



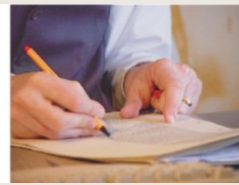
Key aspects of German Corporate Law, forms of business organisations and liability

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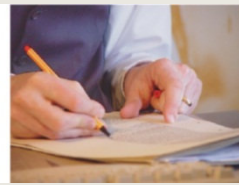
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Content

- Introduction
- Doing business
- Business forms
- Liability





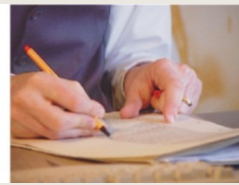
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The German Law legal system

- the German legal system belongs to the central European family of legal systems, broadly classified as **civil law countries**
- one of the basic features: as the core of the legal system five codes, including civil law in the Roman law definition, criminal law, civil procedural law, criminal procedural law and commercial law
- German law is to this day profoundly shaped by
 - the reception of the Roman law
 - the idea of codification and systematisation





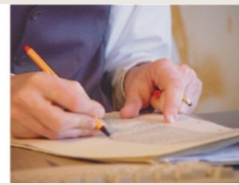
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Sources of law

- Constitution (Grundgesetz) = ultimate source
 - acts are void if they conflict with the constitution
- different Acts
 - HGB (Commercial Code)
 - GmbHG (Limited Liability Companies Act)
 - AktienG (Stock Corporation Law)
 - BGB (Civil Code)
 - InsO (Insolvency Act)
 - UmwG (Law Regulating Transformation of Companies)
- EU law
 - Treaty
 - Directives
 - Regulations





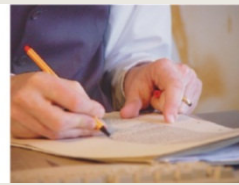
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Basic principle

- there is almost no government guidance of business
- there are restrictions and prohibitions designed to protect business interests and to prevent abuses
 - Unfair Competition Act
 - regulations prohibiting unfair advertising
 - Antitrust and anti-cartel provisions





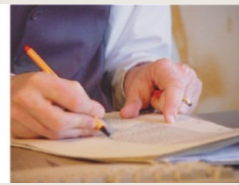
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German court system (with regard to corporate law)

- decentralised
- divided into a number of different streams, each specialising in its own field of law
- separate courts
 - commercial (civil justice)
 - labour law
 - tax
 - at the head of each stream is a single, federal supreme court (3 levels of jurisdiction, tax 2)
- Constitutional Court in Karlsruhe
 - the judgments are binding on all other courts





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Ways of doing business in Germany

Direct sales or services from abroad

- to customers
- to retailers and clients

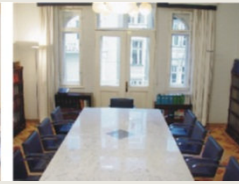
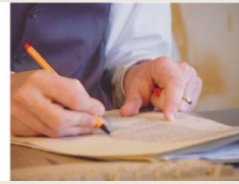
Sales via distribution intermediaries or agents in Germany

- commercial agents
- authorized dealers

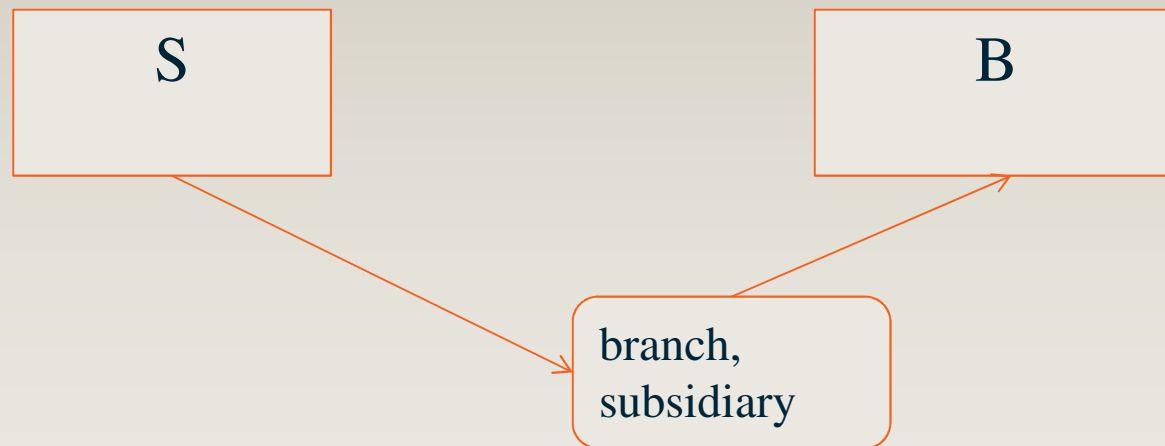
Business with own presence in Germany

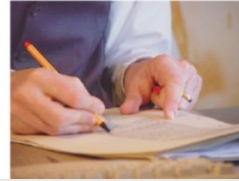
- establishment of
branch
subsidiary
- acquisition of existing company





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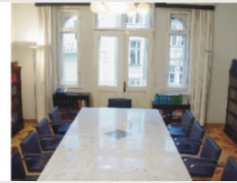
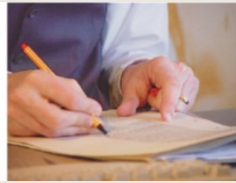
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Sales and Services

- companies (non-consumers)
 - no restrictions with respect to choice of
 - of forum (jurisdiction)
 - applicable law
- consumers
 - German courts may have exclusive competence for most actions
 - Special protection
 - consumers cannot be deprived from protection granted by mandatory provisions of German law





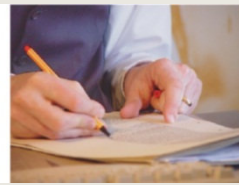
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Do you need a presence in Germany?

- direct employee of the parent company
- can be more effective to employ an agent or distributor with local knowledge
- types of relationship
 - Agent - generates or enters into agreement with customer on behalf of the supplier
 - Distributor - is an independent party which buys your product and sells them on its own account





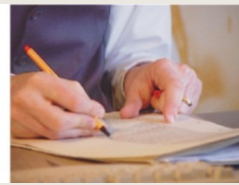
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Commercial Agent

- independent self-employed contractor
- formalities: no written agreement required (but advisable)
- German law applies, unless otherwise agreed
 - commercial agency law has been harmonized in the EU
 - agent in Germany cannot be deprived of compensation claim at termination of contract
- Principal may define scope of duties of commercial agent and can give instructions, but should not impair commercial agent's independence
 - if so: agent may be regarded as employee
- Post-contractual non-compete obligation
 - legally valid, if
 - made in writing
 - it provides for reasonable compensation
 - only for a reasonable period (2 years)





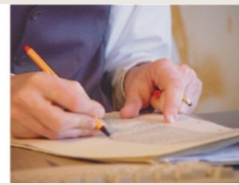
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Distributor/ Authorized Dealer

- independent contractor
- buying manufacturer's goods and selling them in defined territory
- formalities: no written agreement required
- German law applies, unless not otherwise agreed
- no harmonization of relevant laws in the EU
- exclusivity may be critical under EU anti-trust law
- provisions for commercial agents apply by way of analogy





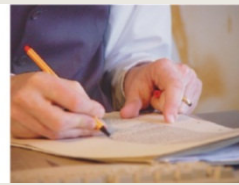
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Why use an Agent?

- greater control
- more choice over who they sell to and prices
- risks to impose such controls in distribution agreements (anti-trust law)
- agents are in general paid less commission





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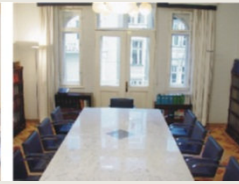
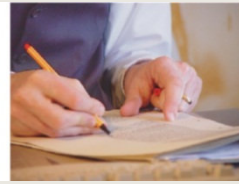


Agreements

Key Topics:

- Exclusivity
- Territory
- Term and termination
- Agent's authority
- Commission/payment terms
- Consequences of termination





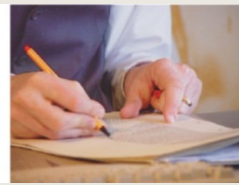
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Establishment

- permanent establishment
 - e.g. a contact office (informal presence)
- branch
 - an extension of the parent, but which conducts business in the name of the parent
 - registered in the commercial register
- subsidiary company
 - separate legal entity from its parent company (fully owned and controlled by the parent)





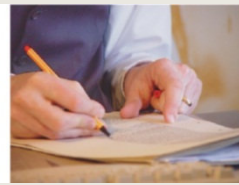
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Branch

- registration: the local court (commercial register) for the area in which the branch is located
- no formal minimum capital or other requirements (except for branches subject to specific industry supervision)
- one or more local branch managers must be appointed
- can be managed by foreign managing directors
- no separate legal entity from its foreign parent company
 - the parent company bears ultimate legal liability for all liabilities and obligations of the branch
- employment contracts with employees working in Germany might be subject to mandatory provisions of German labour law
 - contributions to social security system





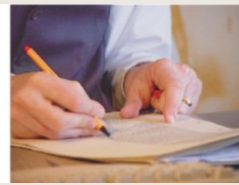
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Factors to be considered

- ▶ control
- ▶ liability issues
- ▶ practicalities
- ▶ tax matters
- ▶ formalities of establishment
- ▶ costs for the establishment and length of time
- ▶ on-going obligations (auditing)
- ▶ labour law matters





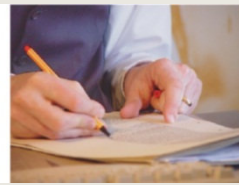
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Control

- **Subsidiary**
this is a separate entity controlled by its board of directors
- **Branch**
this is an extension of the company and is therefore directly controlled by the company





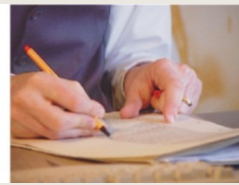
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Liability

- subsidiary
 - shareholders in general not liable for acts of the subsidiary company
 - liability limited to the share capital of the subsidiary
 - directors may be personally liable
- branch
 - no legal entity: shareholders (parent) are fully liable
 - the directors of the parent are in general responsible for ensuring local law compliance

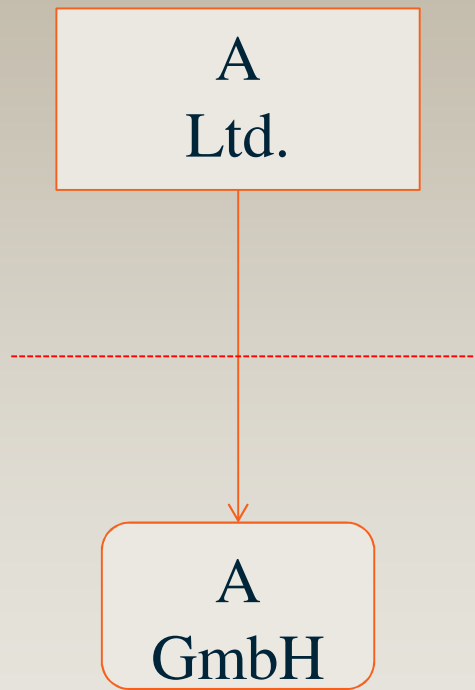




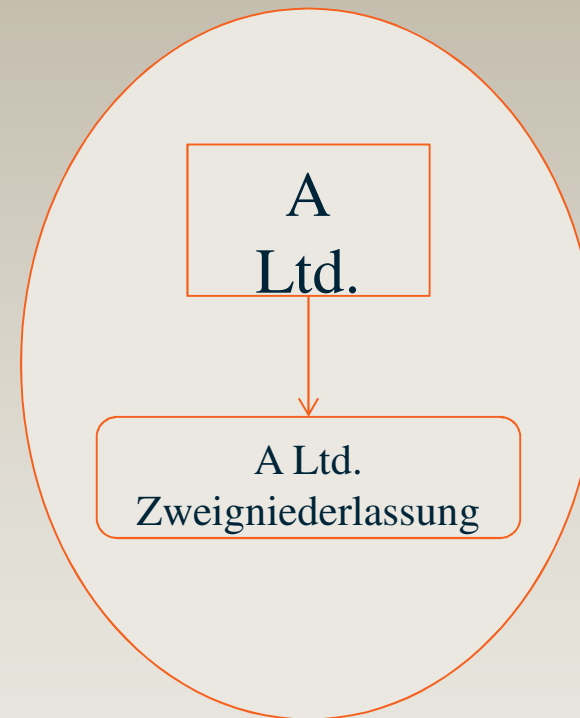
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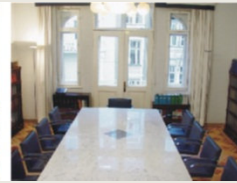
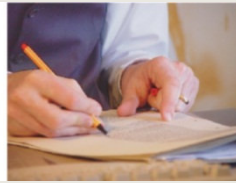


Subsidiary



Branch





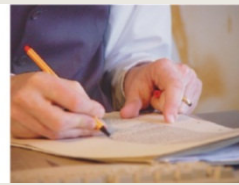
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Practical matters

- a subsidiary is regarded as a more substantial presence - helpful for:
 - a bank account in Germany
 - obtaining a lease/ leasing contract for cars
 - attracting staff
 - entering into commercial agreements





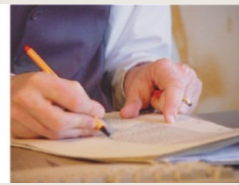
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Overview of business forms available

- corporations
 - legally independent entities
 - corporate veil: in general no liability of shareholders
 - forms:
 - GmbH (Gesellschaft mit beschränkter Haftung)
 - limited liability company
 - UG (Unternehmergesellschaft)
 - “GmbH light”
 - AG (Aktiengesellschaft)
 - stock corporation
 - SE (Societas Europaea)
 - stock corporation with links to at least two EU Member States





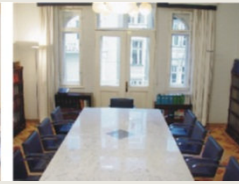
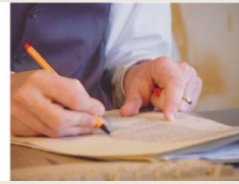
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- Partnerships (Personengesellschaften)

- no independent legal entities (but in many respects treated like a corporation: it can acquire rights and assume obligations in its own name, take up ownership and other rights)
- in general full liability of partners
- forms:
 - GbR (Gesellschaft bürgerlichen Rechts)
 - Civil Code partnership
 - Partnerschaft
 - characteristics of general and a limited partnership
 - OHG (Offene Handelsgesellschaft)
 - general partnership
 - KG (Kommanditgesellschaft)
 - limited partnership
 - only one partner must be fully liable
 - GmbH & Co. KG
 - like KG
 - partner with full liability is a limited liability company



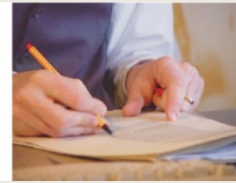


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- the European economic interest grouping (Europäische Wirtschaftsinteressen-Vereinigung - EWIV) is not a separate legal form in Germany
- it is equal to a general partnership (OHG)





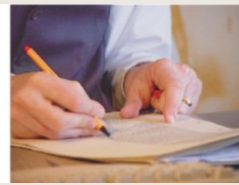
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GmbH (Gesellschaft mit beschränkter Haftung)

- most popular legal form
 - combines high flexibility with relatively few obligations
 - designed for private businesses with clear and stable shareholder structure
- must have at least one shareholder
- minimum share capital: 25,000.00 EUR
- articles of association: notarized
- one or more directors
- supervisory board not mandatory (only if there are more than 500 employees (Drittelbeteiligungsgesetz))
- registration in the Commercial Register (the company comes into existence)





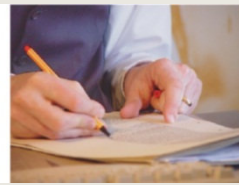
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Aktiengesellschaft (stock corporation)

- articles of association need to be officially notarised by a public notary
- the minimum subscribed capital is EUR 50.000,00,
- amount of members is at least one or more
- members may be individuals or companies
- Liability for a shareholder is restricted to the equity capital subscribed by that member
- AG is managed by one or more directors
- dual system of corporate governance: **executive board** (Vorstand), appointed by a **supervisory board**



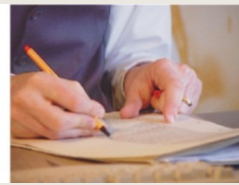


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- the board (Vorstand), take decisions collectively and record their meetings in board minutes
- shareholders have no direct rights of influence, management, or information over the company



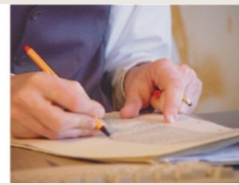


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- the major distinctions
 - the shares of an AG may be publicly traded on a stock exchange
 - a GmbH does not issue share certificates and its shares are not freely transferable
 - AG's formation and shareholders meeting procedures are more cumbersome
 - the GmbH will usually be chosen for simplicity
 - minimum share capital
 - supervisory board
 - direct influence of shareholders of a GmbH





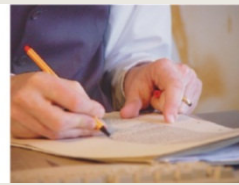
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Recognition of foreign companies

- transfer of seat of a foreign company to Germany
- incorporation theory <-> real seat theory
- conflict of law: which law is applicable
 - real seat: the law of the state in which the seat is
 - incorporation: internal affairs governed by the laws of the state in which the company was formally incorporated
- Real seat theory does not recognize a foreign company as a legal entity (consequence: no limited liability)
- ECJ: freedom of establishment: corporate existence and administration is governed by the law of the state in which the company was incorporated





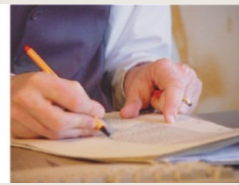
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Trade Register

- each entity carrying on a trade or business in Germany must register with the local trade register
- branches in other towns must also be registered if the branch trades independently
- a German subsidiary must be registered in at least one trade register
- the trade registers are open to public inspection
- the Federal Gazette maintains a database of registered businesses (www.unternehmensregister.de)
- financial statements (annual reports) of companies are also filed with the Federal Gazette



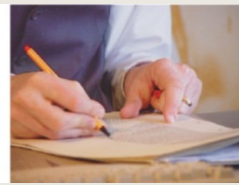


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- banks and other financial services institutions, insurance companies, stockbrokers and asset managers are subject to close supervision by the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht or BaFin)





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Duties of Directors under German Law

General obligations

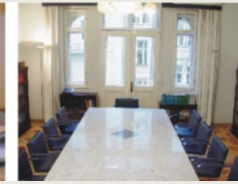
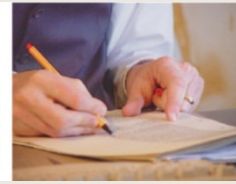
- duty to comply with the laws
- duty to comply with the articles of association, shareholders' resolution
- duty of care: „*the diligence of a prudent and conscientious businessman*“
- duty of loyalty

Business Judgment Rule

Directors shall not be deemed to have violated duty of care if

- entrepreneurial decision,
- good reason to assume that they were acting on the basis of adequate information
- for the benefit of the company
- without any conflicts of interest





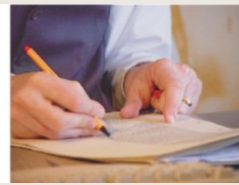
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Compliance

- the “Code of Corporate Governance”
 - corporate management boards are held to a semi-voluntary code of conduct and disclosure
 - it does not have direct statutory force
 - although all publicly quoted companies must disclose any instances where they have not followed its recommendations





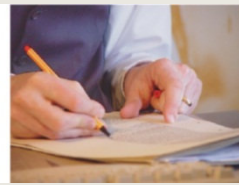
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Personal liability

- delayed filing of insolvency
- § 266 a StGB (*withholding of social security contributions*)
- §§ 69 S. 1, 34 Abs. 1 AO (tax)
- §§ 283-283 d of the Criminal Code („StGB“)
(*bankruptcy crimes*)
- § 82 GmbHG (*false statements*)
- § 266 StGB (*disloyalty*)





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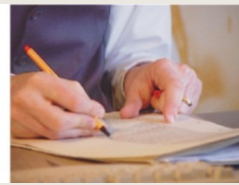


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