The Acquisition of Closely Held Companies

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The structure as well as the content of the rules and regulations of German law may appear strange to a person more familiar with Anglo-American law. For example, in Germany, whenever parties have no written agreement on a particular issue, the law, as it is interpreted by the courts, will apply or impose a solution. Thus, a party that might have forgotten to address a particular issue does not remain completely unprotected.

Such judicially imposed contract terms are, however, often viewed as very unsatisfactory by either the purchaser or seller of a business enterprise. To clarify matters from the onset and avoid such judicial impositions as well as the hassles and high costs of litigation, it has become common practice for the parties in an acquisition transaction to agree to specific terms that are within the range of the law and clearly lay them out in the form of a written contract.

An acquisition involves such diverse areas of law as contract, commercial, corporate, labor, and tax law and sometimes even inheritance or domestic-relations law. Through a contract, the laws can be tailored to meet the needs of a specific case, which offers both the seller and purchaser considerably better protection. It is imperative that significant attention be focused on the drafting of the acquisition contract.

1 Types of Acquisition

As discussed in the previous chapter, German law provides for a variety of business organizational forms, which can be divided into sole proprietorships, partnerships, corporations and forms that are a mixture of the latter two. Only a relatively small number of German companies issue stock and trade it on the open market. As mentioned, the stock corporation (AG) is chosen by only a handful of large and mainly international enterprises, and because its stock is freely traded, there is nothing its management can do to prevent a purchaser bent on acquiring a majority of stocks from getting them. Therefore, in terms of acquisition, it has a unique status. All the other types of enterprises are customized to meet the needs of their owners, and as a general rule, their equity holdings are not openly traded or even freely transferable. They can, therefore, be described as privately or closely held
enterprises. This chapter will deal primarily with the acquisition of GmbHs, the legal form of a closely held company that is most commonly chosen by mid-sized German enterprises.

There are two ways to acquire in whole or in part, any kind of already existing German enterprise: the acquisition of ownership interests (the equity holdings of a GmbH or the stock of an AG, for instance), so called “share deal”, or the acquisition of all or some of its assets and liabilities, so called “asset deal”.

1.1 Acquisition of Ownership Interests

As a rule, all the rights of ownership are transferred from the seller of a GmbH to the buyer on the date of purchase. That means that the legal entity itself is transferred which retains ownership of the assets.

Prior to the acquisition, an interim balance sheet must be prepared showing the expected profits up to the date of sale, which is the date the equity holdings of the GmbH together with the right to receive future profits are transferred to the buyer. Any necessary adjustments to the interim balance sheet must be made in accordance with the final financial report.

1.2 Sale of Assets

The sale of assets is quite complex because a great degree of specificity is required and detailed attention must be given to the matter to avoid the possibility of error. Each item of property, as well as all the rights and liabilities associated with it, must be accurately and clearly listed in the acquisition agreement.

1.2.1 Real Estate

The conditions of ownership and a detailed description of any real estate property can be conclusively determined from the information contained in the real estate register. Buildings constitute an integral part of the real estate. Appurtenances such as machines are included in the sale of real estate unless otherwise agreed. The transfer to the purchaser occurs when an agreement by both the seller and the purchaser has been entered into before a German notary public and the transfer has been officially noted in the real estate register.

1.2.2 Purchase of Current Moveable Assets or Groups of Moveable Assets

If current moveable assets or groups of moveable assets are sold, the individual items must be accurately and clearly listed in the acquisition agreement. With groups of