GERMANY

Germany

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QUESTIONNAIRE

Part I: Contractual - no office in the target country

A. Direct sale

A.1. Without written agreement - general terms

1. *What are the formalities a foreign seller must complete in your jurisdiction in order to make sure that its terms and conditions of sale are binding and enforceable towards local purchasers? Are these conditions enforceable towards non commercial parties?*

a) Towards a commercial party

Under German law, the foreign seller has to actually submit the General Terms and Conditions of Sale (GTC) to the purchaser when the sales agreement is entered into (according to a ruling of the German Federal Court of Justice). GTC can either form part of the contractual document or be submitted as a separate document.

However, any individual agreement overrules general terms (Sec. 305b German Civil Code - BGB -).

If clauses in GTC are ambiguous or deviate from the corresponding statutory provisions they may be considered as null and void (Sec. 305c para.1 BGB).

In case of doubt the interpretation of the GTC will be made to the detriment of the user of the terms (Sec. 305c para.2 BGB).

If isolated clauses of GTC are invalid, the contract as such will remain in force and the invalid clause will be replaced by the corresponding statutory provision (Sec. 306 BGB).

Terms and conditions are deemed to be invalid if they

discriminate the other party in a way which violates the principle of good faith. In particular, this happens to be the case when they contravene the basic idea of a statutory provision or when they limit essential contractual rights and obligations in a way jeopardizing the purpose of the contract (Sec. 307 BGB).

b) Towards a non-commercial party

Towards end-consumers the inclusion of GTC is subject to more formal requirements than in B2B-contracts. GTC only become part of the contract, if the complete text of the terms and conditions is part of the contract signed by the consumer. Where this is not possible – because the contract uses to be concluded verbally – the text of the GTC has to be displayed at prominent place of the business (a typical case would be the limitation of liability in a laundry). The seller (or provider of a service) has to make sure that the customer is actually able to get knowledge of the terms and conditions and the customer has to agree to its terms (Sec. 305 para.2 BGB).

In German law any of limitation of the consumer's legal standard protection in the fields of defects (remedies) as to quality (supplementary performance, lowering of price due to defects, or warranties) is invalid (Sec. 434 - 435, 437, 439 - 443 BGB). This standard protection cannot be reduced neither by terms and conditions nor by individual agreement (Sec. 475 BGB).

The law contains a catalogue of special provisions which are prohibited when dealing with a consumer. These include exclusions of liability for injuries or defects in new products, short-term raise of prices, reversal of the burden of proof, fictitious statements, unreasonably long or short time limits etc. (Sec. 308, 309 BGB).

There is no statutory provision on the mode of presentation of the GTC to the consumer. However, the German Federal Court of Justice ruled that five lines on one centimetre is still a readable size.

The language of GTC has to be German if they are used in Germany.

A.2 With a written agreement

2. What are the clauses a foreign seller should integrate in a written sales agreement (or in his general terms and conditions) and the reasons why?

a) *Retention of title: Is this provided for in your jurisdiction? What are the conditions to make it enforceable towards local purchasers and third parties?*

Retention of title is a very common clause in German sales agreements and General Terms of Sale. It does not require any specific form or registration. However, for reasons of proof, it should always be made in writing.

Retention of title clauses can be drafted in a way so to prevent loss of title if the goods are resold by the customer or mixed or blended with goods of the customer (so-called extended retention of title).

Retention of title clauses are opposable to creditors and towards the liquidator of the purchaser.

If the good sold under retention of title becomes subject to a distraint procedure, the holder of the title is entitled to object to it by filing a claim at the court in the circuit where the distraint has been executed (Sec. 771 para.1 German Code of Civil Procedure - ZPO -).

b) *Interest and penalty clause: Are these clauses enforceable in your jurisdiction? Can they be reduced or annulled? What are the consequences if this clause is not integrated in the agreement? What is the legal rate in your jurisdiction?*

Provisions on interest and penalty clauses exist in German jurisdiction.

A debtor has to pay interests for money debts when he is behind schedule with a payment due, when the creditor has sent him a reminder, and when he cannot show that he/she is not responsible for the delay. A reminder is not necessary when the due date has been agreed upon beforehand (or can be determined), or when the debtor ultimately refuses to pay. The debtor of an invoice automatically will be in arrears 30 days after the payment was due (provided he received an invoice). The seller has to use a certain wording on the invoice to make sure that consumers are informed about the consequences of late payment (Sec. 286 BGB).

Generally, the interest rate is five percentage points above the basic interest rate (since 1 July 2012 fixed at 0,12 % p.a., redetermined every 6 months). If both parties to the contract are dealers, the rate is eight percentage points above the base rate. Parties are also free to claim higher interest rates for arrears, if

they can prove that they pay their own loans at a higher rate (Sec. 288 BGB).

If the parties agreed on a penalty clause the payment of the penalty clause will be due when the above mentioned requirements for delays are fulfilled (Sec. 339 BGB). Penalty clauses towards non-commercial parties cannot be included in general terms and conditions (Sec. 309 Nr. 6 BGB) but have to be made individually. If the penalty rate is unreasonably high it will be reduced by the judge to a reasonable amount (Sec. 343 I BGB). If the party in breach of the clause is a business there will be no such reduction (Sec. 348 German Commercial Code - HGB -).

c) *Applicable law and competent jurisdiction: Are these clauses enforceable in your jurisdiction? What are the consequences if this clause is not integrated in the agreement?*

Choice-of-law and jurisdiction clauses are common in German contracts. However, admissibility is restricted if included in a sales agreement between a German business and a consumer.

(1) Choice-of-law clauses

As a general rule, parties are free to choose which law shall be applicable in cross-border transactions. In the case the parties choose a "neutral" law (which has no connection to the contractual relationship) mandatory provisions of the countries of the parties shall still apply (Art. 3 VO (EC) 593/2008, hereafter referred to as "Rome I").

In agreements between a business and a consumer the choice of law may not deprive the consumer of mandatory provisions of the law applicable in the country of consumer's residence if the commercial party follows its commercial or professional activities in this country or aims such activities to that country (Art. 6 Rome I).

In the absence of a choice of law by the parties, the law of the country applies in which the party, who is supposed to effect the characteristic performance of the contract, has its habitual residence. In a sales agreement, this is the country of Seller's head office; if the contract has to be performed in another country and if the seller maintains a branch in that country, this branch determines the applicable law.

(2) Jurisdiction clauses

In principle, jurisdiction clauses are enforceable in Germany if included in contracts between businesses. For the competent jurisdiction within the German territory there are some mandatory provisions. Generally, it is possible to choose a court of a given place even if that court would not be competent pursuant to the applicable legal provisions. However, both parties have to be commercial parties or legal entities. If individuals are involved, the choice of jurisdiction clause is valid only if either party does not have its ordinary place of jurisdiction in Germany and agrees to the choice of jurisdiction in writing. In all other cases a jurisdiction clause will only be valid after the controversy has arisen or in the case that the individual party intends to leave Germany permanently and thus will not have an ordinary place of jurisdiction in Germany in the future anymore (Sec. 38 ZPO). Jurisdiction clauses have to refer to a distinct legal relationship and are invalid if the statute provides for a mandatory place of jurisdiction (Sec. 40 ZPO). This is the case, for example, in litigations involving real estate located in Germany (exclusive competence of the circuit jurisdiction where the real estate is situated), rent of real estate, the causation of detrimental effects to the environment, and misleading information about the capital market (Sec. 24, 29a, 32a, 32b ZPO).

B. Commercial Intermediaries

3. What types of commercial intermediaries do exist in your jurisdiction?

a) Franchising: an agreement between two parties (franchisee and franchisor) whereby the franchisee has the right, in exchange for a direct or indirect financial consideration, to use the franchisor's trade name, and/or trade mark and/or service mark, know-how, business and intellectual property rights, supported by continuing provision of commercial and technical assistance by the franchisor.

b) Distributorship agreement (Vertragshändler): an Agreement whereby one party (the supplier) agrees with another (the distributor) to supply the latter with products or services for the purpose of resale. The distributor sells the products or services in his own name and on his own account.

c) Commercial representative (angestellter Vertreter): An agreement whereby a white-collar employee, the commercial

representative, agrees to solicit potential customers for payment with a view to negotiating and/or concluding transactions under the authority, for the account, and in the name of one or more principals. The legal intermediary acts on behalf of his principal in such a manner that the legal relationship is created directly between the principal and the customer. The commercial representative has to follow the principal's instructions as an employee.

d) Commercial Agent (Handelsvertreter): An agreement whereby an independent intermediary has on a lasting basis the authority to negotiate, and possibly to conclude agreements in the name and on behalf of the principal. The legal intermediary acts on behalf of his principal in such a manner that the legal relationship is created directly between the principal and the customer.

e) "Kommissionsverkäufer": Sells or buys professionally goods or commercial papers under the authority of the owner but under his own name.

4. What legislation does apply in your jurisdiction with regard to the above mentioned types of distribution agreements?

a) Franchising: There is no specific statute on franchising in Germany. Therefore, parties are relatively free to design their contracts as long as they respect the German legal framework. However, concerning franchise situations, there are some rulings that point out certain pre-contractual and continuous disclosure requirements. Many German franchisors are voluntarily members of the DFV, the German Franchise Association. This association has drafted a code of ethics including pre-contractual and continuous disclosure requirements, provisions stipulating that all conduct of the parties be led by the principles of fairness and good faith, the franchisor's obligation to choose its franchisees with care and consideration etc. The more common this code becomes the more contractual parties will accept it as a sort of standardized content of franchise agreements.

b) As an ordinary employee a commercial representative is subject to German labour law.

c) Commercial agent: Sec. 84 - 92c HGB contain the provisions on commercial agents.

The principal has to provide the agent with all necessary documents, price lists, samples, etc. (Sec. 86a HGB).

The commercial agent is paid by means of commissions to which

he is entitled if his activities actually lead to a business deal during the term of the agency contract. Agents with an exclusively defined district or clientele are also entitled to a commission if they did not take any action within the development of a business deal. If the deal is completed after the termination of the agency contract the agent will still be entitled to the commission if the deal is made shortly after the termination and has been prepared predominantly by the agent, or if the customer made an offer to the principal before the termination of the agency contract (Sec. 87 HGB).

Generally, the commission is due at the time when, and to the extent to which, the deal is executed. If the customer does not perform, the agent will have to pay back the commissions, but the entitlement to the commission will be upheld if the principal does not perform the deal as contracted, unless the non-performance is not attributable to the principal (Sec. 87a HGB).

If the agency contract is concluded for an indefinite period it can be terminated within the first year with a period of one month, in the second year with a period of two months, and from the third to the fifth year with a period of three months. After the fifth year the notice period is six months. Termination notice has to be given to the end of a calendar month unless otherwise agreed by the parties. The statutory notice periods are mandatory and cannot be shortened by contract. In any case, the periods must not be shorter for the principal than for the agent (Sec. 89 HGB).

Termination without notice is possible in the event of a material breach by either party (Sec. 89a HGB).

After the termination of the contract the agent is entitled to a reasonable amount of goodwill indemnity

> if the principal continues to derive substantial benefits from the commercial relationships with customers brought by the agent,
>
> and if, in consideration of all circumstances, in particular, the commissions lost by the agent from business with such clients, the payment of a goodwill indemnity appears to be reasonable.

The amount may not exceed a figure equivalent to commissions earned in one year calculated on the remuneration over the preceding five years (or the respective shorter actual duration of the agency contract). The right to goodwill indemnity is

mandatory; agreements in the agency contract to the detriment of the agent are null and void. The good will indemnity must be claimed within one year after the termination of the agency contract (Sec. 89b HGB).

The former agent must not to reveal any company secrets (Sec. 90 HGB).

A restraint of trade clause can be concluded if it is made in writing. It can only prohibit competition in similar activities and in the same geographical area or with the same customers. Furthermore, such an agreement may not exceed 2 years and must be remunerated by a reasonable indemnity (Sec. 90a HGB).

d) Distributorship Agreements

In contrast to commercial agents, distributors buy and resell the products of a manufacturer in their own name and on their own account. Typically, a distributor is granted an exclusive right to sell goods of a certain brand in a given territory. In return, he has to assure certain quality standards and very often is subject to various instructions from the manufacturer regarding advertising, etc. There are no statutory provisions on distributorship agreements in Germany; to some extent, statutory provisions on commercial agency have been applied by the courts mutatis mutandi (e.g. notice periods).

Under German case law a distributor may, under certain conditions, even be entitled to a good will indemnity payment by the manufacturer in case of termination of the distributorship agreement by applying Sec. 89 b HGB, mutatis mutandis. This will typically be the case if the distributor has been incorporated into the manufacturer's sales structure like a commercial agent and if the distributor has the obligation to communicate names and addresses of his customers to the manufacturer when the distributorship agreement ends.

Part II: Branch - Office in the target country but no legal person:

5. *What are in your jurisdiction the differences between starting up a branch and starting up a company (subsidiary)?*

A branch office does not have legal personality of its own, it is just the „extended arm" of the foreign company.

If a foreign company intends to set up a business in Germany

the most popular legal form is the private limited liability company (Gesellschaft mit beschränkter Haftung, GmbH). The shareholders of a GmbH cannot be personally held liable for the company's debts. The statutory minimum share capital has to be 25.000 € (Sec. 5 German Private Limited Liability Companies Act - GmbHG -). A subtype of the private limited liability company is the so-called "Unternehmergesellschaft (haftungsbeschränkt)" which can be incorporated with a statutory capital of only 1 Euro (but common practise is a capital of 1.000 Euro because its amount must reflect the capital required by the company for the intended business activity) and which is designed as an entry to the GmbH with the obligation to save capital in order to accrue the minimum capital of Euro 25,000.00. In the general partnership (Offene Handelsgesellschaft, OHG) all shareholders are personally liable for the company's debts (Sec. 105 HGB). If only some of the shareholders shall be personally liable whereas one or more others benefit from a limited liability German law offers a Private limited partnership (Kommanditgesellschaft, KG).

6. What formalities must be fulfilled for opening a branch?

   The foreign company has to apply for registration of the branch office in the Commercial Register of its place of business. The company has to file a number of documents relating to its own legal personality and identity (such like copy of its own registration in the Commercial Register, by-laws, etc). The branch has to apply for its own tax numbers in Germany. The registration formalities are quite time-consuming, so it is wise to start well ahead of the tentative date of starting the business activities.

7. Why would you rather advise a foreign seller to set up a branch and not a company in your country, or vice versa?

   Branches are more flexible as their opening and closing down demands less effort and formalities. At the same time, the flexibility of branches might also raise concerns as to their reliability as a long-term business partner.

   A branch benefits from the name of the head company from a marketing point of view. However, the marketing argument can also be turned against the branch by assuming that customers would prefer to deal with a domestic company rather than with the branch of a foreign entity.

   The head office can allocate costs to branches more easily than to independent companies. On the other hand, the head office is fully liable for the branch's acts and omissions.

8. *Is a branch authorized to act before court, do engage people etc.?*

   There is the possibility to designate an authorized representative (Prokurist, Sec. 48 HGB) with a range of capacities to represent the company determined by statute. Generally, the power of procuration is unlimited, but it can be restricted to one branch if the branch has another name than the foreign company itself (Sec. 50 HGB). However, the company has to file an entry into the commercial register for the designation of such an authorized representative (Sec. 53 HGB).

9. *What is the liability of the legal representative of the branch?*

   The representative of the branch usually is an employee of the company. The foreign company as such is liable for all acts or omissions of the branch. The representative can be held personally liable only under certain circumstances, e.g. if he negligently or intentionally acted to the detriment of a third party (usually this must fall under the concept of tort).

10. *Is there an automatic liability of the head office for the operations or acts of the branch?*

    The head office is liable for all acts and operations entered into in the name of the branch.

11. *Which language will the documents be in?*

    All official documents will have to be filed in a sworn German translation.

12. *What are the accounting requirements for a branch?*

    The branch has to have its own accountings, namely if it is considered as a permanent establishment in terms of the double taxation treaties (which is the typical situation). It will then also have to have its annual accounts prepared and audited.

Part III: Subsidiary - legal person (separate legal local entity) in the target country

13. *What are the advantages of establishing a subsidiary compared to establishing a branch?*

    Since the company and its subsidiary are separate legal entities, the parent company is not liable for its subsidiary's debts and conducts.

    Commercialization of the subsidiary's products is considered to be easier when the company is a domestic entity because consumers

tend to be more confident when dealing with a company acting under a well known legal form (e.g. “GmbH”).

14. *Can you present the main characteristics of the company forms under your jurisdiction in the following schedule?*

COMPANY FORM	GbR (Gesellschaft bürgerlichen Rechts) Private partnership	OHG (Offene Handelsgesellschaft) General partnership	KG (Kommanditgesellschaft) Private limited partnership
Limited liability	NO	NO	YES/NO (only for those partners whose liability is limited)
Free transferability of the shares	NO	NO	NO
Fixed or variable capital	Fixed capital only	Fixed capital only	Fixed capital only
Minimum capital	---	---	---
Number of founders	2+	2+	2+
Notarial deed	NO	NO, but entry in commercial register is required	NO, but entry in commercial register is required

COMPANY FORM	Partnerschaftsgesellschaft Partnership (available only for certain professions such as lawyers, physicians, etc.)	GmbH (Gesellschaft mit beschränkter Haftung) Private limited liability company	AG (Aktiengesellschaft) Public limited company
Limited liability	NO	YES	YES
Free transferability of the shares	NO	NO	YES
Fixed or variable capital	variable	fixed by entry in commercial register	fixed
Minimum capital	---	25.000 €	50.000 €
Number of founders	2+	1+	1+
Notarial deed	NO, but entry in the register for partnerships	YES, as well as entry in commercial register	YES, as well as entry in commercial register

COMPANY FORM	GmbH & Co. KG (limited partnership with a private limited liability company as general partner)	KGaA (Kommanditgesellschaft auf Aktien = Limited partnership with one general partner and limited partners holding shares)
Limited liability	YES (for the partners with limited liability due to the legal form of the KG and for the GmbH due to its own legal form)	YES/NO (there is at least one partner with unlimited liability; the others hold shares of the capital without being personally liable)
Free transferability of the shares	NO	YES
Fixed or variable capital	see above GmbH and KG	Fixed
Minimum capital	see above GmbH and KG	50.000 €
Number of founders	GmbH + at least 1	2+
Notarial deed	see above GmbH and KG	YES, as well as entry in commercial register

15. *Which of the company forms is used most frequently in your jurisdiction?*

    GmbH – Private limited liability company.

16. Which company form is used most frequently in case of small or family business?

    For small businesses the partnership organized under the Civil Code (Gesellschaft bürgerlichen Rechts) is the company form which is easy to establish since it does not require a notarial deed and no registration. It is often used by professional persons (lawyers, architects, etc). However, if this partnership engages in commercial activities, it will be converted by virtue of law into a general partnership (OHG) and registration is compulsory. The down side of this legal form is the unlimited personal liability of the partners. For larger family businesses the KGaA is an interesting option because the company can raise money at the stock market while the risk of takeovers is low when the partners with unlimited liability are family members.

17. What are the main formalities a foreign company has to comply with in order to establish a subsidiary (filial)?

    Typically, the subsidiary will be a GmbH which will be established in a notarial deed. Both notary and commercial register will

ask for all documents relating to the foreign shareholder in a legalized form (such as extract from the Commercial Register if the shareholder is a company, its by-laws, board resolution, etc.). All official documents will have to be filed in a sworn German translation, and, unless exempt by bilateral treaties, they have to be provided with the apostille according to the Hague Convention.

18. What are the costs of establishing a subsidiary in your jurisdiction?

    The cost for setting up a GmbH will be around 2.500,00 Euros (taking that it will be endowed with the minimum capital of 25.000 Euros).

19. How long does it take to establish a subsidiary in Germany?

    It takes some 2 to 4 weeks to register the notarial deed with the Commercial Register. However, the preparation of the documents (like translations of extract of Commercial register of foreign parents company, by-laws, etc.) that have to be presented before the Notary public, takes time that should be taken into account when planning the establishment of a subsidiary.

20. Is there specific legislation with regard to the liabilities of the founders and the directors of the most used company form?

    The founders (the shareholders who approved the memorandum of association) of a public company (Aktiengesellschaft, or AG) can be held personally liable for the correctness and completeness of the declarations made in the foundation phase (Sec. 46 German Stock Corporation Act - AktG -).

    The same can be said with regard to the members of the management board and the supervisory board who were in breach of their duties when the company was founded (Sec. 48 AktG). The AG's titles against those persons become time-barred five years after the foundation.

    The founders of a GmbH are also personally liable for any conduct before the GmbH's registration (Sec. 11 GmbHG). The GmbH itself has a title of restitution of its statutory capital against its shareholders if the founders used up the capital in the foundation phase. Also the GmbH can claim damages from its executives and associates for misrepresentation in connection with the formation of the company.

Part IV: Miscellaneous

A. Real estate

A.1 Purchase of real estate

21. Who do you turn to in order to close a valid purchase agreement?

The purchase agreement must necessarily be contained in a notarial deed (Sec. 311 b BGB). No notarial deed is required when the declaration about the transfer of property is made in an insolvency plan or in a settlement before the court. Furthermore, a request for entry in the land register must be made.

22. What are the costs related to the purchase agreement?

The purchaser has to pay

a transfer tax, which varies in the different Länder between 3.5 and 5 per cent of the purchase price;

the notarial fees (depending on the agreed purchase price);

the land register fees (also depending on the purchase price).

23. Is there in your jurisdiction legislation that can slow down the purchase process (e.g. environmental legislation requiring preliminary soil examinations)?

The vendor of real estate must represent that he has no knowledge of contaminated soils. If he does not tell the truth he can l be held liable. The purchaser has to bear the costs for the cleaning of previously unknown contamination. If there are indications for contaminated soils but no certainty about its extent, lengthy pre-negotiations might occur. The German Federal Soil Protection Act (Bundesbodenschutzgesetz, BBodSchG) does not limit the possibility to sell the property as such, but both the vendor and the purchaser can be held liable for contamination of soil or ground water. In general, however, the purchase process is not slowed down by environmental legislation.

A.2 Rent a real estate:

24. Is there imperative law in your jurisdiction with regard to the rent of offices, industrial real estate or commercial real estate? Can you give a summary of the major stipulations of these regulations?

Most of the German law concerning rental agreements can be

found in the area of living space. Nevertheless, some of the provisions are also valid for other rental agreements, hence including the rent of offices, industrial, and commercial real estate (Sec. 578 BGB):

If the duration of a rental agreement is for more than one year it has to be in writing, otherwise it will be deemed to be for an indefinite period (Sec. 550 BGB).

The landlord ipso iure has a lien on the movables the tenant has brought in the property as a security for his outstanding receivables of the rental agreement (Sec. 562 et seq. BGB).

If the owner/landlord sells the property to a third party, the purchaser will automatically enter into the existing rental agreement (Sec. 566 et seq. BGB).

Especially for rental agreements on space, which is no living space, there are provisions concerning the tenant's toleration of renovations, the tenant's right to indemnify the landlord in order to prevent the removal of objects which the tenant put on the property, and the right of termination without notice for disturbance of the sanctity of the home (Sec. 552 para.1, 554 para.1-4, 569 para.2 BGB).

If the rental agreement is on space which - without being living space - is destined for people to stay in, there is also a right of termination without notice due to health risks (Sec. 569 para.1 BGB).

25. *Are there any formalities to fulfil in order to enforce the lease agreement towards third parties?*

A tenant has the contractual right to possess the rental object. This right does not require any kind of official registration.

A.3 Environmental issues:

26. For what types of activities is an environmental permit required?

In order to prevent environmental damages, many projects are subject to a preliminary control. Some of these controls are special examinations in connection with protected biota, bodies of water, soil, immissions etc. However, many projects which put the environment at risk also require administrative planning and control for other reasons. Thus, the environmental control is often included in the approval procedure of different administrative areas. E.g., there is a mandatory control of

environmental aspects for the creation of each development plan. There are many aspects which might make certain projects or systems subject to authorization - with the authorization procedures being classified according to the hazardousness of the project. Also, since Germany is a federal state, there might be variations in the legislation of the different Länder.

When talking about environmentally damaging industrial sites or business enterprises the authorization procedure will be made according to the German Federal Pollution Control Act (Bundesimmissionsschutzgesetz - BImSchG). The competent agency delegates each request to all the other agencies whose field of responsibility is affected and which make their analyses of the request. Thus the different procedures are bundled in one process. Depending on the classification of the examined project there is a formal (with participation of the public) and a simplified process available.

27. Can you describe briefly this procedure? How much time will this procedure normally take?

The procedure includes the following examinations:

protection of the environment and the public at large against hazardous impacts or other dangers as well as serious disadvantages or inconveniences

securing the necessary precaution measures against the dangers mentioned above

orderly removal of waste material or - if possible - its avoidance or recycling

efficient and economical use of energy

other administrative regulations (examined by third agencies) such as laws on nature conservation, water, building, or occupational health and safety.

The Federal law on protection against immissions demands different time limits for the authorization procedures:

7 months for newly authorized systems in the formal procedure

3 months for newly authorized systems in the simplified procedure

6 months for alternations of authorizations in the formal procedure

3 months for alternations of authorizations in the simplified procedure

It is possible to prolong these time limits for another three months, but the decision has to be justified to the applicant.

A.4 Employment:

28. Are there any specific regulations with regard to outsourcing of employees?

    There is a provision in the BGB regulating outsourcing of business units or parts of business units (Sec. 613a BGB):

    If the old employer sells a business unit or a distinct part of it, the purchaser will have to take over the employees with their original employment contracts. The same applies to collective labour agreements (for at least one year), unless the character of the new employment is subject to another collective labour agreement. Both the former and the new employer are liable for the employees' claims which accrue before and become due no longer than one year after the purchase. (If they become due after the outsourcing, the former employer's liability is reduced to the part of the claim which accrued before the outsourcing.)

    Outsourcing is not a proper argument for dismissals. If an employer lays off an employee by giving the outsourcing of a business as the reason, the dismissal will not be valid. The former or the new employers have vast disclosure obligations. They have to inform the employee in writing about the (estimated) date of the outsourcing, the reasons, the legal, economic and social impact, and the intended measures concerning the employees. The employee has the right to object to the transition of his/her employment contract within one month after reception of the disclosure document. The main practical difficulty in applying this statutory provision (Sec. 613a BGB) is to determine whether the concept of "outsourcing" of a business unit or part of it actually applies to a given situation. According to jurisprudence, there must be a transition of a considerable amount of production means and/or skilled workforce, know-how, clientele, in order to prevent this provision from being applicable for all layoffs due to minor restructurings.

29. Applicable legislation according to the type of employment (differences between employment by local company or by head office for the local branch)

In principle, it does not make any difference whether an employee is hired by the head office or a local company. If an employment contract features a cross-border situation, parties are free to determine what legislation shall be applicable to their contract. In the absence of a determination by the parties, Art. 8 Rome I states that the applicable legislation shall be the one of the state in which, or failing that, from which the employee usually does his/her work or - in case the applicable law is not determinable by this means - the country where the branch office which employed him/her is situated. However, if the contract has a closer connection to another country, the law of the other country shall apply. If the parties choose the applicable law this may not deprive the employee of the mandatory protection he/she would have had under the law which would be applicable in the absence of an explicit choice of law.

Concerning the social security regulations, German law stipulates that the German regulations on social security insurance (s. below question 31) are also applicable for employees who are seconded to work in another country by their employer provided the occupation in that country is of a limited time. Likewise, the German regulations are inapplicable for employees who were engaged in another country and do temporary work in Germany (Sec. 4, 5 German Social Welfare Act - SGB IV -).

30. *Legal engagement and dismissal requirements and formalities*

There is no special law on the conclusion of employment contracts in Germany. Thus one has recourse to the general provisions on service contracts, cf. Sec. 611 et seq. BGB):

The contract can be closed orally or in writing. If the parties did not negotiate the remuneration, an adequate payment is deemed to be agreed upon.

The employee is entitled to paid holidays of at least 24 working days (all days except Sundays and public holidays).

In business units with at least five permanent employees (aged at least 18 years) it is possible to elect a works council. The employer cannot dismiss a member of the works council (Sec. 15 German Protection against Dismissal Act - KSchG -).

In the case of dismissals the applicable notice period is four weeks to the fifteenth or the end of each month. The longer the employment has lasted the longer the termination periods become: after two years of employment one month to the end

of a calendar month, after five years two months after each calendar month, after eight years three months, after ten years four months, after twelve years five months, after fifteen years six months, and after twenty years seven months (Sec. 622 para. 2 BGB). A termination notice must be given in writing. The employer must also give a reason for the dismissal which can either lie in the employee's person, in his/her behaviour, or in an urgent operational necessity. In the latter case the employer is obliged to make a careful choice among his/her employees taking into consideration the following factors: job tenure, age, obligations to support, severe disabilities (Sec. 1 para. 3 KSchG). If the employee is laid off for reasons of urgent operational necessity and does not bring the matter before the court, he/she will be entitled to a compensation of one half of his monthly income per year of employment (Sec. 1a KSchG).

A dismissal without notice requires an important reason, a careful consideration of all factors, and a special contemplation of the particular case. It must be effectuated within the first two weeks after the reason became known to the employer (Sec. 626 BGB).

If the company has a works council, the employer has to hear the works council in case of any kind of dismissal. If the employer does not abide by this obligation, the dismissal can be challenged before the labour court and be declared without effect. The works council can communicate its concerns to the employer and under certain circumstances even object against the dismissal. For the employer, this can lead to an obligation to keep the dismissed person as a regular employee until the labor court's final judgement (Sec. 102 German Works Constitution Act - BetrVG -).

The modalities of the employee's termination of the contract are mainly left to the parties. However, the notice period to be observed by the employee may under no circumstances be longer than the one for the employer (Sec. 622 para. 6 BGB).

31. *Social security regulations*

In Germany, there is a mandatory social security insurance for employees (Sec. 3 No. 1, 7 SGB IV). The employer has to notify the collection agency for health, nursing, and pension insurances of all changes as to the employment contract or the employee's social status (Sec. 28a SGB IV). The employer has to withhold the insurance contributions and pay them to the collection agency (Sec. 28d SGB IV).

Concerning the obligatory health insurance Sec. 5 et seq. SGB V determine the upper and lower limit for compulsory insurance deductions (taxable wage base). Generally, the lower limit is an income of not more than 400 € per month, the higher limit is annually adapted by the Federal Government and amounts in 2012 yearly income of more than 50.850 € (Sec. 7 SGB V, Sec. 8 SGB IV, Sec. 6 SGB V). Employees are entitled to sickness benefits when their illness renders them incapable of working or when they are treated as an in-patient in a hospital or rehabilitation centre at the expenses of the insurer (Sec. 44 SGB V).

Employees are entitled to old-age pensions at the age of 67 and after completion of the qualifying period of at least 5 calendar years. They can also claim pensions at the age of 63 and after completion of a qualifying period of at least 35 calendar years. Severely handicapped employees are entitled to pensions at the age of 65 and after 35 years. (Sec. 35 et seq. SGB VI) Employees can also ask from their employer to discuss their options concerning a limitation of job performance combined with a fractional claiming of pensions (Sec. 42 SGB VI).

Furthermore, there is a mandatory accident insurance with the insured event being occupational accidents and illnesses (Sec. 7 SGB VII). The insurer enacts regulations on accident prevention and provides for the necessary staff training, the employer is obliged to execute these measures and to appoint an in-plant safety officer (Sec. 21 - 23 SGB VII).

Employers are obliged to employ severely handicapped people. If the number of employees equals a monthly average of 20 or higher, the employer must engage at least five per cent of disabled people (Sec. 71 SGB IX); failing this he has to pay a compensation charge (Sec. 77 SGB IX). The employer's duties in the context of and towards handicapped employees are too vast to give a comprehensive presentation here.

Annex

Translations of the used German and European acts in alphabetical order:

AktG	German Stock Corporation Law
BBodSchG	German Federal Soil Protection Act
BetrVG	German Works Constitution Act
BGB	German Civil Code
BImSchG	German Federal Pollution Control Act
GmbHG	German Limited Liability Companies Act
HGB	German Commercial Code
KSchG	German Protection against Dismissal Act
Rome I	Regulation (EC) No 593/2008 of the European Parliament and of the council on the law applicable to contractual obligations
SGB	German Social Welfare Act (I – X)
ZPO	German Code of Civil Procedure

Part V Comments on Tax Law in Germany

The reputation of Germany's tax law is worse than reality even though German tax law definitely is rather complex. Consequently, the following comments may just give a short overview. As always in tax law there are more exceptions to the rules than rules as such.

In the last years the Government tried to promote Germany as a better marketplace, for example by reducing the corporate tax from 50% in 1993 to 15% since 2008.

32. Income Tax (Einkommenssteuer)

For 2011 a taxable income of less than € 8,004 is tax-free for a single person (for a married couple always the double of it)). Incomes up to € 52,881 for a single person are then taxed with a rate progressively increasing from 14% to 42%. Incomes from € 52,882 up to €250,730 are taxed at 42%. Amounts over those are taxed at 45%. In addition to this there is the "solidarity surcharge" of 5.5% of the tax, to cover the costs of integrating the states of the former East Germany. Additionally, businesses

not organised as a limited liability company very often must pay a local business tax (Trade Tax) amount depending on local cities (average 14%). As in many other countries, Germany allows a variety of deductions that can lower taxable income.

The German income tax differs between permanent residents and non-residents. Whereas residents have more possibilities of certain deductions, and the choice of a combined income for spouses. Especially the last tax benefit will not be applicable for non-residents. Non-residents do not qualify for many deductions.

The personal income tax of every shareholder by a partnership, i.e. a company with no limited liability (including Kommanditgesellschaft (KG), Gesellschaft bürgerlichen Rechts (GbR), Partnerschaftsgesellschaft, offene Handelsgesellschaft (OHG)), is applied on the personal profit of the individual shareholder.

In general, in the case of a non-resident shareholder, the profit of the partnership will be taxed as income of a non-permanent resident in Germany. Double Tax Treaties can have different regulations.

33. Corporate Tax (Körperschaftssteuer)

Corporate tax is charged first and foremost on corporate enterprises, in particular public and private limited companies, as well as other corporations such as e.g. cooperatives, associations and foundations. Such corporations domiciled or managed in Germany are deemed to have full corporate tax liability. This means that their domestic and foreign earnings are all taxable in Germany. Sole proprietorships and partnerships are not subject to corporation tax: profits earned by these set-ups are attributed to their individual partners and then taxed in the context of their personal income tax bills (cf. above).

The corporate tax charged in Germany is 15% (flat rate tax). Additionally the corporation must pay a solidarity surcharge as well as a local business tax (Trade tax) the amount of which differs locally (average 14%).

Under most Double Tax Treaties the home country has the right of taxation. However, the residene state of the corporation has the right to apply a withholding tax (§ 10 Abs. 2 OECD MA). The withholding tax is limited to an amount of 5%, 10% or 15%

(depending on the Double Tax treaty) of the dividend. This is a privilege compared to resident tax payers who are subject to the capital gain tax of 25% plus solidarity surcharge. If there is no Double Taxation Treaty, Germany has the right of taxation. Dividends are qualified as domestic income, § 49 Abs. 1 Nr. 5 EStG (Income Tax Act) and the shareholder is subject to the Capital Gain Tax of 25% plus solidarity surcharge. This withholding tax is paid by the domestic corporation to the German tax office. If the home state of the foreign shareholder raises taxes as well, the double taxation is avoided normally by the tax credit method.

There is one speciality regarding holding or umbrella companies. In the case of a Double Tax Treaty, or within the EU (Mother-Daughter-Directive 90/435/EC of 23.7.1990) the dividends of 100% daughter companies normally are tax free. Under § 50d sec 3 EStG the German authorities implemented an anti-misuse-clause. Therefore, the holding or umbrella company must prove an own business activity other than simply holding shares. Otherwise, the dividend is taxed with 25%.

34. *VAT (Value-Added Tax) (Umsatzsteuer)*

Companies must add value added tax (VAT) to their prices. Thus, VAT is only paid by the end user of a product or service. Companies transfer the VAT received to the tax authorities on a monthly, quarterly, or annual basis. The frequency generally depends on the level of company turnover. The normal VAT rate of 19 % is just below the European average. A reduced rate of 7 % applies to certain consumer goods and everyday services (such as food, newspapers, local public transport and hotel stays (but not the breakfast). Some services (such as bank and health services or community work) are VAT exempt. On purchasing goods or making use of services, companies regularly have to pay VAT themselves. The taxes collected and paid can be balanced out in the input tax deduction (Vorsteuerabzug). For companies, value-added tax represents a transitory item only.

Trade within the EU is free from customs and other restrictions. However, goods traded between different EU member states are subject to a so-called acquisition tax (Erwerbssteuer) and a reverse charge procedures may be applicable. For trading within the EU a business in Germany must apply for a VAT identification number and has to file a special tax return..

Also with respect to certain services reverse charge procedures are applicable, e.g. certain construction works. House cleaning, sale of discarded metal .

35. *Real Estate Transfer Tax*

Transfers of real property are taxable. Under law, the vendee and the vendor are joint and several debtors of the tax. Normally, the vendee will be contractually obliged to pay the tax. The tax rate is defined by the individual German Federal States. The tax rate differs from 3,5% – 5% of the purchase price depending on the individual state.

Capital Transfer Tax

Inheritance tax and gift tax are regulated in one law. Taxable is either a transfer by reason of death or a gift amongst livings. Depreciations may be applicable, e.g. for [multi-]family houses, family members as well and for entrepreneurs (up to 100%). The tax rate ranges from 7% up to 50%.

Urs Breitsprecher, Rechtsanwalt & Solicitor, Busekist Winter & Partner

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EUROJURIS INTERNATIONAL BUSINESS GROUP:

who we are

Eurojuris International

Eurojuris was formed in the late 1980s with the objective of providing clients with access to legal advice and representation from local lawyers throughout Europe and worldwide.

Eurojuris is now the leading network of law firms in Europe and worldwide with over 600 member firms and approximately 5000 lawyers. In addition Eurojuris can, through its correspondent firms, provide access to local firms in many other countries throughout the world. Members and correspondents are always well established medium sized independent law firms satisfying the Eurojuris criteria.

Eurojuris aims to provide more than just a reliable directory of legal firms. A permanent headquarters with full time staff to manage the organisation was created in 1993 and its responsibilities include co-ordinating numerous national activities, publishing brochures, newsletters and guides, organizing meetings and congresses, promoting specialist groups and setting up an organisation to provide cohesion among different legal systems and business cultures.

The Eurojuris commitment to quality is paramount and is maintained by ensuring that management procedures and work methods are tailored to match the client needs and are dynamic and open to constant improvement. It is also essential that all Eurojuris International members understand and implement approved work methods and that regular internal and external control procedures are reviewed on a systematic basis.

Eurojuris International Business Group

The Eurojuris International Business Group (Eurojuris IBG) is one of a number of the Eurojuris practice groups. Eurojuris IBG is a proactive, business generating group that was formed to enable a small group of Eurojuris members to focus on the needs of business clients. Members of the Eurojuris IBG are experienced in their practice areas and leaders in the international legal and business community.

Eurojuris IBG members aim to provide a Partner level service to clients and, through close co-operation with European colleagues, to provide a consistent and seamless service.

Eurojuris IBG aims to offer a uniform presentation and mutual legal education schemes with common practices and to develop common services for the clients of member firms.

As more and more businesses find that improved communication and access opens the way to more international trade, the need for legal representation throughout a number of jurisdictions becomes essential. Eurojuris IBG provides access to expert local knowledge through a lawyer in the jurisdiction of the client's head office.

The members of Eurojuris IBG maintain close levels of co-operation and knowledge of each other's firms. This is achieved not only via the usual media of email, fax and telephone, but also through regular meetings, some of which take place in the offices of the member firms to enable members to understand the way in which they can better serve their client's needs.

The members of Eurojuris IBG fulfill very strict criteria: they are business minded, they work with business clients across Europe and overseas, they all work in the English language and have some knowledge of other European languages. Importantly they are equipped with the most up to date information technology systems and maintain substantial Professional Indemnity Insurance.

How to expand your business across borders

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