel.

BANKING LAWS

Germany as a country has a history of being overbanked. There are still more than 2000 different banks around in the country, though their number has been somewhat diminished. This means that a business has a lot of possible partners in financing. There is no legal separation between investment banking and savings and loans institutions, and all professional banking business requires an authorization by the BaFin authority. There is no banking secret created by law; this secret is, however, a result of a contractual and sometimes even pre-contractual relation between the customer and the bank. There is a certain grey area in front of state authorities, but in general, there is no obligation to render information to authorities.

Historically, German enterprises have been highly taxed in the past, where thereby restricted in the self-financing and had to rely on loans for additional financing. The stock market as a source of financing was de-facto restricted to big enterprises. For a while, in the years 1999 to 2001, that changed, but the following crash had resulted that an emerging stock market culture failed to be established. Therefore, bank loans and the related law are still overall important. Banking laws, however, are a mixture of public law for the regulation of banks and the trade of stock and other certificates, and private law contained in the civil code, the commercial code, and others. All banking business is broken down to specific contracts, most likely to be governed by the standard contract provisions of banks. Those conditions are, to a certain extent, unified, depending on the group of banks. There is the group of private business banks (Geschäftsbanken), there is a group of savings institutions (Sparkassen), and the cooperative banks (Genossenschaftsbanken).

Of course, there are a lot of loan types, and the legal basis of all is the contract about a “loan” as covered in the civil code Sec. 488 ff. For lines of credit, you may might find a legal basis in the section about the Kontokorrent (“current account”) as in the commercial code, sec. 355 – 357. The interest for a loan can be freely negotiated, but there is a limit to its height. If it is against the ordre public or good mores, the agreement on it is void. That is the case if the interest rate is more than 100 % higher than the usual market rate or if there is an absolute distance to it of 12 percentage points. That might not be applicable to all types of loans.

In the beginning of a banking relationship, it will be hard to obtain loans. There will also be a higher need for a collateral. In case of a newly established company, the first demand of the bank most likely will be a guarantee from the shareholder. Other customary collateral might be the transfer (for security purposes) of the title of ownership in goods, if a loan is used to acquire goods. There may be pledges on real estate; also it is possible that receivables are assigned to the bank. About this collateral, there will be agreements with the bank. The bank will observe the rules and avoid to receive too much collateral. If that happens nevertheless, the agreement might be void. If along the road the collateral, compared to the risk, has become too valuable, there is, independently from any contractual agreements, a claim to free collateral no longer required.

For the transfer of funds from account to account a section in the civil code has recently been created in Sections 676a ff of the Civil Code. It sets rules for the time limit for execution of orders, forbids double charging and determines the extent of liability.

Very customary is also the use of the so-called “Lastschriften”, by which a third party is allowed to draw funds from an account. If that has been agreed it is the burden of the recipient to actually use it. This system has been established by agreement among the banks. Most important is the right of the account owner to call back the funds withdrawn by a third party within six weeks. Cheques, for which an old specific law exists (“Scheckgesetz”), are still used but have come out of fashion.

The financial crisis has put a specific importance on the obligation a bank has in relation to the sale of investment products to their customers. This implies also a contractual relationship, and some obligations are spelled out in the law about the trade with securities (“Wertpapierhandelsgesetz”). There are obligations to disclose certain matters (e.g. if a bank gets commissions), and obligations to give advice on the planned investment. That includes the verification of the personal situation of the customer. Failure to comply with these and other obligation will entitle the customer to damages.

If you deposit funds in a bank, there is a certain security for those funds in case that the bank should fail. As some foreign banks are not necessarily members of the system bank organizations have established, it is advisable to check the securities in place on a case by case basis.