

METHODS OF OPERATION IN GERMANY

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INTRODUCTION

The European Common Market holds out great prospects for increasing the world-wide competitive position of European enterprises. For one thing, the elimination of tariff walls among members of the European Economic Community *inter se* will operate as a significant cost-reducing factor. Also, the free flow of labor and the increase in research incident to free traffic across national boundaries is infusing a hitherto unknown degree of efficiency into European production. American industry, unable in the long run to beat such competition, is increasingly seeking to protect its profits by spawning controlled or wholly-owned European competitors. In this article some of the principal considerations affecting the choice of the legal instrumentality to be used in German business organizations are to be discussed.

BRANCHES AND SUBSIDIARIES

When contemplating the establishment of a German operation, the first question to be decided is whether the operation should be carried on as a legal part of the parent, *i.e.*, through a branch, or whether it should be run as a separate legal entity, *i.e.*, through a subsidiary. In most instances, probably, organization of a subsidiary will be preferred. Here the American parent would not only avoid exposure to unlimited liability but in all probability would also derive considerable tax advantages.

German subsidiaries are subject to the corporate income tax which is computed by the net worth method with emphasis on the adjusted book profit.¹ Losses may be carried forward for a period of five years but may not be carried back. The tax rate which ordinarily amounts to 51% becomes reduced to approximately 23.5% where profits are distributed to the parent.² Corporations with assets of less than DM

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¹ There is no preferential tax for capital gain. Schneider, Germany, 16 Bus. Law. 473-88 (1961).

² The corporate income tax rate is 51% of the undistributed taxable income. The tax rate is reduced to 15% on distribution, but since that portion of the earnings which is used to pay income and property taxes is considered as undistributed, the actual rate on distributed profits amounts to approximately 23.5%. Memorandum on Problems Involved in the Formation of West-German Establishments by Foreign Parties, Mimeograph comp. by Deutsche Waren-Treuhand, A.G., pp. 3-4 (Hamburg, 1962), hereinafter cited as Memorandum.

5,000,000.00 and at least 70% of the nominal capital of which is held by individuals may elect to have their profits taxed on a progressive scale having its maximum at 49% of income in excess of DM 50,000.00. Under this option, the distributed profits are taxed at 26.5%.³

In addition, the subsidiary's distribution to the American parent is subject to a 25% "Capital Yield" tax which is withheld at the source.⁴ However, by application of the German-American Convention on Avoidance of Double Taxation, this rate, in effect, is reduced to 15% or less, provided that the American parent controls at least 10% of the voting stock of the German subsidiary.⁵ The parent company, moreover, may take a United States income tax credit to the extent of any capital yield and trade taxes paid by its subsidiaries.⁶

Trade taxes are imposed by German municipalities where the subsidiary is located and generally vary between 12½ to 14% of the subsidiary's income.⁷ German operating units, regardless of their legal structure, are also subject to a 1% property tax based upon their assets in Germany, and such taxes may not be deducted for the purpose of computing the corporate income and trade taxes.⁸ In addition a turnover tax on gross receipts at a rate of 4% of retail and 1% of wholesale transactions is imposed.⁹ Furthermore, a 2½% capital investment tax which must be paid upon acquisition of an interest in a German subsidiary¹⁰ is a slight burdening factor upon subsidiary operations.

Branch operations, by contrast, are taxed at the rate of 49% on distributed as well as on undistributed profits.¹¹ It may, nevertheless, be advantageous to conduct European operations through a branch where great initial losses or expenses are to be anticipated. Since the branch is but an arm of the parent, overseas losses could be written off against the income of the parent for United States income tax purposes. Later, if and when the European operation has become self-sustaining and is earning a substantial profit, it can readily be converted into a subsidiary.¹²

³ Schneider, *supra* note 1.

⁴ Memorandum, *supra* note 2, at 4.

⁵ *Id.* at 18-19.

⁶ Int. Rev. Code of 1954, § 901; Schneider, *supra* note 1, at 481.

⁷ Schneider, *supra* note 1, at 478; Mueller & Steefel, *Doing Business in Germany* 79-80 (3d ed. 1962).

⁸ Mueller & Steefel, *supra* note 7, at 82.

⁹ If goods are imported into Germany, a turnover adjustment tax of 6% computed on customs valuation plus import duty becomes payable. The exemption from the tax which is applied to transactions between vertically-integrated corporate entities within Germany, said to comprise an "Organschaft," is inapplicable where the parent is a non-German corporation. Schneider, *supra* note 1, at 479; Memorandum, *supra* note 2, at 10.

¹⁰ Kapitalverkehrssteuer. See Schneider, *supra* note 1, at 480-81; also Memorandum, *supra* note 2, at 12.

¹¹ Memorandum, *supra* note 2, at 3-5; Schneider, *supra* note 1, at 477.

¹² Memorandum, *supra* note 2, at 13-15; Gilpin & Kern, *U.S. Tax Considerations*

Where operation through a subsidiary is desired, special care must be taken that the subsidiary not be treated as a branch for tax purposes. Organization as a corporate entity may not be enough. For instance, if the subsidiary is used to store inventory belonging to the parent it might be treated as an operating section, *i.e.*, a *permanent establishment*, of the parent and as such be taxed as a branch. Storage of inventory, however, does not have this effect in every instance. Thus, mere warehousing for processing or for consignment would not render the subsidiary an operating section of the parent unless the parent were also employing the administrative facilities of the subsidiary to operate a local office. Similar problems arise in cases where the subsidiary acts as agent or representative of the parent in Germany. If the tax benefits incident to subsidiary operation are desired, any employment or agency relationship between parent and subsidiary should be strictly avoided.¹⁸

OPERATIONS CONDUCTED FROM WEST BERLIN

In selecting a base for European operations, careful consideration should be given to locating in West Berlin. The German corporate income tax law provides both subsidiaries and branches domiciled in West Berlin with lower tax rates on distributed and undistributed profits coupled with higher depreciation allowances¹⁴ than enterprises located in other parts of Germany.¹⁵ Branch operations from West Berlin, moreover, might further benefit from accelerated depreciation rates which the American parent could negotiate with the United States Treasury Department.¹⁶ Finally, under certain conditions, the sale of goods and services produced or rendered in West Berlin is exempt from the German turnover tax.¹⁷

BASE COMPANY OPERATION

In passing, mention should be given to the operation of a subsidiary through a so-called "Base Company." The base company, frequently located in Switzerland or Liechtenstein may be a pure holding company which derives its income solely from distributions of subsid-

Affecting Major Alternatives of Conducting Foreign Operations, in 2 Doing Business Abroad 470-506 (Landau ed. 1962), (hereinafter cited as Doing Business Abroad).

¹³ Memorandum, *supra* note 2, at 3.

¹⁴ Strobl, Local Tax Factors—Germany, 2 Doing Business Abroad 416, 420.

¹⁵ Schneider, *supra* note 1, at 477.

¹⁶ With respect to capital assets to be operated by a branch in West Berlin, a treasury agreement as to accelerated depreciation rates could be sought by the parent under Int. Rev. Code of 1954, § 167, on the grounds that political hazards incident to West Berlin operations are likely to render the assets economically useless regardless of physical conditions. See Treas. Reg. § 1.167(a) - 9 (1956).

¹⁷ Schneider, *supra* note 1, at 479; Strobl, *supra* note 14, at 427.

aries located in third countries such as Germany, or it may be both a holding as well as an operating company. In the past, Switzerland has attracted base companies primarily because holding companies not operating in Switzerland are virtually free of any income tax, and because the Swiss anticipatory tax on dividends paid to American parent corporations may be as low as 5% if the American recipient owns at least 95% of the shares of the Swiss holding company.

In the case of an American parent which operates a German subsidiary, however, handling of dividend distributions through a Swiss holding company would add to the tax burden because the German capital yield tax which in the case of dividend distributions destined for the United States is reduced to 15%, is imposed at the full 25% rate on dividends distributed into Switzerland. If, however, the American parent desires to reemploy profits of the subsidiary in other countries, and thereby avoid or reduce the need for additional capital investment, operation through a Swiss base company is still worth considering. The American parent may also wish to accumulate profits earned by the German subsidiary in the Swiss holding company and later so liquidate the Swiss holding company that the proceeds from the liquidation will be taxed in the United States as capital gain.¹⁸

While a branch may, but need not necessarily, be set up as a corporate entity, organization of a subsidiary requires formation of a corporation. A brief outline of forms of business organizations common in Germany, based largely on an article by Dr. Jacob Strobl entitled "Principles of the German Law of Partnerships and Corporations,"¹⁹ follows.

I. CORPORATIONS

The two common forms of corporations under German law are the Stock Corporation (*Aktiengesellschaft*, hereafter referred to as AG), and the corporation of a more personal character, the Company with Limited Liability (*Gesellschaft mit beschränkter Haftung*, hereafter referred to as GmbH). There is also a third corporate form which combines the stock corporation with the limited partnership: the Limited Partnership by Shares (*Kommanditgesellschaft auf Aktien*).²⁰

A. The Stock Corporation

The stock corporation is the proper vehicle for raising capital

¹⁸ Schneider, *supra* note 1, at 483-84; Gilpin & Kern, Foreign Base Corporations—Their Use and Selection, 2 *Doing Business Abroad* 533, 540-41.

¹⁹ 1 *Doing Business Abroad* 114.

²⁰ The German Stock Corporation (A.G.) is analogous to the Sociedad Anonima and Society Anonyme (S.A.); and the Limited Liability Company is analogous to the Sociedad de Responsabilidad Limitada or Société à Responsabilité Limitée of Spanish and French-speaking civil law countries. Nattier, Local Business Organization and Operation, 1 *Doing Business Abroad* 72-108; § 17 *Handelsgesetzbuch-H.G.B.* (Commercial Code).

through the sale of shares or debentures in order to carry on large-scale business operations. The law specifies a minimum capital requirement of DM 100,000.00 which is divisible into shares having a par value of not less than DM 100.00 each.

1. INCORPORATION

The stock corporation must have a name which bears some relationship to the purpose and activities of the business,²¹ or else includes the name of one or more individuals and is followed by the letters "A.G."²² It must have five incorporators who may be individuals or corporations, each of whom must subscribe for at least one share.²³ Subsequently, however, all shares may be transferred to one individual, creating in effect a one-man corporation.

If the incorporators subscribe to all of the shares to be issued, so-called simultaneous incorporation occurs.²⁴ The incorporators frame the by-laws which must set forth the name of the firm and the place of incorporation, the object of the enterprise, the amount of the capital, the kind of shares to be issued and their face value, the names of the members of the board of managers, and the journals in which the corporation is to publish its announcements.²⁵ If one of these requirements is not met, the by-laws are invalid as a whole.

While subscription and notarial recording of the by-laws establishes the corporation, it can become a legal entity only through entry upon the Commercial Register.²⁶ In order to qualify for such registry the incorporators must first appoint a supervisory council for the corporation.²⁷ The supervisory council in turn appoints the board of managers.²⁸ Once appointed, the board issues a call for payment of at least 25% of the subscribed capital. Thereafter, the incorporators prepare a written report respecting compliance with the required establishment procedure which must be passed upon first by the board and then by the council. It is also subject to audit by the

²¹ Section 4 Aktiengesetz-AktG (Stock Law). (Abbreviated and hereinafter cited as AktG).

²² Section 4 I AktG.

²³ Schneider, *supra* note 1, at 475.

²⁴ Section 16 AktG.

²⁵ Section 16 III AktG.

²⁶ German law as well as the law of most other civil law nations prescribes that the designations of all merchants and commercial enterprises be entered in the Commercial Register. In the instance of corporations, these come legally into existence only upon registration of their respective organic documents. The register is kept by local, i.e., Municipal Courts (Amtsgerichte). They are also referred to as Courts of Registry (Registergerichte) and their decisions are appealable. Mueller & Steefel, *supra* note 7, at 12-13.

²⁷ Section 86 AktG.

²⁸ Section 25 AktG.

Registry Court which subsequently passes upon the application of the corporation.²⁹

After approval and adoption of the establishment report, the corporation may file its application for incorporation with the Court of Registry. The application must be signed by the incorporators as well as by the members of the board of managers and the supervisory council. After ascertaining that all the legal requirements for registration have been met, the court may order the corporation entered in the register, whereupon it becomes a legal entity.³⁰

Where certain privileges are to be granted to a number of shareholders or, where the shareholders are to be permitted to contribute part of the consideration for their subscribed shares in kind, if prior to the incorporation the incorporators signed contracts in respect to the transfer of assets to the corporation, German law spells out a so-called "qualified establishing procedure." The prerequisite special transactions must be disclosed by the by-laws in order to be valid with respect to the other shareholders. The law also imposes a strict obligation upon the incorporators to reveal these facts in order to protect the public from deception.³¹

Where part of the shares are to be sold to the public before incorporation, German law provides for so-called phase-incorporation.³² In most cases, however, banks and syndicates prefer to subscribe for the full issue and then subsequently sell the stock to the public. In general, incorporation procedure here is the same as outlined above except that, immediately after all the shares have been subscribed, the incorporators must call a shareholders' meeting at which the supervisory council is to be elected.

2. THE BOARD OF MANAGERS

Management of the stock corporation rests with the board of managers which consists of one or more individuals who may be of any nationality. Members of the board are elected by the supervisory council for terms not to exceed five years,³³ although re-election is permitted. The board of managers has unlimited powers³⁴ and represents the corporation in dealing with third parties. Internally, however, managerial powers may be restricted either by the Articles of Incorporation, by resolutions of the supervisory council, or by appropriate action on the part of the shareholders assembled at a

²⁹ Sections 25-27 AktG.

³⁰ Section 28 AktG.

³¹ Sections 19-20 AktG.

³² "Stufengruendung." See Strobl, *supra* note 19, at 118. "Vorstand." See § 70 AktG.

³³ Section 75 AktG.

³⁴ Schneider, *supra* note 1, at 475.

shareholders' meeting.³⁵ Such restrictions, however, do not bind third parties.

If members of the board fail to act in accordance with instructions they expose themselves to liability to the shareholders. Moreover, they may also render themselves liable to creditors and third parties for negligence, even if their action has the approval of the board of managers.³⁶ Where the board consists of several persons its powers are exercised collectively unless the by-laws otherwise provide.³⁷

3. THE SUPERVISORY COUNCIL³⁸

The supervisory council supervises without managing. It consists of not less than three and no more than fifteen members who serve for a term of five years. One-third of its membership is elected by the employees of the corporation. The remaining members of the council are elected at shareholders' meetings with the exception of the first council which is appointed by the incorporators. Members of the supervisory council are not permitted to serve on the board of managers nor may members of the board of managers serve on the supervisory council.³⁹

Shareholders' meetings must be called by the board of managers at least once a year.⁴⁰ Special shareholders' meetings become obligatory if the corporation has lost 50% of its capital or if shareholders representing at least 20% of the capital so demand.⁴¹ Notice of the meeting, including the proposed agenda, must be published at least two weeks prior to its occurrence in the journals stipulated in the Articles of Incorporation.⁴²

4. SHAREHOLDERS' MEETINGS (*Hauptversammlung*)

Unless otherwise provided for in the by-laws or by statute, the shareholders act by simple majority.⁴³ They elect and dismiss members of the supervisory council, distribute the profits, ratify action taken by the board of managers and the supervisory council, and decide those questions of business policy submitted to them by the board of managers. They also must pass upon proposed amendments to the by-laws and on proposed increases or decreases of corporate capital. Adoption of amendments and changes in capital structure require

³⁵ Section 103 AktG.

³⁶ Strobl, *supra* note 19, at 119.

³⁷ Section 71 AktG.

³⁸ Aufsichtsrat. See § 86 AktG.

³⁹ Strobl, *supra* note 19, at 120.

⁴⁰ Section 105 AktG.

⁴¹ Section 106 AktG.

⁴² Sections 105 II, 107 AktG.

⁴³ Section 103 AktG.

a majority of at least three-fourths of the capital represented at the meeting, and the amendment becomes effective only upon filing with the Court of Registry.⁴⁴ Shareholders' resolutions, in order to become effective, must be filed with a notary public or with a court.⁴⁵

5. CAPITALIZATION

Shares must not be issued under par, but may be issued above par.⁴⁶ They may be represented by bearer certificates or be registered in the name of the shareholders. Bearer shares, however, may not be issued before the full amount of the consideration for the issue is paid in.

German law does not permit shares with voting preference, although, under special circumstances, shares without voting power can be issued if the shareholders grant it other preferred treatment such as special dividend rights.⁴⁷ Shares are freely transferable, and a transfer of bearer shares can be made without any formality.⁴⁸

In order to raise capital, the stock corporation may issue stock, bonds, or debentures.⁴⁹ Where new stock is issued, existing shareholders have preemptive rights to acquire new shares.⁵⁰ Where convertible debentures are authorized, a conditional increase in capital may be made.⁵¹ Capital may be decreased in several ways. One method is the so-called "regular decrease," which may be effected either through a decrease in the par value of the stock or through an exchange of several shares for one share.⁵² Another method is the so-called "simplified decrease," where a decrease in the value of assets or operating losses is to be offset, or where a "legal reserve" is to be created.⁵³ Where this method is used, no payments are made to shareholders.

6. LIQUIDATION

Unless otherwise provided in the articles, the stock corporation may be liquidated by the board of managers or by resolution adopted by a three-fourths majority of the capital present at a shareholders' meeting.⁵⁴ Apart from voluntary dissolution or dissolution effected by expiration of the corporate term of existence, involuntary dissolution occurs upon bankruptcy, removal of corporate domicile from Germany,

⁴⁴ Sections 145, 146 AktG.

⁴⁵ Section 111 AktG.

⁴⁶ Section 9 AktG.

⁴⁷ Section 12 AktG.

⁴⁸ Strobl, *supra* note 19, at 116.

⁴⁹ Section 174 AktG.

⁵⁰ Section 153 AktG.

⁵¹ Sections 159-68 AktG.

⁵² Section 175 IV No. 1 AktG.

⁵³ Section 182 AktG.

⁵⁴ Strobl, *supra* note 19, at 123.

or upon an order of the supreme court. In order to protect creditors, the statute provides that liquidation proceedings be published and entered upon the company register.⁵⁵

B. *The Limited Liability Company*

Where establishment of a small, closely-held enterprise is desired, and participants wish to restrict their respective liability to the amount of their contributions, the limited liability company is the appropriate vehicle. Legally, this corporate entity fits somewhere between the stock corporation and the partnership. Its advantage lies in that the legal requirements governing it are less strict than those applicable to the stock corporation, and that a smaller number of members may participate in the business. Also, procedure for incorporation is less complicated and minimum capital amounts merely to DM 20,000.00.⁵⁶ While members are entitled to receive an annual financial statement,⁵⁷ on the basis of which pro-rata distributions of profit are made, the statement need not be published.⁵⁸

1. INCORPORATION

At least two persons,⁵⁹ who may be either individuals, other corporations, general partnerships or limited partnerships, must execute a memorandum of association which must be recorded with a notary and entered in the Commercial Register. The memorandum must state the name of the proposed firm, the place of its incorporation, the object of the business to be conducted by it, the amount of fixed capital and the contribution to be made by each incorporator. The name of the enterprise may either indicate the purpose of the business or contain the name of one or more of its participants, followed by the letters "G.m.b.H."⁶⁰

After the memorandum of association has been executed, the incorporators appoint one or more managers through execution of a *Prokura*, a power of attorney. Incorporators may be managers. After each incorporator has paid at least one-fourth of his subscribed capital, but not less than DM 250.00, in cash, or if payment is to be made in kind, after the consideration has been placed at the disposal of the manager, the latter files application for registration of the company.⁶¹ This application must be accompanied by the memorandum of as-

⁵⁵ Id. at 124; §§ 204, 215 AktG.

⁵⁶ Section 5 I GmbHG.

⁵⁷ Section 41 I GmbHG.

⁵⁸ Mueller & Steefel, *supra* note 7, at 40.

⁵⁹ Members must contribute a minimum of DM 500.00 each. See Strobl, *supra* note 19, at 125.

⁶⁰ *Ibid.*

⁶¹ Section 7 GmbHG.

sociation, the *Prokura* of the manager and an instrument signed by the incorporators setting forth their names and the amount of their individual capital contributions.⁶² As in the instance of the stock corporation, incorporation occurs after registration has been ordered by the court.

Sole management of the limited liability company rests with the manager, who may be of any nationality, and who represents the company exclusively in its relationship with third parties. While internally the manager or managers may be required to act in accordance with instructions set forth either in the memorandum of association or in membership resolutions,⁶³ no limitation of his powers is binding upon third parties.⁶⁴ He is, however, subject to dismissal by the membership at any time. Among other duties he is required to see to it that the company's books are kept in accordance with sound accounting principles. In carrying on the business, he is required to exercise the care and prudence of a good businessman.⁶⁵ Changes in membership must be entered in the court register.

2. MEMBERSHIP MEETINGS

General membership meetings must be called by the manager at regular intervals. Moreover, he must call special membership meetings, where holders of at least 10% of the outstanding capital so demand⁶⁶ or where the annual financial report shows a loss of 15% of the fixed capital. Notice of such meetings must be given by registered mail at least one week prior to the date scheduled for the meeting. The notice should state the time and place of the proposed meeting and its agenda.⁶⁷

If no resolutions are to be passed which require official recording, meetings may be held anywhere. If, however, members unanimously consent, resolutions may be adopted without a meeting.

3. TRANSFER OF INTEREST BY MEMBERS

No share certificates are issued to members of the company. Each member may sell or otherwise dispose of his interest unless otherwise provided in the memorandum of association. A transfer by a member of a fractional part of his interest, however, requires the written consent of the company. As in the case of the stock corporation,

⁶² Section 8 GmbHG.

⁶³ Section 37 I GmbHG.

⁶⁴ Section 37 II GmbHG.

⁶⁵ Section 41 I GmbHG.

⁶⁶ Section 49 I GmbHG.

⁶⁷ Section 51 I GmbHG.

the interest of all members may, after incorporation, be transferred to one member creating, in effect, a one-man corporation.⁶⁸

As in the instance of the stock corporation, amendments of the memorandum of association, changes in the capital structure of the company and liquidation require resolutions by three-fourths majority of the holders of capital present at a membership meeting. These resolutions require notarization and must be entered in the company register.⁶⁹ Moreover, where a decrease in the fixed capital of the company is to be effectuated, the resolution must be published three times, and a notice of intention to make a decrease in capital must be sent to all known creditors who have a right to object to the decrease and to demand liquidation of their individual claims.⁷⁰ Liquidation is carried out by the manager and generally follows the procedure applicable to the stock corporation.

C. *Limited Partnership By Shares*

This corporate entity comprises several shareholders whose liability is limited to the amount of their individual capital contributions and at least one person who is fully liable without limitation for the debts of the company. This type of corporation is no longer used very much. In general it is governed by the rules which apply to the stock corporation.⁷¹

II. PARTNERSHIPS

German law provides for several types of partnerships: (a) the simple partnership as defined by the German Civil Code; (b) the general partnership (OHG); (c) the limited partnership (KG); and (d) the silent partnership, all of which are defined by the German Commercial Code.

A. *Civil Code Partnerships*

The civil code partnership corresponds in several respects to the joint venture at common law. Professional people and small-scale individual businesses frequently use this form of organization. Such a partnership need not engage in business, is not entered in the Commercial Register and has no legal entity. Partners are jointly liable, without limitation, for partnership debts. They have equal management powers, and limitations on their powers do not bind third parties.⁷²

⁶⁸ Strobl, *supra* note 19, at 127.

⁶⁹ Sections 53-54 GmbHG.

⁷⁰ Section 58 I 1 GmbHG.

⁷¹ Establishing a Business in the Federal Republic of Germany and West Berlin, U.S. Department of Commerce Bureau of International Programs (1961); Strobl, *supra* note 19, at 124.

⁷² Strobl, *supra* note 19, at 130.

B. *General Partnerships-OHG*

The suitable form for small and medium size business operations is the general partnership (*Offene Handelsgesellschaft*, hereafter referred to as OHG).⁷³ Similar in many respects to the civil code partnership, the OHG engages in business under a firm name. Domestic and foreign corporations may become partners. The partnership is established by an agreement which should be, although it need not be, in writing and executed before a notary.⁷⁴ The firm name must consist of either one or all of the names of the partners followed by the letters "OHG."⁷⁵ Special provisions govern acquisition of an established firm, or a severance of a partner from the firm.⁷⁶

Although not a legal entity, the OHG enjoys certain privileges ordinarily incident to legal personality. It may acquire title to property, incur liability, sue and be sued in its own name.⁷⁷ Its assets are liable for partnership debts, although not for the private debts of the partners. Unless otherwise provided in the partnership agreement, each partner is entitled, and even obliged, to participate in management⁷⁸ and to take all actions arising in the ordinary course of business.⁷⁹ Actions extending beyond this scope, however, such as the conferring of a power of attorney, must be agreed upon by a resolution of the partners in charge of the management.⁸⁰ Unless limited by the partnership agreement, each partner may deal with third persons.⁸¹ Limitations of their powers, however, are valid only among the partners and do not bind third persons.⁸² Partners, on the other hand, bind the OHG⁸³ by their respective legal acts, but if any partner acts contrary to a partnership resolution he renders himself liable to the other partners.

Termination occurs (1) on death of one of the partners, (2) by the justifiable exclusion of one of the partners by resolution of the remaining partners, (3) upon bankruptcy of the partnership, and (4) on a partner's voluntary retirement or bankruptcy.⁸⁴ Unless, however, the partnership agreement contains express provisions with respect to termination on voluntary retirement, such voluntary wind-up may be demanded by a retiree only at the end of the fiscal year.⁸⁵ On

⁷³ Section 105 I HGB.

⁷⁴ Section 109 HGB.

⁷⁵ Section 19 HGB.

⁷⁶ Sections 22-24 HGB.

⁷⁷ Section 124 I HGB.

⁷⁸ Section 114 HGB.

⁷⁹ Section 116 I HGB.

⁸⁰ Sections 116 II, III HGB.

⁸¹ Section 125 HGB.

⁸² Section 126 III HGB.

⁸³ Section 126 I HGB.

⁸⁴ Section 131 I HGB.

⁸⁵ Section 132 HGB.

termination, the partners as liquidators wind-up the affairs of the business, pay the debts of the partnership, and distribute the remaining assets pro-rata among themselves. Liquidation is completed upon filing an appropriate document with the Court of Registry.⁸⁶

C. *The Limited Partnership*

The limited partnership (*Kommanditgesellschaft*, hereafter referred to as KG) is another form of partnership and is closely related to the OHG. The basic distinction is that, whereas in the OHG all partners are personally liable without limitation, in the KG only one or more individual partners referred to as *Komplementaere* are so liable, while the remaining partner or partners, referred to as *Kommanditisten*, are liable only to the extent of their contributions.⁸⁷ Since German law permits corporations to become partners, it is quite common for corporations, as limited partners, to form a KG with one or more individuals as general partners under an agreement reserving broad control to the corporate limited partner.

In dividing profits, all partners each first receive 4% of their respective contributions to the partnership, and the remaining profits are then equitably distributed among them. General partners who are fully liable for partnership debts, particularly where they participate in management, generally receive a greater share.⁸⁸

Termination of the partnership corresponds to that of the OHG except that on death of a limited partner the share of the latter is assumed by his heirs.

D. *The Silent Partnership (Stille Gessellschaft)*

In the silent partnership, the silent partner simply contributes to the business of another in order to share in the profits.⁸⁹ The relationship is established by an agreement which need not be in writing nor filed with the Court of Registry. It is purely internal in nature and does not become apparent to third parties. Much like the limited partner in the KG, the silent partner is liable only to the extent of his contributions,⁹⁰ and termination of the silent partnership generally corresponds to that outlined for the KG.

A complete and detailed discussion of this vast subject is, of course, impossible within the brief space allotted here. The above presentation can do no more than serve as an introductory survey and guide to a complex of business problems with which the general practitioner is likely to find himself increasingly involved.

⁸⁶ Section 143 I HGB.

⁸⁷ Section 161 I HGB.

⁸⁸ Section 168 HGB.

⁸⁹ Section 335 HGB.

⁹⁰ Section 337 I HGB.