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Several Legal Peculiarities of the Regulation of Business Environment in Germany

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ABSTRACT

Business law includes contractual, labor, corporate, tax and other relations. However, the purpose of the study is to highlight and analyze only few interesting issues since it is physically impossible to cover all its aspects within the framework of one article. First of all, it is necessary to determine the legal basis for doing business in Germany and then – the features of starting and doing business. Therefore, this paper serves as a concise methodological guide to the regulation of the business environment in Germany. In this sense, the study examines the legal forms of doing business recognized in Germany, the legal possibilities for establishing various contractual or labor relations with contractors, as well as the grounds for corporate or private liability in case of violation of the rules. Model of corporate governance, external liability and internal corporate governance issues are of particular interest in Germany.

The study confirms that the basis for regulation of various aspects of doing business in Germany is specific. The principle of direct corporate liability to creditors is common in Germany but the principle of piercing the corporate veil is allowed if the relevant prerequisites are present. However, business contracts in Germany are based on a narrow approach of contract terms regulation compared to the United States. Hearing of cases by specialized judges in Germany ensures a better and fairer judicial system in labor disputes.

INTRODUCTION

Business law applies to contractual, labor, corporate, tax and other relations since these relations refer to business activity, are loaded with a commercialization component and are creating ideas about the business environment. However, since it is physically impossible to cover all aspects of business law in one article, especially given the specifics of the fundamentals of business regulation in Germany, the purpose of the study is to highlight and analyze only some of them.

The paper describes how to conduct business in Germany in compliance with legal regulations. Accordingly, the purpose of the study is to determine the legal framework for doing business in Germany, and then – the legal peculiarities of starting and doing business. Therefore, this article serves as a methodological guide to obtain information about the business environment in Germany. In this sense, the study discusses the legal forms of doing business recognized in Germany, the legal possibilities of establishing various contractual or employment relations with counterparties, and the grounds for corporate or private liability in case of violation of rules. The model of corporate governance in Germany and its features are of particular interest. This is to some extent related to issues of external responsibility and internal corporate governance.

It is also necessary to clarify the prerequisites for implementation of contractual and labor rights in Germany, especially in the event of a pandemic. Thus, a brief discussion of the issue will highlight the specifics of the performance of duties during a pandemic in Germany.

A normative-dogmatic method is used to achieve these goals. This method will help us present the legal basis for doing business in Germany and discuss dogmas associated with them. In addition, the study uses methods of synthesis and analysis to create a general picture around these issues and draw logical conclusions.

LEGAL FORMS OF DOING BUSINESS IN GERMANY

Business law in Germany is associated with certain unions and larger business enterprises such as corporations. For the clarification of the business situation it is necessary to determine how business law plays a central role in this area.[1]

Initially, the provisions of the Law on Limited Liability Companies and the Law on Joint Stock Companies in Germany were part of the Commercial Code, but desire to combine all the rules into one code gradually disappeared in the process of developing economic relations. Accordingly, the following laws have now been separately adopted in Germany to regulate business relations: the Law on Limited Liability Companies (GmbHG 16), the Law on Joint Stock Companies (AktG17), and the Commercial Code[2] (Gandelsgesetzbuch – HGB 15). However, the German Civil Code (BGB 14) is particularly important among the corporate governance rules in Germany.[3] The German Civil Code contains general rules on legal entities and distinguishes non-profit and entrepreneurial legal entities (BGB § 21 and § 22).[4] Thus, the law allows creation commercial and non-commercial associations for doing business.

It is notable, however, that Germany has developed the Pre-foundation Doctrine (Vorgesellschaft), which states that an association is entitled to step in a legal relation and is considered a sui generis legal entity (but not a corporation) if the statute of the association is duly signed. Accordingly, the company that existed before the registration is called “Previous Company”. At this time, the statute already applies to relations between the founders. When the registration process is completed, the previous company will automatically turn into a corporation, i.e. eventually become a corporation. After the registration of the company, the personal liability of the founder disappears, because the transactions concluded by the “previous company” and their results are transferred to this registered company. It should be noted here that the founders can be held liable before the corporation if the economic activity car-

1 Elseven, A., Germany Business Law. Business Laws in Germany. <https://www.hg.org/germany-business-law.asp> [Last seen: 22 March, 2022].

2 The norms governing the activities of limited liability companies and joint-stock companies in Georgia are combined into one Law on Entrepreneurs. See. Betaneli, K, Masbaum, M. S., (2003). Corporate Law in Georgia. Review of Georgian Law. N6, Vol. 2/3, p. 280.

3 Madisson, K., (2012). Duties and liabilities of company directors under German and Estonian law: a comparative analysis, RGSL Research papers. pp. 13-15.

4 BGB § 21 and § 22.

ried out before the establishment reduced its assets and led to a decrease in the authorized capital of the company (decapitalized the company).[5]

A corporation is expressed by the term "Verein" In Germany, which means union, community, association. Although one group of German authors sharply distinguishes between such concepts as a corporation and a union of capitals, others, on the contrary, consider these concepts as identical ones.[6] The fact is that the idea of a corporation lays in a basis of gathering of different capitals, hence its name is "Capital Society" (Kapitalgesellschaft). However, unlike personal associations, personal participation is not mandatory here, participation is inherited; Legal status is more difficult to obtain than in a union of persons. It should also be noted that, as a rule, members of the Society are not liable for the debts of the Society. The will is expressed by a majority vote, and business is usually done on behalf of the union.[7]

Any company or individual must decide which form to use to start a business in Germany. German companies can be divided into corporations, partnerships and associations.[8]

German commercial law provides following organizational and legal forms of corporations: a joint-stock company (Aktiengesellshaft – AG), a partnership limited by shares (Kommanditgesellschaft auf Aktien – KGaA) and a limited liability company (Gesellschaft mit beschränkter Haftung – GmbH). It is clear that a limited liability company has an advantage if we look at practice, namely there were 15,453 joint-stock companies and 1,1186,598 limited liability companies in 2016 in Germany.[9] There are also separate European Type Companies (SE). As for the type of partnership, its forms are: Civil law partnership (GbR), General commercial partnership (oHG), limited commercial Partnership (KG), Partnership Association (PartG), Closed type partnership. However, in fact, foreign investors operate through a partner Company or Branch in Germany. There are tree types of partnership, the civil law partnership (BGB Gesellschaft), the general commercial partnership (oHG) and limited commercial partnership (KG).[10] With regard to partnerships, the most common organization in Germany is a limited liability company. [11] This is due to the fact that, unlike joint-stock companies, this organizational and legal form has less legal requirements. An LLC is considered a more flexible form of small business because the liability of shareholders in an LLC (such as a JSC) is limited. However, unlike the JSC, shareholders have more possibilities to interfere in the management of the company; moreover, they can give direct instructions to the directors of the LLC. However, directors are jointly and individually liable to the company.[12]

In addition, with the reform dated on November 1, 2008 it was enacted the federal law "On the modernization of legislation on limited liability companies and the prevention of abuse of rights" in Germany. The purpose of the reform was to simplify the establishment of a company, and the main condition for the simplification was that the founders of such a company could start their activities without determining the minimum required authorized capital. As a result, two limited liability companies were formed: there is a standard company On the one hand, which must have a minimum share capital of 25,000 euros, and a company, which can be created according to the German law, without the mandatory share capital, on the other hand. It is also stipulated that 25% of the profits must be credited to the statutory reserve until the amount reaches the authorized capital (25,000 euros) in such a company.[13]

5 See Bakakuri, N., Gelter, M., Tsertsvadze, L., Ghugheli, G., (2019). Corporate Law, Handbook for Lawyers. Tbilisi. pp. 55-57.

6 Vasilevskaya, L. Yu., (2004). The doctrine of property transactions under German law. Moskow: Statut. p. 107.

7 Zhalinsky, A., Rericht, A., (2001). Introduction to German Law. Moscow: Spark. p. 508.; Karuna, D., (2003). Comparative Corporate Law: A Comparative Legal Review of EU, US and UK Corporate Systems, Free Economic Zones. Tbilisi: Ilia State University Press. pp. 60-61.

8 Schulz, M., Wasmeier, O., (2012). The Law of Business Organizations, A Concise Overview of German Corporate Law. Berlin, Heidelberg: Springer. p. 26.

9 Sethe, R., (2019). The Law of Business Associations, Introduction to German Law, Third Edition, Ed. Zekoll, J., Wagner G. The Netherlands: Kluwer Law International BV. p. 160.

10 Schulz, M., Wasmeier, O., (2012). The Law of Business Organizations, A Concise Overview of German Corporate Law. Berlin, Heidelberg: Springer. p. 26, 29.

11 Elseven, A., Germany Business Law. Business Laws in Germany. <https://www.hg.org/germany-business-law.asp> [Last seen: 22 March, 2022].

12 Tsertsvadze, L., (2016). Duties of the directorate in merging companies and alienating the controlling stake (comparative-legal analysis). Tbilisi: World of Lawyers. p. 47.

13 Burduli, I., (2009). Statutory capital and its functions, in the book: "Theoretical and practical issues of modern

The above community can be an entrepreneur. In accordance with Article 14 of the BGB, an entrepreneur is an individual or legal entity or a legally capable partnership that makes deals for the manufacturing or independent professional activities. In addition, an association of persons is a society that may have subjectiv rights and obligations.[14] The consumer, which, according to article 13 of the BGB, is any natural person whose actions in the process of making deals are not based on his commercial or professional purpose, uses manufacturing products.[15]

Two types of capital are recognized in Germany: a. Limited Liability Company and b. Joint-stock company. Shares of a Limited Liability Company may not be put on public sale, while shares of a Joint Stock Company may be traded on the securities market.[16]

CORPORATE GOVERNANCE SYSTEM AND RESPONSIBILITY

German corporate law recognizes a two-step system of management, which is considered as its peculiarity. The fact is that the management board and the supervisory board are considered as equal bodies in such management model.[17] German companies' two-step system involves a supervisory board and a board of directors. The Meeting of shareholders elects the Supervisory Board, and the directorate, which is appointed by the Supervisory Board, carries out the management of the company.[18] However, the German Corporate Governance Code allows for the choice of a single-step system for European companies. Thus, German law is in line with the European directive, according to which a European company is free to choose a one-step or two-step management model.[19]

Members of the governing body are not strictly liable for damages to the company or its creditors in Germany. The inability to manage the company ultimately has a negative impact on the company, but does not automatically lead to its liability for possible damage. The director is personally liable for any culpable violation of his duties. Such obligations may arise from contract (by internal rules of the association, agreement with the director) or from law (civil, corporate, criminal or insolvency law). Cases of violation of the obligations of loyal competition and illegal redistribution of the company's capital have become more frequent. German law divides duties of directors into two parts: a. The director's responsibility directly to the company (internal liability) and b. Director's liability to third parties (external liability). They can also be held criminally and administratively liable at the same time. Internal liability is based on violations of duties arising from the powers of the director in the company. Members of the management body shall be jointly liable for any damage caused to the Company because of non-compliance with their reasonable leadership and caring leadership duties. External liability refers to liability to any person other than the company. The responsibilities of the governing body are primarily the responsibility of the company and not of third parties; therefore, external liability is very rare. As a rule, any claim by third parties for damages can only be directed against the company and the organization may have recourse against the director.[20]

Thus, preference is given to intra-corporate management in Germany, which is because the competence between these bodies is strictly separated at the legislative level.[21]

Successful management of a company means protecting the shareholders and directors of the company from their individual property liability under the so-called "corporate veil ". In this sense,

corporate law". Tbilisi: Meridiani, pp. 216-218. (in Georgian).

14 § 14 BGB.

15 § 13 BGB.

16 ob. Girasa, R., (2013). Corporate Governance and Finance Law. New York: Springer, p. 98.

17 Chanturia, L., (2006). Corporate Governance and Accountability of Managers in Corporate Law. Tbilisi: Samartali. p. 126.

18 See Girasa, R., (2013). Corporate Governance and Finance Law. New York: Springer, p. 98.

19 Tsertsvadze, L., (2016). Duties of the directorate in merging companies and alienating the controlling stake (comparative-legal analysis). Tbilisi: World of Lawyers. p. 45.

20 Madisson, K., (2012). Duties and liabilities of company directors under German and Estonian law: a comparative analysis. RGSL Research papers. pp. 13-15; Bichia, M., (2020). Legal Obligation Relations, Handbook, 3nd ed. Tbilisi: Bona Causa. pp. 396-397.

21 Chanturia, L., (2006). Corporate Governance and Accountability of Managers in Corporate Law. Tbilisi: Samartali. p. 30.

corporate protection is seen as an immunity that limits the liability of owners of the company and separates the owner of the company from the obligations of the company. A company's limited liability protects owners' personal assets from the company's creditors.[22]

The court has developed the doctrine of piercing the corporate veil ("Durchgriffshafung") in Germany.[23] The rule of pierced corporate veil can be enforced by the court n Germany if the shareholder and the corporation fail to comply with corporate formalities, resulting in the creditor misidentifying the corporation.[24] According to the example of Germany, we can say that often the principle of piercing the corporate veil is applied to a limited liability company. However, the partner's personal liability is based on mandatory provisions of concern law.[25]

Violation of formalities entails piercing of corporate veil if creditor was deprived of the opportunity to identify the counterparty exactly because of this violation. As for confusion in owner of the property (is it individual or corporate property), it can lead to pierced corporate veil if the financial transactions are carried out in such a way that it is impossible to identify property of society.[26]

The fact is that German courts do not take into account the corporate principle of limited liability in exceptional cases. The German jurisdiction shares the so-called "traditional vision of a legal entity", according to which any registered company has a basis for its legitimate existence. The factors applied to Piercing of corporate Veil in Germany are similar to those presented in the United States. Thus, liability to shareholders can most often be brought when the full control exists among other factors such as mistake in nature (individual or corporate) of assets of a shareholder, insufficient capitalization, and neglect in corporate formalities (rules of governance).[27]

The German law on joint-stock companies determines that a decision-maker (director), which caused damage enjoys immunity of the directors (sovereignty), which protect them from responsibility, provided the board of directors: (a) Passed the business decision, (b) Acted in accordance with the principle of good faith; c) Acted on the basis of adequate information; d) Acted in interests of the corporation.[28]

Germany bears the burden of proof on the director in this case, so he must prove that he acted in good faith, had the right information and that his activities served for the benefit of the enterprise.[29]

It is also important to distribute duties of care and loyalty to members of the Managment Board together with members of the Supervisory Board. Violation of them gives rise to the right to claim the compensation for damages. However, members of the Supervisory Board are liable in the case of transactions made against the interest of society.[30]

The freedom of entrepreneurial decision is important in relation with the presumption of the validity of a business decision (rule of business judgment). American rule of free enterprise decision also has international significance. For example, the freedom to make an entrepreneurial decision was achieved through a court decision in Germany.[31]

The business judgment rule was first developed in the United States, although it is also found in German law. It is seen as a mechanism by which board members, directors and members of the supervisory board can be relieved from the risk of failure caused by production activities: This risk is not a

22 Hansmann, H., Kraakman, R., Squire R., (2006). Law and the rise of the firm (asset partitioning and entity shielding). Hawvard Law Review, 119(5). pp., (1333)-1403.

23 It is known in the US as "piercing the corporate veil". See. Presser, S. B., (2011). Piercing the Corporate Veil. Eagen. pp., (1392)-93.

24 Alting, C., (1995). Piercing the Corporate Veil in American and German Law – Liability of Individuals and Entities: A Comparative View. Tulsa Journal of Comparative and International Law. Vol. 2, Issue 2, p. 214.

25 Presser, S. B., (2011). Piercing the Corporate Veil, edition, Eagen. pp., (1392)-93.

26 Alting, C., (1995). Piercing the Corporate Veil in American and German Law – Liability of Individuals and Entities: A Comparative View. Tulsa Journal of Comparative and International Law. Vol. 2, Issue 2. p. 198.

27 Alting, C., (1995). Piercing the Corporate Veil in American and German Law – Liability of Individuals and Entities: A Comparative View. Tulsa Journal of Comparative and International Law. Vol. 2, Issue 2. pp. 249-250.

28 Vasiljevid, M., (2012). Civil Law and Business Judgment Rule. Annals FLB – Belgrade Law Review. Year LX, No. 3. p. 17.

29 Jugheli, G., (2010). Capital protection in a joint stock company. Tbilisi: Siesta. p. 114.

30 Kübler, F., Assmann, H.-D., (2006). Gesellschaftsrecht, Die privatrechtlichen ordnungsstruqturen und Regelungsprobleme von Verbänden und Unternehmen, 6. Aufl., Berlin: CF Müller GmbH, S. 215.

31 See. BGH April 21, 1997, BGHZ 135, 244 (ARAG/ Garmenbeck) (in German); See Bakakuri, N., Gelter, M., Tsertsvadz, L., Ghugheli,, G., (2019). Corporate Law, Handbook for Lawyers. Tbilisi. p. 84.

risk for members of management bodies, but directly for society and indirectly also for partners, since it is clear that economic and entrepreneurial activity is impossible without risk.[32]

The German Business Judgment Rule is a modified version of the American Business Judgment Rule. Germany implemented the Business Judgment Rule in legislation in 2005. In order to codify this institution, the first paragraph of Article 93 of the Law on Joint Stock Companies[33] was amended, which states that "obligations are not considered violated if a member of the board could reasonably assume that he acted in the interests of the company on the basis of relevant information."[34] The rules of business judgment in Germany imply that management (leadership) must apply the measures that a wise and purposeful manager would take. Management board can be held liable for the poor performance of a company based on entrepreneurial business decisions taken with the due care of responsible managers, even if these decisions subsequently turn out to be failures. Business judgment rules makes the content the responsibility of directors wider and make them responsible for taking production risks, but at the same time do not allow them to to be inactive at the expense of investors and employees.[35]

However, not all management decisions are protected by the Rule of Business Judgment, but only those that are made in accordance with the following preconditions: first, the decision must be made by impartial directors, that is, directors who do not have a personal interest in the decision; Secondly, the decision must be made on the basis of sufficient information; Third, directors must act in the interests of the corporation. If a decision is made in violation of any of these requirements and the plaintiffs (shareholders or board of directors) prove it, the Business Judgment Rule will not take effect and the director who made the decision may be held liable.[36]

BUSINESS NEGOTIATIONS AND PECULIARITIES OF BUSINESS CONTRACTS IN GERMANY

The legal basis of the disposal of capital or property in Germany is related to business law, Buying and selling rules, commercial law, solving cases in court and more.[37]

As a rule, Germans are more formal in business relations. They are more oriented on task (cause) rather than on building a relationship. Consequently, the Germans are critical to events, especially since they take into account the experience gained in the analysis of past projects and act to improve current processes.[38]

In this regard, in the process of business negotiations, first of all, it is important for parties to take the preliminary actions in their business relations.

The doctrine of the so-called "culpa in contrahendo" has been developed in German law, which was put in the BGB as a result of an imperative legal reform in 2002 and is considered as an independent basis for pre-contractual liability.[39] This pre-contractual legal obligation to prepare a contract was created, the prerequisite of which is the existence of a contract-like, trusted relationship and occures regardless of whether the contract is concluded in the future or not.[40]

Even in the pre-contractual period, protective obligations arise the violation of which causes liability. By virtue of the only "breach of duty" option,

32 See. Luther, M., (2003). II Georgian-German Symposium, Responsibilities of Joint Stock Companies and Limited Liability Governing Bodies. Tbilisi. p. 25, 4.

33 Chanturia, L., (2006). Corporate Governance and Accountability of Managers in Corporate Law. Tbilisi, p. 237, 4.

34 Grundei, J., von Werder, A., (2005). Die Angemessenheit der Informationsgrundlage als Anwendungsvoraussetzung der Business Judgment Rule. AG, 22, S. 825-834 (in German); Chanturia, L., (2008). Civil liability of officials of a joint-stock company. Bulletin of Corporate Governance. N7. p. 14.

35 Madisson, K., (2012). Duties and liabilities of company directors under German and Estonian law: a comparative analysis. RGSL Research papers. p. 35; Bichia, M., (2020). Legal Obligational Relations, Handbook, 3nd ed. Tbilisi: Bona Causa. pp. 397-398.

36 Chanturia, L., (2008). Civil liability of officials of a joint-stock company. Bulletin of Corporate Governance. N7. p. 14.

37 Prepared for the Barbados Private Sector Association (BPSA) with the support of the IADB project "Building Capacity to increase exports", A guide for business, July 2012. p. 6.

38 Clortescu, E., (2017). Business Communication _ British and German Perspectives. Logos University Mentality Education Novelty. Section: Political Sciences and European Studies. Vol. 4.1. p. 60.

39 BGB § 311 (2).

40 Kropholler, I., (2014). German Civil Code – Commentary on the study, Translators: Darjania, T. and Chechelashvili, Z., Tbilisi: GIZ. p. 197.

violation of all protective duties would invoke damages in the unified system of remedies. This, in turn, in the case of "culpa in contrahendo", considers breaches of obligations in the context of the legal consequences of violation of the contract.[41] The obligation of pre-contractual diligence is presented in the form of "culpa in contrahendo" and is based on good faith in German law.[42]

The first erosion of the principle of good faith is the concept of pre-contractual duty based on the principle of good faith. Certain data and information about the parties are collected during negotiations based on the general principle of good faith, and, accordingly, duties arise to disclose, inform, keep confidentiality and protect the interests or rights of the other party. It is the violation of those pre-contractual obligations that can be considered culpa in contrahendo.[43]

The second change is provided by the reform of obligation law. According to § 311(2) of the BGB, there is a general duty of care during the pre-contractual period in accordance with the duty of care in the performance of contract.[44]

All this ensures the fulfillment of protective obligations in pre-contractual negotiations and appropriate sanctions in case of their violation. Accordingly, Germany thus created a mechanism for protecting the interests of parties at the pre-contractual stage.

It is also important to know what the contracts are like in Germany. In general, parties believe in Germany that they can achieve their goals at a much lower cost with the help of a treaty than in the US. What is the basis of this approach to the formation of contracts in Germany? This approach can be justified: If we compare the positions of the USA and Germany, then the difference between them will become clear and the question will be answered logically. Notably, the US contracting process focuses on individual cases and specific details of the contract to help parties get what they want in the contract. Based on this assumption German parties create shorter contracts than US parties. It is possible that US contracts are based on an approach that avoids conflicting provisions and includes definitions of certain terms. However, it is clear that the achiewwing a perfection in these treaties is impossible because of impossibility of exhaustively define everything. Complex US business contracts are characterized by the following features: (a) They are very extensive and complex; (b) There have many explanations, conditions and restrictions in these agreements; (c) There are many "legal" rules or clauses in the agreement; (d) The legal language is mostly similar from agreement to agreement, but not exactly the same; (e) Some types of contracts are generally similar in a broad sense, but depending on the specific case, the specific language varies from contract to contract; (f). The initial outline of the contract is relatively different, which is important for a buyer who wants a broad representation and a buyer who wants to create a much smaller and highly qualified presentation. Contracts in Germany are distinguished by the following features: A) contracts are very simple and concise, contain basic data; B) Business contracts in Germany contain much fewer explanations, reservations and restrictions from a linguistic point of view as well as less formal language; C) German agreements make up half or 2/3 of the agreements in the USA in terms of volume; D) the legal language is almost the same from contract to contract; E) Most of the provisions of the contract are the same from agreement to agreement u.s.[45]

Thus, in contrast to the Anglo-American space, the German-speaking countries mainly use the rule of concise wording of contracts, which corresponds to the motto: "the less, the better." However, at the same time, the key here is that the conditions set out in the contract are clear and understandable.[46]

At the same time, German cross-border transactions, including those regulated by German law, are increasingly using the Anglo-American model and do not accept or slightly change the provisions of the law. Thus, lawyers in the United States are

41 Li, X-Y., (2017). The Legal Status of Pre-Contractual Liability: Contrasting Responses from German and English Law. National Taiwan University Law Review. Vol. 12:1. p. 134.

42 Preis, U., Gottardt M., (2000), NZA, pp. 348-354.

43 Li, X-Y., (2017). The Legal Status of Pre-Contractual Liability: Contrasting Responses from German and English Law. National Taiwan University Law Review. Vol. 12:1. pp. 138-139.

44 *Ibid.*

45 Hill, C. A., King, C., (2004). How do German Contracts do as much with fewer words? Chicago-Kent Law Review. Vol. 79. pp. 894-895.

46 Huemer, D., Lenz W., Kerschner F., Lux D., Schlager J., Szep, C., Wittmann, E., Schlager, S., Trausner M., (2013). Handbuch Vertragsgestaltung: Zivilrecht, Geselschaft, Steuerrecht, Für Praxis und Studium. herausgegeben von Kerschner F. p. 24.

called “perfectionists” when it comes to drafting a contract, because their actions are aimed at resolving everything with maximum accuracy, but practice shows that it is impossible to achieve perfection.[47]

Thus, contracts concluded in accordance with German law are usually, in structural terms, short and simple. The main structural elements of business contracts in Germany are regulated by the German Civil Code. The most common is the contract of sale among the contracts in the field of business. In addition, the United Nations Convention on International Trade Agreements applies to the sale of goods in Germany. German commercial law complies with international standards. Global trade practice and standard trade contract rules recognize International Commercial Terms. Germany also uses global mechanisms for financing international sales, such as letters of credit and monetary guarantees.[48]

If we compare the standards of dispute settlement between parties of a contract in the US and Germany, then the difference between them is obvious in the contract. For example, the following provision is reflected in American law: „The exclusive forum for the resolution of any dispute under or arising out of this agreement shall be the courts of general jurisdiction of__ and both parties submit to the jurisdiction of such courts. The parties waive all objections to such forum based on forum non conveniens. “ A similar provision applies to similar provisions in German contracts: “Ausschlieflicher Gerichtsstand ist __ .“[49] If the dispute between parties cannot be settled by agreement of parties, the case will be resolved in court. In this sense, it is noteworthy that there is no case law in Germany and decisions made by a court here are binding only parties to the process, and not on another court. This is more obvious taking into account that decisions of the Supreme Court are used by lower courts as a guidelining provisions.[50]

In one case in Germany, it was found that the ban on overnight stays for tourists was a somewhat serious violation of professional freedom and property rights. Such interference is justified, because it serves a legitimate purpose – to prevent new cases of coronavirus infection and to reduce the spread of COVID-19. However, the principle of proportionality should not be violated in relations with various business sectors. Also, it also found that light measures do not give immediate results and the ban is temporary in nature.[51]

PROTECTION OF LABOR RIGHTS IN GERMANY

First of all, it should be noted that there is no unified German labor code. The main sources of regulation of labor relations are federal laws, collective agreements, labor contracts, judicial practice in labor disputes. Laws applicable to labor relations in Germany include: the Civil Code, which defines labor relations, the Constitutional Labor (Industrial) Law, concerning cooperation between employers’ and workers’ councils, and Law on Collective Agreements.[52]

The basic principles of labor law in Germany are defined by the Civil Code (BGB 611-630), and the rules governing individual issues are scattered in various laws.

Labor law governs the relationship between an employer and an employee.[53] It is noteworthy that German federal law does not define the concept of an employee in German labor law. Only the Code of

47 Hill, C. A., King C., (2004). How do German Contracts do as much with fewer words? Chicago-Kent Law Review. Vol. 79. pp. 924-925.

48 Prepared for the Barbados Private Sector Association (BPSA) with the support of the IADB project “Building Capacity to increase exports”, A guide for business. (July 2012). p. 6.

49 Hill, C. A., King, C., (2004). How do German Contracts do as much with fewer words? Chicago-Kent Law Review. Vol. 79. p. 895.

50 Prepared for the Barbados Private Sector Association (BPSA) with the support of the IADB project “Building Capacity to increase exports”. A guide for business. July 2012. p. 6.

51 Verwaltungsgericht Berlin, Entscheidung vom 20.05.2020 – VG 14 L 97.20; Bichia, M., (2021). The danger of the privacy “disappearance” during a pandemic in the context of globalization and the grounds for its legitimacy: An institutional Analysis. Globalization and Business. №11. 46, <https://doi.org/10.35945/gb.2021.11.005> [Last seen: 22 March, 2022].

52 Mayr, L., (20211, May 20). German Labor and Employment Law: issues concerning the set-up of a company in Germany. MAYR Kanzlei für Arbeitsrecht. <https://www.mayr-arbeitsrecht.de/en/spectrum/german-employment-law/#quicklink1> [Last seen: 22 March, 2022].

53 Lorenz, M. and Falder, R., (2016). Das deutsche und chinesische Arbeitsrecht, The German and Chinese Labour law. Wiesbaden: Springer Gabler. p. 21.

Commerce defines the concept of "self-employed": "Self-employed" is anyone who can freely organize their work and determine their working hours. Thus, the main feature of self-employment is personal freedom. This is why the traditional understanding of "employed" refers to the opposite of personal freedom, called "personal subordination" (subordination). In accordance with this, employee is a person who is obliged to work for someone under a personal contract within the framework of a private contract. The key element of this formula is personal subordination; Another important element is the private contract, which excludes, on the one hand, all relations in which a person has not entered voluntarily, but in which he is still forced to work, and, on the other hand, relations based on public law instruments.[54]

At the same time, labor law seeks to establish social justice on the basis of private law through the (labor) contract.[55] German federal law is of great importance from the point of view of the protection of labor rights,. Also, special laws protect labor rights in Germany: Act on Protection Against Unjustified Release (KSchG), General Equal Treatment Act (AGG), Incentives Act (EFZG). Separate laws on safe producting and working conditions were also adopted: the Law on Working Hours (ArbZG, 1994), the Federal Law on Necessary Allowances for child Care and Parental Leave tax, and others. Germany has a social security system that obliges employees to pay certain social security contributions. However, this obligation does not apply to self-employed workers or freelencers, as they are self-employed and are not required to follow instructions of their directors, so they are not considered employed.[56]

German Labor law creates a balance between protecting the rights of the employer as a powerfull party and protecting the rights of the employee to ensure equal and proper working conditions. Accordingly, the purpose of labor law is not to equalize the rights of the employer and the employee, but to strengthen (elevate) the employee almost to an equal degree in terms of the rights and duties of the "stronger" employee. Otherwise, the employer can use the freedom of contract in his favor and to the detriment of the "weak" employee. Employees are usually more deserving protection than, for example, freelencers who are not covered by labor law. The protection of employees is carried out in various ways. Basic freedom of contract is now severely restricted through the courts, which can challenge the validity of employment contracts or such specific agreements. Some German laws provide contract terms, including hours of work, vacations, paid holidays, and more. One of the main issues in Germany is the protection of an employee from unfair dismissal.[57]

The German Federal Law on Equal Treatment should be noted from the point of view of the protection of labor rights. This law establishes that any discrimination in hiring process and working conditions in pre-contractual relationships is unacceptable.[58] However, according to the prevailing practice in Germany, there is a general approach according to which indirect discrimination is confirmed by asking the question whether the candidate is pregnant or not before the concluding a contract.[59] However, the German Federal Labor Court also makes an exception to this rule, in particular, such a question is considered legitimate if it concerns the existence of risks to the health of the mother and child.[60]

It should also be noted that Germany combines working time as well as time spent on previous and subsequent work-related activities. Working time here is the time that the employer uses to transfer work materials to the employee and perform previous activities, and the employee uses it to organize his workplace.[61] In addition, statutory working hours are considered time required for changing clothes

54 Weise, M., Schmidt, M., (2008). Labour Law and Industial Relations in Germany, Fourth edition. The Netherlands: Kluwer Law Internationa BV. p. 45.

55 Lorenz, M. and Falder, R., (2016). Das deutsche und chinesische Arbeitsrecht, The German and Chinese Labour law. Wiesbaden: Springer Gabler. S. 21.

56 Mayr, L., (20211, May 20). German Labor and Employment Law: issues concerning the set-up of a company in Germany. MAYR Kanzlei für Arbeitsrecht. <https://www.mayr-arbeitsrecht.de/en/spectrum/german-employment-law/#quicklink1> [Last seen: 22 March, 2022].

57 Lorenz, M. and Falder, R., (2016). Das deutsche und chinesische Arbeitsrecht, The German and Chinese Labour law. Wiesbaden: Springer Gabler. S. 21.

58 Federal act of equal treatment (2006, amended 2009). Section 2, paragraph one, no1.

59 Erfurter Kommentar zum Arbeitsrecht/Schlachter, 16. Auflage 2016, MuSchG §5 Mitteilungspflicht, Rn 5, BAG 15.10.1992 NZA 1993, 257.

60 Erfurter Kommentar zum Arbeitsrecht/Schlachter, 16. Auflage 2016, MuSchG §5 Mitteilungspflicht, Rn 5, BAG 1.7.1993 NZA 1993, 933.

61 25.04.1962. AP BGB 611 Mehrarbeitsvergütung N6.

only when it is required for the work. Such is the security service. Therefore, whether this type of working time is paid or not depends on each specific circumstance.[62]

In addition, the actions of the employee may cause harm to a third party, which will entail the tort liability of the employer. This, in turn, is the fault of the employer. Here the fault of the employer is that he could not find the right employee and could not control him after hiring. The burden of proof shifts to the creditor, as the employer's fault is presumed. The case here concerns a presumption that can be denied after confirmation of the contrary.[63] However, the liability of the employer is excluded if he has selected the worker in good faith, supervised and trained him and provided him with appropriate equipment, or if the injury would still have occurred in the proper performance of his duties.[64]

However, the legal consequences of the invalidity of the contract after the commencement of work are specific. If actual employment relations are established, then the consequences of the invalidity of the employment contract should not extend directly to the past period. In this case, the contract must have legal force in relation to the past time.[65] However, contracts related to the performance of immoral work may be declared invalid from the moment the contract is concluded.[66]

Article 623 of the BGB determines the form of termination of labor relations, in particular, the termination of labor relations requires the protection of a written form when submitting an notice of termination or a separation agreement.[67]

An employment can be terminated immediately without warning, but this directly depends on the degree of violation of labor duties In Germany. The German Labor Court ruled in one case, that immediate termination without prior notice was legal because the case concerned a material violation of safety regulations by an employee. Circumstances of the case were as follows: This man was guarding a gold cutting workshop. Access to this workshop was possible only with a pass, even when the exit was not locked using an emergency generator, which served to further comply with security rules. Under these conditions, the employee turned off the generator and left the workplace for a long time leaving the workshop without protection and control. Several days passed and the workshop lost about 74,000 euros in gold. It is clear that the employee violated security measures that were directly related to his job duties. It was unacceptable for the employer to continue the employment relationship with the employee because the violation was serious. it was not necessary to notify the employee in advance of the immediate termination of the employment contract on this basis.[68]

It is also noteworthy that there are labor courts in Germany.[69] The fact is that, there are special courts for labor disputes with independent jurisdiction taking into account the specifics of disputes. They set precedents for labor disputes in Germany.[70] Article 313 of the BGB contains important provisions that may apply during a pandemic: If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not concluded the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration. It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be

62 Erfurter Kommentar zum Arbeitsrecht., (2009). 9, Auflage, München, S. 549.

63 Falk, U., Schneider B., (2012). Klausurenkurs im Bürgerlichen Recht II, Ein Fall – und Repetitionsbuch für Fortgeschrittene. Heidelberg, München, Landsberg, Frechen, Hamburg: CF Müller GmbH. S. 211.

64 Spindler, G., Rieckers, O., (2011). Tort Law in Germany. The Netherlands: Kluwer Law International. p. 77.

65 The results of the invalidity of the actually performed work before the termination of the contract should not be distributed in the past tense. See. BAG 15.11.1957 – 1 AZR 189/57 NJW 1958, S. 397.

66 Kropholler, I., (2014). German Civil Code – Commentary on the study, Translators: Darjania, T. and Chechelashvili, Z. Tbilisi: GIZ. pp. 458-459.

67 BGB 623.

68 Landesarbeitsgericht Berlin-Brandenburg, Urteil vom 09.09.2015 – Az. 17 Sa 810/15.

69 Weise M., Schmidt M., (2008). Labour Law and Industial Relations in Germany, Fourth edition. The Netherlands: Kluwer Law International BV. pp. 45-46.

70 Mayr, L., (20211, May 20). German Labor and Employment Law: issues concerning the set-up of a company in Germany. MAYR Kanzlei für Arbeitsrecht. <https://www.mayr-arbeitsrecht.de/en/spectrum/german-employment-law/#quicklink1> [Last seen: 22 March, 2022].

incorrect. If the prerequisites of Subsection 1 or 2 are met and there is a reasonable adaptation option, the aggrieved party may demand adaptation from the other side. This adaptability of German law becomes especially relevant in the context of COVID-19. The aggrieved party is entitled to withdraw from or to terminate the contract due to the changed circumstances only if contract adaptation turns out to be illegal, impracticable or unreasonable for the other side.[71] The COVID-19 coronavirus is affecting many aspects of labor law in Germany. Many offices are sending their employees away to work home office en-masse to help reduce the rate of contagion while others are introducing "Kurzarbeit" (reduced working hours) measures.[72]

CONCLUSION

The legal basis for regulating the business environment is diverse and extends to civil, labor, corporate and other relations. Business law in Germany covers a wide range of issues that are part of business law and represent a conglomeration of various areas. This becomes even clearer if we take into account that one or another area of activity is not regulated by one act and different laws apply, including special laws for specific companies. In this sense, the foundations of business regulation in Germany are specific.

It seems that in Germany, issues related to capital companies are regulated by special laws, which are considered an important part of the Commercial Code. Accordingly, these laws should be applied when creating various legal entities. At the same time, it seems acceptable to use the so-called pre-registration community. The presence of a "previous company", which will be transformed into a corporation after registration. This shows that importance of the personal responsibility of the founder of the society is decreased from this stage and the responsibility of the society becomes more important. A company or individual can form a corporation and a partnership in Germany. Limited liability companies are especially popular in Germany. This should be dictated by the fact that the law imposes relatively few requirements on it's activities and is considered the most flexible organizational and legal form for small businesses.

The study showed that German company law is based on a two-step management system (Management Board and Supervisory Board). The responsibility of directors can be internal (when the responsibility of the director is assigned to the company) and external (when the responsibility of the director arises to third parties) In Germany. It is true that public liability to creditors for the company's obligations is recognized, but comprehensive liability is also allowed if certain preconditions are met. The manager enjoys some immunity, but his decision will not be protected by the Business Judgment Rule if the decision was made in violation of bias and other rules.

In many ways, however, American boards are becoming more and more like their German counterparts. Raised monitoring standards for boards of directors and the growing importance of committees have made the one-tier board in America more akin to a multi-tiered board. In Germany, corporations now have the choice of adopting a one-tier model of government but very few have done so.[73]

At the same time, it turned out that as a result of the reform in Germany, the so-called culpa in contrahendo rule operates, which is considered to be an independent basis for pre-contractual liability. This is due to pre-contractual duties of protection (care, good faith), the violation of which entails liability. This created a strong legal mechanism in Germany for security.

At the same time, Germany has chosen the easy way of business contracts and decided to settle terms of the agreement and the various points of agreement through a narrow approach to the agreement unlike the US.

A separate area of discussion is the protection of labor rights in Germany. Labor rights are not regulated by a single codified act. Here, the legal status

71 Berger K. Peter, Behn D. (2019-2020). Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study. McGill Journal of Dispute Resolution. Volume 6, Number 4. pp. 123-124.

72 Schlun & Elseven, Rechtsanwälte. Employment Law and COVID-19 Coronavirus in Germany. <https://se-legal.de/corona-covid-19-crisis-lawyer-germany/?lang=en> [Last seen: 22 March, 2022].

73 Block, D. and Gerstner, A.-M., (2016). One-Tier vs. Two-Tier Board Structure: A Comparison Between the United States and Germany. Comparative Corporate Governance and Financial Regulation. N1. p. 51.

of the employee and the employer is relatively balanced, and from the point of view of protecting the labor rights of the employee, various laws are incorporated into the mechanisms for maximizing the interests of the employee. The specific approach to labor disputes is also confirmed by the fact that labor courts deal specifically with labor rights cases. Consideration of cases by judges specialized in the field of labor law makes the judicial system better and fairer.

The norms of German business law prove how flexible and well-formulated the German rules are. Using the rich experience of Germany will greatly help European countries, especially during a pandemic.

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