CONTENTS

I. Corporate, Finance
AugustinPartners LLC
Choices of Business Entity ..................... 03

Ernst & Linder LLC
Der „Verkauf“ notleidender Forderungen gegen US Schuldner als unternehmerische Option ..................... 06

Noerr LLP
Recent Decisions by German Courts Bring Clarity to Use of Shelf-Companies – a Checklist for US-Investors ..................... 08

WeiserMazars LLP
Transfer Pricing for Small and Medium Sized Companies ................ 10

Wuersch & Gering LLP
FBAR Reporting Based on Signature Authority ..................... 12

II. Energy, Environmental & Land Development
Chadbourne & Parke LLP
Demand-Side Energy Management in the United States – What it means for the German Smart Grid and its Energy Economy ..................... 14

III. Intellectual Property
Vonnemann Kloiber & Kollegen
The holder of the exclusive copyright in computer programs cannot oppose the resale of his “used” licenses allowing the use of his programs downloaded from the internet ..................... 16

IV. Litigation and Arbitration
Sidney N. Weiss
Should You Insist On A Compulsory Arbitration Clause In Commercial Contracts? ..................... 18

V. Tax
Deloitte Tax LLP
Dividend Withholding Tax to a U.S. S-Corporation under the 2006 Germany-U.S. Double Tax Treaty ..................... 20

Dr. Grewe & Partner LLP
Neues Steuerverfahren zur freiwilligen Selbstanzeige – Ein neues Trojanisches Pferd? ..................... 22

Hodgson Russ LLP
Foreign Entities Doing Business in The U.S. Should Become Familiar with the State Tax Environment ..................... 24

VI. Others
Nietzer & Häusler
Foreign Corrupt Practices Act: Haftungsrisiken auch für deutsche Unternehmen ..................... 26

Phillips Nizer LLP
AGB ohne AGB Gesetz – Versteckte Gefahren in US Terms and Conditions of Sale ..................... 28

v. Einem & Partner
New Requirements for Electronic Commerce in Germany ..................... 31
Choices of Business Entity

When starting a new business, one of the most important decisions involves choosing the “right” form of business. The most popular options are sole proprietorship, partnership, Limited Liability Company, C-Corporation, and S-Corporation. Not all business entities are alike; therefore it is essential have a basic understanding of the legal and tax implications in setting up a new business.

Sole Proprietorship
You may already be operating a sole proprietorship without even knowing it! It is the simplest form of business – single direct ownership. The single owner is responsible for all aspect of business. Income or loss derived from such business must be reported directly on individual's income tax return, Form 1040, Schedule C “Profit or Loss from Business.” In addition, business net income is subject to self-employment taxes which include Social Security and Medicare taxes.

- Advantages
  - Easy to form & to discontinue
  - Minimum legal restrictions
- Disadvantages
  - Personal liability for business debts
  - Lack of business continuity

Partnership
A partnership is an association of two or more persons who organize as co-owners (known as “partners”) to carry on a business for profit. Such persons can be individuals, other partnerships, corporations, and other associations.

For tax purposes, the partnership is considered to be a “pass-through” entity and reports the income and losses from its operation on an informational tax return, Form 1065, “U.S. Return of Partnership Income.” The partnership itself does not pay income tax and such income and losses “pass through” the partners, who must include their share of the partnership's income or loss on their individual tax return. In addition, partners are considered self-employed individuals and must pay self-employment taxes.

- Advantages
  - Easy to form
  - Wider pool of knowledge, skills and funds
  - Tax advantage – one level of taxation
Choices of Business Entity

- Disadvantages
  - Unlimited personal liability for the general partners
  - Partnership tax rules are very complicated
  - Sharing profits with other partners
  - Limited life span

Limited Liability Company ("LLC")

The LLC is another legal form of business that is a hybrid of the features of a partnership and corporation. Like a partnership, all of its profit and losses “pass through” to the owners of the LLC (known as “members”). An LLC is similar to a corporation in that the members have limited liability for the debts incurred.

By default, for federal tax purposes, an LLC with a single member is treated as a sole proprietorship while an LLC with two or more members is treated as a partnership.

- Advantages
  - Limited liability for the members
  - Special allocation of profits allowed
  - Tax advantage – one level of taxation

- Disadvantages
  - Inconsistent treatment from state to state
  - Sharing profits with other members

However, an LLC may elect to be taxed as a corporation by making the so-called “check-the-box” election on Form 8832, “Entity Classification Election.”

C-Corporation

A C-Corporation is an entity created by state law that is separate and distinct from its owners, the shareholders, who in turn elect the board of directors. A C-Corporation is formed through the issuance of stock or securities and is established with the state authorities and must abide by the corporate law in the state of incorporation.

A C-Corporation files an annual tax return, Form 1120, “U.S. Corporation Income Tax Return”, and pays taxes at the corporate level on any taxable profit, after deducting its business expense from its revenue. In addition, the shareholders are taxed again on the dividends they receive from those earnings. This is commonly known as “double taxation.”

- Advantages
  - Limited liability toward business debts and lawsuits
  - Easy transfer of ownership
Choices of Business Entity

- Option of having a fiscal year
- Unlimited number of shareholders
- Perpetual life

- Disadvantages
  - Double taxation of profits
  - More expensive
  - Difficult to set up and terminate

S-Corporation
Shareholders of a qualifying C-Corporation may elect to be treated as an S-Corporation by filing Form 2553, “Election by a Small Business Corporation.” There are certain restrictions; for example, an S-Corporation may not have more than 100 shareholders and corporations and nonresident aliens may not be shareholders. The income and losses of an S-Corporation pass through to their shareholders for federal tax purposes just like in a partnership.

Which is best for you?
There is no easy answer. Selecting the right type of business entity is based on facts and circumstances. You should consider getting professional advice from a legal and accounting perspective to avoid any pitfalls when starting a business.
Der „Verkauf“ notleidender Forderungen gegen US Schuldner als unternehmerische Option


Wenn die Verbindlichkeiten eines Unternehmens die Summe seiner Werte übersteigen, hat ein Unternehmen die Möglichkeit dies nach Chapter 7 oder 11 des US Bankruptcy Code dem Federal Bankruptcy Court zu melden.


Im Falle eines Chapter 11 Verfahrens werden Gläubiger oftmals von Unternehmen kontaktiert, die anbieten die Insolvenzforderung gegen einen Abschlag, dessen Höhe von den Erfolgsaussichten der Reorganisation abhängt, zu kaufen. Während dies im Vergleich zur eigenen Verfolgung des Anspruchs zunächst sofortige Liquidität, die unmittelbare Erhöhung des Eigenkapitals sowie die Möglichkeit der Entlastung der Buchhaltung für den Gläubiger bietet, sind solche Angebote gründlich zu prüfen und es empfiehlt sich einen Experten in die Entscheidungsfindung einzubeziehen.

Zunächst ist zu unterscheiden, ob es sich bei dem Angebot um echtes Factoring, das heißt einen endgültigen Forderungskauf handelt, bei dem der Käufer (Faktor) das Risiko der Zahlungsunfähigkeit des Schuldners übernimmt.

Überwiegend handelt es sich bei solchen Angeboten in den USA jedoch um sogenanntes unechtes Factoring, das heißt um eine Abtretung erfüllungshalber. Der Faktor verlangt üblicherweise die Unterzeichnung und Annahme des vorgelegten Angebotes,
bevor der Gläubiger Gelegenheit hat ein wichtiges und meist nicht verhandelbares Dokument, das sogenannte Claim Assignment Agreement, welches weitere Rechte und Pflichten des Gläubigers regelt, zu prüfen. Der vereinbarte Betrag wird zeitnah, oftmals 7 bis 10 Tage nach Unterzeichnung des Claim Purchase Agreements per Scheck oder Überweisung an den Gläubiger ausgekehrt.

Ob der Verkauf der Insolvenzforderung für einen Gläubiger Sinn macht, hängt von den Umständen des Einzelfalles ab und die Angebote sollten genau geprüft werden, da es entscheidend auf das „Kleingedruckte“ ankommt. Oftmals kann der Faktor bei dem Forderungsverkäufer Rückgriff nehmen,falls ein Teil der Forderung vom Bankruptcy Court abgelehnt wird oder der Faktor weniger erhält als er für die Forderung bezahlt hat. In solchen Fällen muss der Gläubiger einen Teilbetrag an den Faktor inklusive Zinsen (oftmals im zweistelligen Bereich) ab dem Unterschriftsdatum des Claim Purchase Agreement zurückzahlen. In Anbetracht der möglicherweise langen Verfahrensdauer kann hier ein erheblicher Zinsbetrag anfallen.

Wenn Sie mehr über diese Thema wissen möchten oder weitere Fragen bezüglich Bankruptcy haben, stehen wir Ihnen gerne jederzeit zur Verfügung. Sie können uns erreichen unter: ERNST & LINDER LLC, Dr. Marcus A. Ernst, 212-488-1668, ernst@el-law.com; Steffanie E. Keim, 212-488-1666, keim@el-law.com.
Recent Decisions by German Courts Bring Clarity to Use of Shelf-Companies – a Checklist for US-Investors

Recent decisions by the German Federal Court of Justice and the Higher Regional Court of Düsseldorf bring clarity to the use of limited liability shelf-companies concerning the liability of the new owner for a potential underfunding of the company. To sum up, when reactivating a shelf-company, funding rules applicable to the establishment of a limited liability company apply mutatis mutandis. The ultimate goal is to ensure full funding of the respective company (generally EUR 25,000) at the time it resumes business operations. In case of underfunding the new shareholders of the company are liable for a shortfall between the legally required amount of share capital and the amount actually available to the managing director.

In its decision dated March 3, 2012 the German Federal Court of Justice ruled that the re-activation of a shelf company has to be registered with the competent Commercial Register and at this point availability of the legally required share capital has to be confirmed. The registration requirement provides the Commercial Register with the opportunity to evaluate, whether the original share capital is still available to and at the free disposal of the managing director. The paramount goal is the protection of creditors against the risks of contracting with an underfunded company.

The Federal Court of Justice further clarified that without registration of the reactivation, liability of the new shareholders is determined by a potential under-funding existing at the time of either (1) the factual commencement of business activities or (2) registration of amendments to the company’s articles with the Commercial Register.

In all cases, liability of the new shareholders is limited to the shortfall between actually available and legally required share capital. The Federal Court of Justice expressly confirmed that in cases of underfunding new shareholders cannot be held liable for losses to the share capital incurred after the reactivation. In these cases, no creditor protection is needed, much like the creditors of a newly established company would not be protected against any de-creases of the share capital following the registration of such company.

Adding to the mix is the decision by the Higher Regional Court of Düsseldorf dated July 20, 2012, which confirms that liability cannot be avoided by merely registering the re-activation of a shelf-company. The registration only de-termines the point in time at which a potential shortfall of share capital takes place.

The Federal Court of Justice further emphasized that liability for underfunding is tied to the shares in the company pursuant to Sec. 16 para. 2 of the German Limited Liability Companies Act. As such, any liability would be transferred with the shares to an acquirer,
Recent Decisions by German Courts Bring Clarity to Use of Shelf-Companies – a Checklist for US-Investors

even if the sale and transfer of the shares is effectuated some time after reactivation of the shelf-company. US investors should be aware of this when conducting a legal Due Diligence.

For US investors the following checklist provides initial guidance when coming across a limited liability shelf-company:

- The reactivation of a shelf-company must be registered with the competent Commercial Register.
- Shareholders need to confirm and the Commercial Register will review the availability of the legally required share capital.
- In case of underfunding liability is limited to the shortfall between available and legally required share capital.
- Claims resulting from under-funding in the moment of reactivation are tied to the shares in the company and may therefore be transferred to a new owner, which could then be held liable.
Transfer Pricing for Small and Medium Sized Companies

Rapid expansion in the U.S. market has typically been associated with large businesses in possession of significant resources and capital reserves. However, decreasing communication and transportation costs are increasing the opportunities for small and medium sized businesses to grow internationally, including within the U.S.

Though many different strategies exist for initial entry into the U.S. market, it is common for most U.S. companies to be involved in substantial cross-border transactions, especially with their parent companies. From a tax perspective, the question then becomes how to best evaluate these transactions in order to satisfy tax authorities with regards to intercompany pricing.

The US, as well as many other countries has rules governing the prices charged between related parties for goods, services and use of intangibles with the common goal of determining the fair value of the goods and services, as well as retaining appropriate documentation.

Under US tax law, the cost of exchanged goods and services between related parties have to be valued at an “arm’s length” price. The arm’s length standard establishes that intercompany transactions should be valued in the same manner that it would be had the exchange been between unrelated parties. Yet, companies are not required to use the exact pricing method as with third parties. Rather, these rules require several pricing methods to be tested and documented, in order to determine the most appropriate to apply in a particular case.

In Germany, a similar approach to the arm’s length standard is in place (Fremdvergleichsgrundsatz). Differing from the US approach, German fiscal authorities have adopted a hierarchy of specific methods, from which the company must determine the methodology it will use. Companies operating in both jurisdictions face the problem of choosing a methodology that is accepted by both governments.

Many systems also permit advance agreement between taxpayers and one or more governments regarding mechanisms for setting related party prices to reduce tax uncertainties. These documents, called Advance Pricing Agreements (APA), are arrangements between companies and tax jurisdictions that determine, in advance, the cost of a good or service transferred between the two companies. Obtaining these agreements, however, is a long and costly process and thus often, does not make economic sense. For smaller companies, less costly alternatives, albeit with more tax uncertainties, exist. These include reviews of current intercompany prices, as compared to the US rules of the comparable profits or cost plus methods, as well as other contemporaneous documentation requirements, should the pricing methods be challenged upon audit.
Transfer Pricing for Small and Medium Sized Companies

Small and medium size businesses must now also concern themselves with whether their related party transactions are on an arm's length basis. A company that has cross-border related party transactions can use transfer pricing as an effective tax-planning tool to minimize tax liability and prevent double taxation. However, the entity must also be concerned with the rules governing transfer pricing to ensure compliance, limit risk and avoid steep penalties. It has become critical that a company address this topic at an early stage of U.S. operations in order to avoid future issues.

The authors may be contacted at monica.ranniger@weisermazars.com or christopher.meier@weisermazars.com.

IRS CIRCULAR 230 DISCLOSURE: TO ENSURE COMPLIANCE WITH REQUIREMENTS IMPOSED BY THE IRS, ANY U.S. FEDERAL TAX ADVICE CONTAINED IN THIS COMMUNICATION (INCLUDING ANY ATTACHMENTS) IS NOT INTENDED OR WRITTEN TO BE USED, AND CANNOT BE USED, FOR THE PURPOSE OF (I) AVOIDING PENALTIES UNDER THE INTERNAL REVENUE CODE OR (II) PROMOTING, MARKETING, OR RECOMMENDING TO ANOTHER PARTY ANY TRANSACTION OR MATTER ADDRESSED HEREIN.
FBAR Reporting Based on Signature Authority

Each year a US person is required to file a report on Treasury Form TD F 90-22.1 (“FBAR Report”) for any German or other foreign financial account (“FFA”) in which the US person has a financial interest or over which he or she has “signature or other authority” during that year unless the total value of the assets held in all such accounts does not exceed $10,000 at any time during the year. FFAs include bank accounts; securities accounts; and other financial accounts including mutual funds that issue shares to the general public and insurance or annuity policies with a cash value. An FBAR Report must be received by the Internal Revenue Service on or before June 30 of the calendar year following the year for which the German or other FFA is reported.

While FBAR reporting by US persons with a financial interest in an FFA is conceptually easy to understand, the FBAR reporting requirement for US persons holding signature or other authority over an FFA raises a number of issues and puts a compliance burden on seemingly disinterested parties. This requirement applies only to individuals. An individual is deemed to have such authority over an FFA if the individual can control the disposition of money or other property in the account by direct communication to the person with whom the account is maintained. Filing of an FBAR report is required whether such control is exercised in writing or otherwise and whether the individual can exercise this control by himself/herself or needs the consent of other individuals. But an individual without a financial interest in an account does not have to file an FBAR report merely because he or she can participate in decisions involving asset allocations in the account or can supervise others who do have signature or other authority over the account.

There has been controversy about the potential scope of the rule that an officer or employee who has signature authority over FFAs of his or her employer must file an FBAR account for these accounts. Specifically, employees of financial institutions or finance companies within a corporate group could potentially have been faced with a tremendous compliance burden.

As a result, Treasury regulations relating to FBARs provide exceptions for officers and employees of the following entities: (a) US federally-regulated banks; (b) financial institutions registered with the Securities and Exchange Commission (the “SEC”) or the Commodities Futures Trading Commission; (c) SEC-registered companies that provide services for an FFA maintained by a US federally-regulated investment company such as a mutual fund; (d) a US or foreign company traded on a US national securities exchange; (e) a US subsidiary of such a US public company named in its consolidated FBAR report; and (f) a US entity registered under Section 12(g) of the Securities Exchange Act of 1934. There is, however, no relief from FBAR reporting for US employees of privately held companies, or investment managers which are not registered with the SEC, e.g., family
FBAR Reporting Based on Signature Authority

offices, or for US employees of non-US banks or funds operating in the United States.

Being required to file an FBAR report only because of an individual’s signature authority over an FFA can come as a surprise. However, because of the potential consequences of a failure to comply with this requirement, this rule should not be ignored.

Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication was not written to be used and cannot be used for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any tax-related matters addressed herein.
Demand-Side Energy Management in the United States – What it means for the German Smart Grid and its Energy Economy

As Germany continues developing its smart grid, the benefits of Demand-Side Management (“DSM”) policies will grow in importance. DSM is the general term that describes the ways in which consumers of electricity are incorporated into the planning and production of electricity on a day-to-day basis. For the last decade the United States has been utilizing DSM as a key tool in maintaining the reliability of its electrical grid. Specifically, New York State has emerged as a leader in DSM policy.

The European Commission is currently exploring a new directive that would drastically alter DSM regulations within member states. New York’s energy policy considerations provide a valuable reference point to German business operations in anticipation of this regulation.

The Growth of Demand Response

In light of Germany’s commitment to phase-out all nuclear power by 2022 in addition to the renewed feed-in tariff, its economy is faced with the need to more fully develop its diversified energy mix beyond renewables and energy efficiency. The use of DSM tools – specifically demand response – within Germany creates a path to help achieve its energy goals, while also stimulating its economy.

Demand response is the process of enabling electricity consumers of all types (residential, commercial, and industrial) to lower their normal consumption patterns at critical times, usually when wholesale energy prices are at their highest, in order to ensure the reliability of the electrical grid. The use of demand response as a DSM tool requires several things:

• Policies that promote the development of distributed power sources and encourage consumer participation in the electricity market.
• Advanced metering technologies that can record consumer electricity consumption and report it back to electricity service operators.
• An energy market exchange where consumer curtailed or produced electricity can be sold as a wholesale commodity.

The European Commission is currently exploring a directive that would enable member states to create their own demand-response marketplaces in order to enhance the reliability of Europe’s electricity grid. Similar legislation has been passed in the United States and, beginning in 1997, New York State pioneered the use of demand response.
as a demand-side resource. New York enacted regulation that created both day-ahead and real-time markets for electricity, as well and an emergency demand-response and demand-side ancillary services program.

In order to prepare for the creation of these markets, New York established interconnection requirements that standardized the way electricity sources were connected to the electric grid and paved the way for the use of interconnection agreements between the owners of solar PV panels, and electricity system operators. Such agreements provide investment security and enable the creation of energy markets where contracted electricity can be sold.

At present, Germany does not require the use of interconnection agreements, and many residential feed-in tariff participants in fact operate without one. This has created a fracture between the transmission of electricity produced under Germany’s feed-in tariff program and the market conditions needed to take advantage of demand response once European regulation is passed.

Implications for German Business Operations
The effects of demand response as a DSM tool in Germany will be felt most in priority areas adjoining Scandinavia and those surrounding large cities. Key implications may include the following:

• The creation of interconnection agreement requirements for connecting renewable energy to energy marketplaces. This will likely shorten the timeframe associated with current interconnection siting requirements and enhance the appeal of energy-related asset and real estate investments.

• Operations that produce energy technologies will be stimulated by the need for advanced metering products needed to underpin a demand response marketplace.

• Providers of electricity-related goods and services depending on the transmission and distribution of power will become increasingly important as more renewable power comes online and is utilized as a demand response asset.

Preparing for these changes now will be essential in taking full economic advantage of demand response once the necessary regulatory structure is created. What was done in New York over a number of years may offer some instructive examples.
The holder of the exclusive copyright in computer programs cannot oppose the resale of his “used” licenses allowing the use of his programs downloaded from the internet.

In the decision C-128/11 (Used-Soft GmbH / Oracle International Group) of July 3, 2012 concerning the distribution of “used software” the Court of Justice of the European Union (Grand Chamber) ruled:

The right of distribution of a copy of a computer program is exhausted if the copyright holder who has authorised the downloading of that copy from the internet onto a data carrier has also conferred, in return for payment of a fee, a right to use that copy for an unlimited period. The second acquirer of the licence, as well as any subsequent acquirer of it, will be able to rely on the exhaustion of the distribution right and hence be regarded as lawful acquirers of a copy of a computer program.

Oracle develops computer software and is the proprietor of the exclusive user rights under copyright law in those programs. Oracle’s databank software can be downloaded by customers from the internet. The licence agreement includes the right to store a copy of the program permanently on a server and to allow a certain number of users to access it by downloading it to the main memory of their work-station computers. On the basis of a maintenance agreement, updates and patches can be downloaded from Oracle's website.

UsedSoft markets used software licences for the Oracle computer programs. For that purpose UsedSoft acquires from customers of Oracle such user licences. Oracle succeeded in proceedings seeking an order that UsedSoft cease this practices. UsedSoft appealed on a point of law to German Federal Court of Justice who decided to stay the proceedings and to refer the question to the Court of Justice of the European Union for a ruling.

In his reply the Court interpreted Article 4(2) of Directive 2009/24 according to which the first sale in the European Union of a copy of a computer program by the rightholder exhausts the distribution right within the EU of that copy. The need for a uniform application of EU law and the principle of equality require that the terms must be given an independent and uniform interpretation throughout the EU. A uniform interpretation of the term ‘sale’ is necessary in order to avoid the protection offered by that directive varying according to the national law applicable.

As regards the question whether the commercial transactions concerned involve a transfer of the right of ownership of the copy of the computer program, the Court stated that a customer of Oracle who downloads the copy of the program and concludes a...
user licence agreement receives, in return for payment of a fee, a right to use that copy for an unlimited period. In those circumstances the operations mentioned involve the transfer of the right of ownership of the copy of the computer program in question. It makes no difference whether the copy was made available to the customer by means of a download from the rightholder’s website or by means of a material medium such as a CD-ROM or DVD.

Consequently the transfer by the copyright holder to a customer accompanied by the conclusion of a user licence agreement, constitutes a ‘first sale … of a copy of a program’ within the meaning of Article 4(2) of Directive 2009/24. The term ‘sale’ must here be interpreted as encompassing all forms of product marketing characterised by the grant of a right to use a computer program, for an unlimited period, in return for payment of a fee. In those circumstances the exhaustion of the distribution right concerns both tangible and intangible copies of a computer program, and hence also copies of programs which have been downloaded from the internet onto the first acquirer’s computer. Further the exhaustion extends to the copy of the computer program sold as corrected and updated by the copyright holder.

An original acquirer who resells a tangible or intangible copy of a computer program for which the copyright holder’s right of distribution is exhausted must, in order to avoid infringing the exclusive right of reproduction of a computer program which belongs to its author, make his own copy unusable at the time of its resale.
Should You Insist On A Compulsory Arbitration Clause In Commercial Contracts?

Most foreign companies are terrified of the United States court system. Consequently, most attorneys try to insert a clause in commercial contracts which provides for compulsory arbitration as the sole method of dispute resolution. But with the expansion of arbitration over the past few decades, trial lawyers have tended to become arbitration lawyers and arbitrators as well. As a result, arbitration and litigation have become very similar, and arbitration has certainly lost much of its distinctiveness and appeal.

In deciding whether arbitration or litigation is the best method of dispute resolution, it is important to consider the differences in the two systems and your expectations in the event of a breach of the agreement.

**Time:** Arbitration is still generally quicker that litigation, although the gap is narrowing. Arbitration, now typically takes between one and two years. While this is much longer than arbitration used to take, it is still quicker than litigation. This is especially true because no appeals are permitted in most arbitrations, while appeals are permitted in commercial litigations. So, when you believe that time will be a factor in dispute resolution, you should try to insert an arbitration clause.

**Expense:** With the adoption of discovery procedures and other trial-type activities, arbitration is getting much more expensive. Moreover, filing fees for arbitration are usually higher than filing fees for courts. The most crucial difference here is that the parties are required to pay arbitrators for their time and expenses in preparation, attendance, and transportation to and from hearings. This often runs tens of thousands of dollars per day. In a moderately lengthy arbitration with many documents, this expense often runs to hundreds of thousands of dollars. These costs are non-existent in litigation. Therefore, if you expect relatively straight-forward disputes (such as enforcement on or collection on a guarantee or a note, or enforcement of a security interest), litigation is almost always better than arbitration.

**Discovery:** One of the initial benefits of arbitration was its lack of discovery. However, it is now rare that an arbitration does not have discovery at a level comparable to litigation. Therefore, in terms of the drain of corporate resources which must be devoted to discovery issues, the two dispute-resolution systems are comparable.

**Collection and Enforceability of Judgments and Awards:** Paradoxically, it is easier to enforce most arbitration awards in court, than it is to enforce court judgments outside the forum in which the judgment was rendered. When enforceability outside the court’s jurisdiction is a concern, arbitration is usually the better default position.
Complexity and Simplicity: Attorneys have different views on this issue, but my belief is that the simpler the case is (less issues, less documents), litigation is the better course. Courts have a tendency to apply the law in a stricter fashion, and this favors simpler cases. It also means that the court is more likely to insist that parties raising counter-claims (such as unsuitability) meet the high standards of proof that those claims require. This makes courts the better forum in most cases that counterclaims are likely to be an issue.

Damages: Generally, courts (especially with juries) are likely to award higher damages than arbitrators. This is especially true in cases of intentional breaches. This factor is an extremely important consideration. If you are likely to be a defendant, you will almost always tend to want arbitration.

Conclusion: The type of dispute resolution you chose should be based on your expectations of the types of dispute you expect. This choice should never be made in an arbitrary or automatic way.

Sidney N. Weiss, snw@weisslaw.net, is an international trade and transactions lawyer in New York, and the former president of the Customs and International Trade Bar Association, the largest association of customs and trade lawyers in the world.
Dividend Withholding Tax to a U.S. S-Corporation under the 2006 Germany-U.S. Double Tax Treaty

On July 16, 2012 the Lower Tax Court of Cologne published a decision regarding the dividend withholding tax to a U.S. S-Corporation under the 2006 Germany-U.S. double tax treaty (DTT). In its decision the Lower Tax Court came to the conclusion that such dividends qualify for a reduced 15% dividend WHT based on Art. 10(2)(b) of the 2006 Germany-U.S. DTT and denied a reduction to a 5% dividend WHT based on Art. 10(2)(a) of the 2006 DTT. The Lower Tax Court based its decision on Art. 1(7) of the 2006 DTT which deals with the treaty applicability on hybrid entities. The decision of the Lower Tax Court is the first decision of a German Tax Court on the treatment of a U.S. S-Corporation for dividend WHT purposes under the 2006 Germany-U.S. DTT, and it should have relevance for other US-outbound/German-inbound structures involving hybrid entities.

In the case decided a corporation, which was resident of the United States, had chosen to be treated as a transparent entity under subchapter S (Sect. 1361-1378) of the Internal Revenue Code. As a result the corporation was treated as a transparent entity for U.S. tax purposes and not subject to income tax. In 2008 the U.S. Corporation held a share of 50% in a German GmbH and received a dividend payment from its subsidiary. The German GmbH withheld a domestic dividend WHT of 21.1% on this payment. The U.S. Corporation applied for a refund and a reduction of the dividend WHT to 5% based on Art. 10(2)(a) of the 2006 treaty. The Federal German Tax Authorities refused to apply this provision and granted only a reduction to a 15% dividend WHT based on Art. 10(2)(b) of the 2006 treaty.

To be entitled to a reduced 5% dividend WHT, Art. 10(2)(a) of the 2006 treaty requires inter alia that the dividend is derived and beneficially owned by a company resident of the other Contracting State. The 2006 Germany-U.S. treaty defines the term “residency” in its Art. 4(1). Based on this article the term “resident of a Contracting State” means any person, who under the laws of that state, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature. As a result, the application of Art. 10(2)(a) or in general terms the application of the DTT is directly linked to the tax treatment of the recipient in its residence state. As the S-Corporation is treated as a transparent entity for U.S.-tax purposes and therefore not subject to U.S. income tax it cannot be treated as a “resident of a Contracting State”, and the S-Corporation is as a result not able to benefit from a reduced dividend WHT under the 2006 treaty based on the opinion of the Lower Tax Court.
The Lower Tax Court made clear that contrary to the old 1989 treaty which included a residency fiction for transparent entities (Art. 4(1)(b) of the 1989 DTT which was based on the 1981 US model treaty), the new 2006 treaty does not include such a fiction any longer. According to the court, Art. 1(7) of the 2006 DTT which deals with hybrid entities cannot be interpreted in such a way that it deems the residency of an entity and the court justified this interpretation with the wording and the position of Art. 1(7) in the 2006 treaty.

The decision of the Lower Tax Court is now pending before the Federal Tax Court. Tax Practitioners should carefully revisit applications for a reduced dividend WHT for payments to U.S. S-Corporations/refund notices and ask the tax authorities for a suspension of any appeal procedures until a decision of the Federal Tax Court will be issued.

The decision of the Lower Tax Court once more demonstrates the issues of using a U.S. S-Corporation for investments into Germany. Despite the huge success and use of S-Corporations for U.S. tax planning purposes U.S. investors might be well advised not to use this vehicle for international investments. WHT triggered on dividends from Germany to the U.S. should generally be creditable for U.S. tax purposes; however, in a situation where the U.S. tax position does not allow for the use of these FTC’s the WHT might become a final tax burden. Taxpayers might also want to consider investment structures that do not trigger dividend WHT when cash is repatriated back to the U.S. out of Germany.
Neues Steuerverfahren zur freiwilligen Selbstanzeige – Ein neues Trojanisches Pferd?

Expatriierte und Dual Citizens

Did we find our pot of gold at the end of the rainbow?


Die Vorgehensweise:

Das Verfahren zur Selbstanzeige trägt mit der Einfachheit seiner Vorgehensweise. Der Bewerber muss hier lediglich einen Fragebogen ausfüllen und die Steuer- und Informationserklärungen für drei Vorjahre sowie die Meldung der Auslandskonten (FBAR) für die vorangegangenen 6 Jahre einreichen. Sollte eine Steuerschuld fällig sein, werden lediglich Verzugszinsen berechnet, so dass die Gesamtbelastung im Vergleich zum OVDP Verfahren deutlich geringer erscheint.


Der IRS wird die gesamten Unterlagen zunächst überprüfen und anschließend einschätzen, ob ein geringes oder hohes Compliance-Risiko vorliegt. Sollte das
Neues Steuerverfahren zur freiwilligen Selbstanzeige – Ein neues Trojanisches Pferd?


Die Definition:
Faktoren, die zu einem erhöhtem Compliance Risiko führen können beinhalten:

- Steuererklärungen die zu Steuererstattungen führen;
- Materielle wirtschaftliche Tätigkeit in den USA;
- Nichtangabe von Einkommen in dem Staat des vorübergehenden Wohnsitzes;
- Eine Steuerprüfung von der IRS;
- Ein Schreiben der Steuerbehörde wegen der Nicht-Abgabe oder eine gezahlte FBAR Strafe;
- Auslandskonten außerhalb des Wohnsitzstaates;
- Auslandsinvestitionen außerhalb des Wohnsitzstaates;
- US Einkommen;
- Steuerplanung oder Steuervermeidungsmodelle.

Schlussfolgerung:
Wir raten mit großer Vorsicht, in das neue Verfahren zu gehen. Für viele U.S. Steuerzahler, die im Ausland leben und auf dieses neue Verfahren gewartet haben, erschien diese Nachricht wie der Topf voll Gold am Ende des Regenbogens. Da die Entscheidungsgewalt aber bei der IRS liegt, sehen wir eher die Gefahr eines Trojanischen Pferdes; die nur unter größter Vorsicht geöffnet werden sollte. Weitere Informationen finden Sie unter www.wp-ra-usa.com
Foreign Entities Doing Business in The U.S. Should Become Familiar with the State Tax Environment

Nearly all of the individual states within the U.S. and some localities impose some form of tax on business income, including the income of foreign businesses that have a certain connection with the state, generally referred to as “nexus.” Nexus is also constitutionally required before a state can impose any other tax compliance responsibilities, such as sales, wage withholding, business activity, franchise or gross receipts taxes on a foreign corporation. The tax revenues raised by the states are principally used to fund education and health care in addition to a variety of other services. The 50 states and the District of Columbia spent over $1 trillion for such services in fiscal year 2010. At the same time, the recession that started in 2007 caused the largest collapse in state revenues on record. The budget gaps that states have had to close for fiscal year 2012 total $55 billion in 31 states. How does this affect foreign entities conducting business in the U.S.? It raises the likelihood of being pulled into a state tax audit as revenue hungry states have become increasingly smart, efficient and aggressive in the pursuit of additional state revenues.

Although the Germany/U.S. Tax Treaty specifies a number of U.S. activities that will not create a “permanent establishment” in the U.S. that would trigger U.S. federal income taxes, these same activities may cause particular states to impose their taxes because they are not bound by the provisions of U.S. tax treaties. Under the Germany/U.S. Tax Treaty, for example, the following connections should not result in a German business being subject to U.S. income tax on its earnings: (1) using facilities solely for storing, displaying or delivering inventory belonging to the taxpayer; (2) maintaining inventory belonging to the taxpayer for the purpose of storage, display or delivery or processing by another enterprise; and/or (3) maintaining a fixed place of business for the purpose of purchasing goods or collecting information for the taxpayer. Significantly, any of these activities is likely to create nexus for state tax purposes. Owning property in a public warehouse, for instance, is sufficient physical presence to constitute nexus in almost every state that has an income tax.

Moreover, a business need not have a physical presence in a state to be subject to its taxing jurisdiction. Earlier this year, the New Mexico Court of Appeals held that an out-of-state limited liability company operating as an online bookseller and selling merchandise through the internet to customers located in New Mexico had sufficient contact in the state to establish nexus for purposes of the gross receipts tax because of the in-state use of trademarks. An affiliate of the online bookseller
Foreign Entities Doing Business in the U.S. Should Become Familiar with the State Tax Environment

licensed the same trademarks from the mutual parent company which the affiliate used in its retail bookstores located in New Mexico. The use of the trademarks in New Mexico by the affiliate was held to strengthen the goodwill and trademarks of the online bookseller which in turn helped it to establish and maintain a market in New Mexico. This was held to create a substantial nexus between the online bookseller and New Mexico.

The best way to protect against unforeseen tax nexus is to be aware of the basic activities that create nexus by conducting a thorough evaluation of how you conduct business in every jurisdiction you do business. This evaluation should include the following information:

- All business locations, including warehouses and leased property at customer locations.
- Temporary places of business, such as trade show booths, sales meetings, off-site training, and movable equipment at job sites.
- Permanent and temporary locations of any employees and agents, including sales representatives and customer service personnel.
- States in which business contracts are executed.
- Locations where installation or training occurs.
- Manner in which products are shipped into another state.
- Corporate structure.

The risk in ignoring potential requirements around nexus can be significant. The exposure may not materialize for years and the company is responsible for any penalties and interest that the jurisdiction imposes. If, after assessing your operations, you find that your business has established state tax nexus and there may be back taxes, many states offer voluntary disclosure or amnesty programs that can be utilized to resolve tax liabilities without fear of civil or criminal penalties or excessive look-back periods.

By implementing a comprehensive state tax compliance plan on a going forward basis, you can keep your focus on business objectives rather than on battles with state and local tax departments.
Foreign Corrupt Practices Act: Haftungsrisiken auch für deutsche Unternehmen


Das Bestechungsverbot des FCPA verfolgt in erster Linie die Bestechung ausländischer Amtsträger („foreign officials“). Hierbei wird auch dieser Begriff sehr weit

Der Tatbestand der Bestechung ist dann erfüllt, wenn die entsprechende Handlung als „korrupt“ qualifiziert werden kann. Hiervon ist auszugehen, wenn das Angebot einer Zahlung, das Zahlungsversprechen oder die Zahlung dazu bestimmt ist, den Empfänger zum Missbrauch seines Amtes oder seiner offiziellen Funktion zu verleiten, um dem Geber (direkt oder indirekt) unrechtmäßig ein Geschäft zu erteilen oder zu sichern. Unerheblich ist hierbei, ob der betreffende Amtsträger tatsächlich in der Sache zuständig ist und ob der begehrte Vorteil tatsächlich gewährt wird.

Deutsche Unternehmen können potentiellen FCPA-Risiken unter anderem dadurch begegnen, dass sie bei entsprechenden Berührungspunkten in den USA ein auf die Anforderungen des FCPA angepasstes Compliance-Programm entwickeln. Dies nicht nur, um potentielle Risiken zu identifizieren und durch geeignete Kontrollmaßnahmen minimieren zu können, sondern auch, um im Falle eines FCPA-Verfahrens die Strafzumessung positiv beeinflussen zu können. Denn ein dokumentiertes, geeignetes Compliance-Programm wird strafmildernd berücksichtigt.

Ein wesentlicher Aspekt bei der Implementierung eines solchen Compliance-Programms ist neben der Ausformulierung klarer Regelungen auch die Einführung eines Schulungssystems, im Rahmen dessen den Mitarbeitern in regelmäßigen zeitlichen Abständen die entsprechenden Verhaltensgebote und -verbote verständlich erklärt werden.

Als eine seit über 17 Jahren auf deutsches und U.S.-amerikanisches Unternehmensrecht spezialisierte Wirtschaftskanzlei (nunmehr auch auf China und UK ausgerichtet) berät NIETZER & HÄUSLER gerne bei der Strukturierung und Entwicklung eines geeigneten Compliance-Programms.
AGB ohne AGB Gesetz – Versteckte Gefahren in US Terms and Conditions of Sale

I. Hintergrund
In fast jedem Vertrag, Auftrag und jeder Bestellung findet man detaillierte AGB. Da man weder Lust hat, das schwer verständliche Kleingedruckte selbst zu lesen, noch Geld investieren möchte, um sich juristisch damit auseinanderzusetzen, akzeptiert man sie ungeprüft. Erst wenn ein Problem auftaucht, erinnert man sich, dass der Teufel im Detail steckt und fragt sich nach dem Lesen: „Wie konnte ich das nur unterschreiben?“


II. Beispiele für gefährliche AGB-Klauseln aus der Praxis: AGB-Klauseln, die nach deutschem Recht unwirksam wären, sind in den USA aufgrund der Vertragsfreiheit durchsetzbar. Der einzige sichere Schutz ist eine gründliche rechtliche Prüfung vorab. Die folgende, nicht abschließende Liste soll Sie hellhörig machen und als Hilfe dienen, einige der gefährlichsten Klauseln aus der Praxis aufzuspüren:

1. „Acceptance after inspection at any time“: Laut dieser Klausel ist der Käufer nicht verpflichtet, die gelieferte Ware unverzüglich zu untersuchen und abzunehmen, wie die damit abbedungene Regelung des UCC es fordert. Er kann die Ware auch zukünftig jederzeit mit der Begründung ablehnen, dass diese nicht im Einklang mit dem Vertrag stehe und den Verkäufer zur Abholung auf Verkäuferkosten auffordern.

2. „Additional and spare parts“: Der Verkäufer muss Ersatz- und Zubehörteile für mindestens z.B. 15 Jahre weiter produzieren und innerhalb dieser Zeitspanne zu dem jetzigen Preis an den Käufer verkaufen.

3. „Design changes“: Der Käufer ist berechtigt, dem Verkäufer jederzeit vor der Lieferung Produktänderungen aufzugeben, die der Verkäufer kostenlos und ohne Verzögerung des Liefertermins umzusetzen hat.

4. „Most favored customer“: Falls der Verkäufer sein Produkt innerhalb eines von den Parteien bestimmten Zeitraums einem anderen Kunden zu einem geringeren Preis verkauft, muss er die Differenz an den Käufer zurückzahlen oder diesem eine Gutschrift ausstellen.
5. „Buyer only has to pay for goods if it is paid by its customers“: Obwohl diese Klausel dreist erscheint, weil sie das Ausfallrisiko des Käufers für zahlungsunfähige Endkunden einfach auf den Verkäufer abwälzt, findet sich die Klausel gelegentlich in den AGB von großen Unternehmen. Das Vertragsverhältnis wird durch diese Klausel in eine besondere Form des Kommissionsgeschäfts umgewandelt.

6. „Termination for convenience“: In einigen Branchen behält sich der Käufer das Recht vor, Bestellungen jederzeit ohne besonderen Grund zu kündigen, ohne dass er dem Verkäufer mehr als die unmittelbaren Kosten erstatten muss.

Der Ersatz von entgangenem Gewinn sowie indirekten Unkosten für Produktentwicklung, Miete und Anpassung der Produktionsstätte oder Entsorgung der Produkte wird ausgeschlossen. Was macht der Verkäufer dann mit tausenden halbfertigen, speziell für den Käufer angefertigten Maschinen?

7. „Damages“: Die Präzedenzentscheidungen des englischen Common Law haben zu mehreren Arten von Schadensersatz geführt. Unter keinen Umständen dürfen Sie verschiedene in AGB verwendete Begriffe mit der Einstellung überfliegen, diese hätten keine große Bedeutung! Beispiel:

„Seller - having been informed of Buyer’s reliance on the full and timely performance - shall be responsible for all direct, indirect or incidental consequential damages and all expenses, including attorneys fees, and punitive damages arising from seller’s default of any of the terms of this agreement.”


Zusätzlich sind in den USA Anwaltsgebühren normalerweise nicht einklagbar. „Punitive Damages“, eine Art Strafschadensersatz, sind im Vertragsrecht nicht üblich und sollten deswegen ebenfalls gestrichen werden.

8. „Fit for specific purpose intended“: Nach dieser Klausel muss ein Produkt für den vom Käufer beabsichtigten Verwendungszweck geeignet sein. Nach US-Recht wird sie so ausgelegt, als wüsste der Verkäufer genau, wofür der Käufer die Produkte verwenden will. Sollte das Produkt nicht perfekt für diese Anwendung funktionieren, haftet der Verkäufer. Die Klausel sollte also nur dann akzeptiert werden, wenn die Anwendungen
auf Verwendungszwecke begrenzt sind, die dem Verkäufer bekannt sind.

New Requirements for Electronic Commerce in Germany

Electronic business is constantly growing. Although e-commerce has a share in retail business of only approximately 6 % (according to a study published by Deutsche Bank Research in 2011\(^1\)), steady growth rates of 0,5 % per year are expected in the future. And perhaps a more significant finding of the aforementioned research is the circumstance that the percentage of German citizens who ordered products via Internet has grown from under 40 % in 2004 to over 60 % in 2010.

Before this background, German parliament recently enacted a law introducing new requirements for e-commerce which aim at strengthening consumer rights and consumer protection in this field. These important legal provisions entered into force on August 1, 2012. They are setting new standards for information which businesses have to provide to consumers and they are introducing the so-called “Button Solution”. The new statutory provisions have been incorporated into section Sec. 312g) of the German Civil Code (“BGB”). They are applicable to contracts between businesses and private consumers provided that the contract establishes payment obligations for the consumer. The information obligation does, however, not apply to financial services.

The following information has to be provided to the consumer:

- The essential characteristics of the product or service;
- The minimum term of a contract (if the contract relates to continuous or recurrent services);
- The overall price of the product or service including all ancillary price components and all taxes to be paid through the business. In the event that no exact price can be indicated, the calculation basis has to be mentioned in order to enable the consumer to double-check the price;
- Information on any additional delivery and lead costs as well as the indication of possible additional taxes and costs which the seller will not take care of and which will also not be mentioned in the invoice.

(Sec. 312g) Para.2 German Civil Code establishes strict standards with regard to the way and the point in time for providing such information. It says the information has to be provided to the consumer immediately before he sends his order and it has to be given in a “clear and comprehensible, and in an accentuated way”. In order

---

\(^1\) „Der digitale Strukturwandel–Chancen für den Einzelhandel”, www.dbresearch.de (August 26, 2011)
to comply with these new requirements, the seller should place such information on the same page of the order form where the consumer clicks on the order button. Any doubts regarding the layout of the order form (which is visible on the screen when the customer sends his order) have to be solved case by case. The layout will basically depend on the amount of “essential characteristics” to be provided to the consumer and these obviously vary according to nature and features of the offered product or service. Generally speaking, the seller should try to place all such information on one page on the screen (without necessity to “scroll”). Exceptions may apply if the description of the product or service has to be more detailed due to its characteristics.

The second important new requirement in e-commerce (Sec. 312g Para. 3 German Civil Code) is the “Button Solution” (**in Germany commonly known as “Button-Lösung”). According to this legal provision, the seller has to design his online order form in a way that prompts the consumer to expressly confirm his payment obligation immediately before sending the order. To this effect, the business has to insert in the order button (only) the words “zahlungspflichtig bestellen” (which means “ordering with the obligation to pay”), or a similarly unambiguous wording.

The consequence of the nonobservance of this new requirement is severe: pursuing to Para. 4 of Sec. 312g) German Civil Code the contract will only be validly concluded if the “Button Solution” has been properly implemented on the seller’s website. In other words: the consumer does not have a payment obligation for his order if the seller’s website has not been properly designed.

In addition to the aforementioned direct consequence, the nonobservance of the new legal requirements also gives competitors actions against the business for unfair competition.
DISCLAIMER: The content in this newsletter is provided by the German American Chamber of Commerce, Inc. and its third party content providers for general informational purposes only. It is not intended as professional counsel and should not be used as such. You should contact an attorney to obtain advice with respect to your specific circumstances. The German American Chamber of Commerce, Inc. shall not be liable for any errors, inaccuracies in content, or for any actions taken in reliance thereon.