

## Table of Contents

Preface .....	V
Overview of Contents .....	VII
Table of Contents .....	IX
Abbreviations .....	XIX
Introduction .....	1
I. Legal nature of the <i>GmbH</i> .....	1
II. History .....	2
III. Importance .....	3
1. German corporate landscape .....	3
2. Statistics .....	4
3. Reason for the popularity of the <i>GmbH</i> .....	4
Chapter 1: Formation .....	7
I. Overview .....	8
1. Summary outline of formation process .....	8
2. Pre-registration and pre-formation phases .....	9
II. Formation by contributions in cash .....	9
1. Share contributions to be set forth in the articles .....	9
2. Minimum payment requirements for registration purposes .....	9
III. Formation by contributions in kind .....	10
1. Contributions in kind to be set forth in the articles .....	10
2. Report on the formation by contributions in kind .....	10
3. Liability of shareholders for shortfall in value ( <i>Differenzhaftung</i> ) .....	11
IV. Confirmation of payment by managing director .....	11
V. No prepayments of share capital .....	11
VI. Articles of association .....	12
1. Contents .....	12
a) Mandatory provisions .....	12
aa) Share capital .....	12
bb) Shares .....	13
cc) Shareholders .....	13
dd) Firm name .....	13
ee) Domicile .....	14
ff) Business purpose .....	14
b) Desirable additional provisions .....	14
aa) Fiscal year .....	14
bb) Company's journals .....	15
cc) Signing authority of managing directors .....	16
dd) Formation costs .....	16
c) Further provisions .....	16
2. Rules of interpretation .....	17
VII. Execution of the formation deed and the articles of association .....	17
1. Procedure of notarial recording .....	17
2. Language of the articles .....	18
3. Authority of signatories .....	18
4. Power of attorney .....	18
a) Form requirement .....	18
b) Execution abroad .....	18
c) Powers of attorney from non-German legal entities .....	18

The GmbH – Table of Contents

X

VIII. Application and registration .....	19
1. Application .....	19
2. Notarial certification of the application letter to the commercial register .....	19
3. Registration .....	20
4. Publication .....	20
IX. Subsequent amendments of the articles .....	20
1. Shareholders' resolution .....	20
2. Application for registration .....	21
3. Registration and publication .....	21
X. "Formation" by acquisition of shares in a shelf <i>GmbH</i> .....	22
1. Shelf companies .....	22
2. Observance of formation rules .....	22
<b>Chapter 2: Managing Director .....</b>	<b>23</b>
I. Corporate body .....	24
II. Legal prerequisites for being eligible as managing director .....	24
1. Natural person .....	24
2. No criminal record .....	24
3. Nationality .....	25
a) Appointment of foreign nationals .....	25
b) Execution of application letter abroad .....	25
4. No conflicting other offices .....	25
III. Representation of the <i>GmbH</i> .....	26
1. Scope of authority .....	26
a) Statutory scope of authority .....	26
b) Limitation of the scope of authority .....	26
2. Statutory regime of signing authority .....	27
a) Statutory signing authority .....	27
b) Extension of signing authority .....	27
3. Prohibition of self-contracting and multiple representation .....	28
a) Section 181 Civil Code .....	28
b) Release from the restrictions of section 181 Civil Code .....	28
IV. Management of the <i>GmbH</i> .....	28
V. Appointment and revocation of appointment .....	29
1. Appointment .....	29
2. Service contract .....	29
3. Revocation of appointment .....	30
4. Registration in the commercial register .....	30
VI. Tasks and obligations .....	31
1. Ensuring compliance with applicable laws .....	31
2. Ensuring maintenance of the share capital .....	31
3. Bookkeeping/accounts/taxes .....	31
a) Bookkeeping and accounts .....	31
b) Taxes/social security payments .....	32
c) Storage of books and records .....	32
4. Preparing and calling shareholders' meetings .....	32
5. Obligation not to compete .....	33
a) Statutory obligation for term of office .....	33
b) Post-contractual non-compete clauses .....	33
6. Filings with the commercial register .....	34
7. Business letters .....	34
8. Application for the opening of insolvency proceedings .....	35
VII. Instructions from the shareholders .....	35
VIII. Liability .....	36
1. General .....	36
2. D&O liability insurance .....	37

## The GmbH – Table of Contents

<b>Chapter 3: Shareholders' Meeting .....</b>	<b>XI</b>
I. Principal corporate body .....	39
II. Competencies of the shareholders' meeting .....	40
1. Competencies .....	40
2. Shifting of competencies to other corporate bodies .....	41
III. Calling shareholders' meetings .....	41
1. Frequency of and reasons for calling shareholders' meetings .....	41
2. Notice requirements .....	42
3. Right of participation .....	42
4. Chairman .....	42
5. Single member company .....	42
IV. Voting rights .....	43
1. Exercising voting rights .....	43
2. Different classes of shares .....	43
3. Voting another's shares .....	43
a) Form requirements .....	43
b) Scope and duration .....	44
4. Prohibition of voting .....	44
5. Voting commitments/voting pool agreements .....	45
6. Fiduciary duty to vote in good faith .....	45
V. Majority requirements for resolutions .....	46
1. Simple majority .....	46
2. Majority of three quarters of the votes cast .....	46
3. Consent of all shareholders .....	46
VI. Form requirements for resolutions .....	47
VII. Deficiencies of resolutions .....	47
1. General .....	47
2. Resolutions that are null and void .....	48
3. Resolutions subject to avoidance .....	48
a) Reasons for avoidance .....	48
b) Time limit for avoidance .....	49
c) Avoidance only by shareholders .....	49
<b>Chapter 4: Supervisory Board .....</b>	<b>51</b>
I. The traditional structure of a German <i>GmbH</i> .....	51
1. Corporate bodies .....	52
2. Competencies of corporate bodies .....	52
II. The impact of employee co-determination acts .....	52
1. Establishment of a supervisory board with employee representation .....	52
2. Co-determination acts of practical relevance .....	52
a) Co-Determination Act .....	53
b) One Third Participation Act .....	53
3. Competence to appoint managing directors .....	53
a) One Third Participation Act .....	53
b) Co-Determination Act .....	54
III. Installation of the supervisory board .....	54
1. Number and election of members .....	54
a) One Third Participation Act .....	54
b) Co-Determination Act .....	54
2. Persons eligible .....	55
3. Notification and publication requirements .....	56
IV. Rights and responsibilities of the members of the supervisory board .....	56
1. Management supervision .....	56
a) Monitoring function .....	56
b) Catalogue of transactions requiring the consent of supervisory board .....	57
c) Additional functions .....	57
2. Right of inspection and examination/reports .....	57

3. Call of shareholders' meetings .....	58
4. Review of annual financial statements by the supervisory board .....	58
a) Review of annual financial statements .....	58
b) Report on results of review .....	58
c) Appointment of the auditor .....	59
5. Duty of care .....	59
6. Right of participation in shareholders' meetings .....	59
V. Meetings and resolutions of the supervisory board .....	59
1. Meetings .....	59
2. Resolutions by way of written proceedings .....	60
3. Frequency of meetings .....	60
VI. Avoiding co-determination .....	60
1. One Third Participation Act .....	60
a) Conversion into a <i>GmbH &amp; Co. KG</i> .....	60
b) Groups of companies .....	60
2. Co-Determination Act .....	61
<b>Chapter 5: Financial Regime .....</b>	<b>63</b>
I. Payment of share capital .....	65
1. General .....	65
2. Contributions in cash .....	66
3. Contributions in kind .....	66
4. Hidden contributions in kind ( <i>verdeckte Sacheinlagen</i> ) .....	67
a) Basic concept .....	67
b) Legal consequences .....	67
c) Curing hidden contributions in kind .....	67
5. Forfeiture ( <i>Kaduzierung</i> ) of shares .....	69
a) Forfeiture .....	69
b) Liability of predecessors in title .....	69
c) Secondary liability of co-shareholders .....	69
6. Liability for deficit balance at registration ( <i>Unterbilanzhaftung</i> ) .....	70
II. Maintenance of share capital .....	71
1. No payments to shareholders that result in a deficit balance situation .....	71
a) Forbidden payments to shareholders .....	71
b) Deficit balance ( <i>Unterbilanz</i> ) .....	72
c) Future shareholder .....	73
2. Legal consequences of violation of capital maintenance rules .....	73
a) Claim of the company for repayment .....	73
b) No set-off .....	73
c) Secondary liability of co-shareholders .....	73
d) Liability of managing directors .....	74
e) Statute of limitation .....	74
3. Loans to shareholders (upstream loans) .....	75
a) Arm's length terms .....	75
b) No violation of capital maintenance rules .....	75
c) Cash pooling .....	75
d) Upstream securities .....	76
4. Loans to managing directors and senior officers .....	77
5. Treasury Stock .....	77
a) Observance of capital maintenance rules .....	77
b) Reserve .....	77
c) No exercise of rights attaching to treasury stock .....	78
III. Changes of the registered share capital .....	78
1. Capital increase .....	78
a) Ordinary capital increase .....	78
aa) No obligation to inject additional equity funds .....	78
bb) Amendment of the articles .....	78
cc) Subscription to new shares .....	78

## The GmbH – Table of Contents

XIII	
dd) Application for registration .....	79
ee) Registration .....	79
b) Capital increase by capitalization of reserves .....	79
aa) Timing .....	79
bb) Balance sheet .....	79
cc) Audit .....	79
dd) Capital or profit reserves .....	79
ee) Effects on shares .....	81
ff) Application for registration .....	81
2. Capital decrease .....	81
a) Ordinary capital decrease .....	81
aa) General .....	81
bb) Protection of creditors .....	82
b) Simplified capital decrease .....	82
IV. Shareholder loans (downstream loans) .....	83
1. General .....	83
2. Debt/equity ratio – safe haven .....	83
3. Terms of the loan agreement .....	83
4. Loans considered as substitute for equity ( <i>Kapitalersatz</i> ) .....	83
a) Criteria for a loan to be qualified as substitute for equity .....	84
b) Granting of a loan before a crisis .....	84
c) Legal consequences .....	84
aa) In insolvency proceedings .....	84
bb) Outside insolvency proceedings .....	84
d) No circumvention .....	84
aa) Sureties and guarantees substituting equity .....	84
bb) Loans from closely connected third parties .....	85
e) Granting of rights to use an asset ( <i>kapitalersetzende Gebrauchsüberlassung</i> ) .....	85
f) Exempted shareholders .....	86
V. Piercing the corporate veil .....	86
1. Basic principle of limited liability .....	86
2. Exception to the basic principle: Piercing the corporate veil .....	86
a) Overview .....	86
b) Substantial undercapitalization .....	87
c) Mingling of assets .....	87
d) Blurring shareholder and company spheres .....	87
e) Destructive intervention ( <i>existenzgefährdender Eingriff</i> ) .....	87
f) Abuse of legal form .....	88
g) Liability of the ultimate parent .....	89
VI. Financial statements .....	89
1. Size of the company .....	89
2. Preparation of the financial statements .....	90
3. Appropriation of profits .....	90
4. Filing of the financial statements with the commercial register/publication .....	90
a) Filing/publication requirements .....	90
b) Consequences of failure to comply with filing duties .....	91
<b>Chapter 6: Changes in shareholdership .....</b>	<b>93</b>
I. Assignment of shares .....	94
1. Assignability of shares .....	94
2. Restrictions .....	94
a) Restriction clauses in the articles of association .....	94
b) No share certificates .....	95
c) Pre-emptive rights .....	95
d) Requirement to obtain the consent of spouses .....	95
e) Unwritten requirement of consent ( <i>Holzmüller</i> doctrine) .....	95
aa) Applicability .....	95

bb) The <i>Holzmüller</i> decision .....	96
cc) The <i>Gelatine</i> decisions .....	97
3. Notarial form .....	97
a) Notarial recording of deed of assignment and purchase or sale obligation .....	97
b) Notifications to authorities by the notary .....	97
c) Notarial recording abroad by a foreign notary .....	98
4. Notification to the company pursuant to section 16 LLCA .....	98
a) Notification .....	98
b) Effects of the notification .....	99
c) Knowledge otherwise obtained .....	99
d) Liability of assignee and assignor .....	100
e) Defective assignment .....	100
5. Assignment of a portion of a share .....	101
6. Revised shareholders' list .....	101
7. Assignment of shares in a shelf company .....	102
II. Redemption of shares .....	102
1. Prerequisites .....	102
a) Permission clause in the articles .....	102
aa) Redemption against the will of the shareholder .....	102
bb) Redemption with the consent of the shareholder .....	102
b) Fully paid up share .....	103
c) Shareholders' resolution .....	103
d) Declaration of redemption .....	103
2. Consequences .....	103
a) Redeemed share ceases to exist .....	103
b) Effects on registered share capital and nominal amounts of remaining shares .....	104
aa) Registered share capital .....	104
bb) Rights and obligations of remaining shareholders .....	104
cc) Nominal amounts of remaining shares .....	104
III. Forfeiture of shares .....	105
IV. Abandonment of shares .....	105
V. Expulsion of a shareholder .....	105
1. General .....	105
2. Prerequisites .....	106
a) Good cause .....	106
b) Shareholders' resolution .....	106
c) Action for expulsion .....	106
d) Compensation .....	107
3. Legal consequences .....	107
VI. Withdrawal of a shareholder .....	107
1. General .....	107
2. Prerequisites .....	107
a) Good cause .....	107
b) Declaration of withdrawal .....	108
c) Decision of the company with respect to the share .....	108
<b>Chapter 7: Transformations .....</b>	<b>111</b>
I. Introduction to the Transformation Act .....	112
1. Particular importance for changing group structures .....	112
2. Reasons for changes to corporate structures .....	113
3. Transformation Act .....	113
a) Types of transformation most commonly occurring .....	113
b) Some advantages of transformation pursuant to the Transformation Act .....	113
c) Primary purpose of the Transformation Act .....	114
d) Cross-border mergers .....	114
II. Merger .....	115
1. Purpose of a merger .....	115

## The GmbH – Table of Contents

	XV
2. Legal forms eligible for merger .....	115
3. General outline of merger proceedings .....	115
4. Merger agreement .....	116
a) Contents of the merger agreement .....	116
b) Submission of the merger agreement to the works councils .....	117
c) Execution of the merger agreement .....	118
5. Merger report .....	119
a) Contents of merger report .....	119
b) Execution of merger report .....	119
c) Waiver of merger report .....	120
6. Audit of the merger .....	120
7. Shareholders' resolutions .....	120
a) Majority and form requirements .....	120
b) Timing .....	121
c) Capital increase .....	121
8. Application for registration in the commercial register .....	122
a) Form requirements of application letter .....	122
b) Contents of application letter .....	122
c) Attachments to application letter .....	122
9. Registration/publication/effects .....	123
10. Rights of creditors .....	124
11. Managing and supervisory bodies of the predecessor entity .....	124
12. Domination and profit and loss absorption agreements .....	125
<b>III. Conversion .....</b>	<b>125</b>
1. Purpose of a conversion .....	125
2. Legal forms eligible for conversion .....	125
3. General outline of conversion proceedings .....	126
4. Draft conversion resolution .....	126
5. Submission of the draft conversion resolution to the works council .....	127
6. Conversion report .....	127
7. Adoption of the conversion resolution .....	127
8. Application for registration in the commercial register .....	128
9. Registration/publication/effects .....	129
10. Rights of creditors .....	129
11. Conversion from a <i>GmbH</i> to a <i>GmbH &amp; Co. KG</i> .....	129
12. Domination and profit and loss absorption agreements .....	130
<b>IV. Splitting .....</b>	<b>131</b>
1. Purpose of a splitting .....	131
2. Available types of splittings .....	131
3. Legal forms eligible for splitting .....	131
4. General outline of splitting proceedings .....	132
5. Splitting and transfer agreement .....	133
a) Contents of the splitting and transfer agreement .....	133
b) Submission of the splitting and transfer agreement to the works council ....	134
c) Execution of the splitting and transfer agreement .....	134
6. Splitting report .....	134
7. Audit of the splitting .....	134
8. Shareholders' resolutions .....	135
a) Majority/form .....	135
b) Timing .....	135
c) Capital increase .....	135
d) Capital decrease .....	135
9. Application for registration in the commercial register .....	136
10. Registration/publication/effects .....	137
11. Rights/protection of creditors .....	137
a) Right to claim security .....	137
b) Joint and several liability of entities involved in the splitting .....	138

12. Spin-off or hive-out of contracts containing restriction of assignment clauses .....	139
a) The legal issue .....	139
b) Treatment of the issue .....	140
aa) Judicial precedents .....	140
bb) Legal authors .....	140
c) Conclusion .....	141
13. Domination and profit and loss absorption agreements .....	141
<b>Chapter 8: Groups of Companies .....</b>	<b>143</b>
I. General .....	143
II. Groups of companies based on the existence of control .....	144
III. Groups of companies based on contract .....	145
IV. Domination and profit and loss absorption agreements .....	145
1. Object .....	145
2. Tax motives .....	146
3. Entering into of the agreement .....	146
a) Execution of the agreement by managing directors .....	146
b) Form requirements .....	146
c) Shareholders' consent .....	147
d) Registration in commercial register .....	147
4. Termination of the agreement .....	147
a) Termination with notice .....	147
b) Termination by operation of law .....	147
aa) Merger .....	148
bb) Conversion .....	148
cc) Splitting .....	148
c) Termination without notice for good cause .....	148
aa) Merger .....	148
bb) Conversion .....	149
cc) Splitting .....	149
d) Cancellation by mutual consent .....	150
e) Termination in the event of the disposal of the dominated entity .....	150
f) Registration in the commercial register .....	151
<b>Chapter 9: Liquidation .....</b>	<b>153</b>
I. General .....	153
II. Overview of the liquidation proceedings .....	153
III. Shareholders' resolution .....	154
IV. Registration and publication .....	154
1. Application for registration .....	154
2. Publication of the dissolution by the company .....	155
V. Liquidation process .....	155
1. Sale of assets/discharge of liabilities/collection of receivables .....	155
2. Corporate structure left intact .....	155
3. Shareholder receivables and payables .....	156
VI. End of liquidation .....	156
<b>Chapter 10: The GmbH &amp; Co. KG .....</b>	<b>159</b>
I. General .....	159
II. Legal nature of the GmbH & Co. KG .....	159
1. The basic structure of a KG .....	160
a) Two different classes of partners .....	160
b) Liability of the partners of a KG .....	160
aa) General partner .....	160
bb) Limited partner .....	160
c) Resolutions/amendments of the partnership agreement .....	161
aa) Unanimity/no filing of partnership agreement .....	161
bb) Core elements rule ( <i>Kernbereichstlehre</i> )/specification rule ( <i>Bestimmtheitsgrundsatz</i> ) .....	161

The GmbH – Table of Contents

	XVII
d) Applications to the commercial register .....	161
e) Assignment of partnership interests .....	162
f) Treatment for tax purposes .....	162
2. Effects of a <i>GmbH</i> being the general partner of a <i>KG</i> .....	162
a) Limited liability .....	162
b) Possible structures of a <i>GmbH &amp; Co. KG</i> .....	163
III. Reasons for choosing a <i>GmbH &amp; Co. KG</i> .....	163
1. Flexibility combined with limited liability .....	163
2. Outside management personnel .....	163
3. Avoiding co-determination .....	164
a) One Third Participation Act .....	164
b) Co-Determination Act .....	164
<b>Chapter 11: Use of foreign legal forms in Germany .....</b>	<b>165</b>
I. The “Inspire Art” judgment of the European Court of Justice .....	166
II. Consequences in practice: the English Ltd .....	167
III. The Ltd: a viable alternative legal form for doing business in Germany? .....	167
1. No minimum share capital requirement .....	167
2. Liability of shareholders and directors .....	168
3. Registration of a branch in Germany .....	169
4. Increased administrative expenses .....	170
5. Conclusion .....	171
<b>Literature .....</b>	<b>173</b>
<b>About the Author .....</b>	<b>183</b>
<b>Index .....</b>	<b>185</b>

