LEGAL STRUCTURING AND DOING BUSINESS WITH AMERICANS
A Guide for German Companies
Prepared By: Jana Gerken & Geoff Morgan

The prospect of doing business between German companies and Americans – either in America or overseas – is often attractive to both parties, and the opportunities are great right now. If the relationship is properly structured, parties can take advantage of the prospering economies of both countries and synergies within party’s businesses.

If the relationship is properly structured, both parties win. But for German companies considering doing business with American companies, several factors must be weighed to ensure the protection of both the German business and its operator’s personal assets.

This brief will summarize those considerations and provide recommendations for structuring the arrangements between the parties to be sure German companies safeguard their assets. The following items will be discussed in detail:

- Understanding the U.S. company
- Creating a joint venture
- Sales and distribution in the U.S.
- Barriers to entry

UNDERSTANDING THE U.S. COMPANY
In most cases, German companies will be dealing with either a corporation or a “limited liability company.” These are entities created under the laws of a particular state in the U.S. and generally protect the owners from liability beyond the specific investment they have made in the company. For German companies, it is important to understand if the company they will be working with is financially healthy and therefore able to carry out its responsibilities under the arrangement that is reached. Below are the primary items for consideration:

**Officers.** Who are the shareholders, owners, directors and officers of the company?

**Standing.** Is the company “in good standing” in its state of organization? This can signal that the company is in financial distress or is not well organized and operated.
Reporting. Has the company filed all required reports? Failure to do so can result in suspension of the company by the state government, which can (but does not always) impact the company’s ability to operate.

Financial Strength. What is the financial strength of the company and its related companies? Larger companies will likely have audited financial statements, while smaller companies may not. Copies of any and all financial statements available should be requested and received. In reviewing those statements, look for guarantees or other commitments that the company may have made for the benefit of related companies or shareholders of the company. The existence of these types of guaranties can have an adverse impact on the company’s financial condition.

Security Interests. Are there any “security interests” recorded against the company or granted by the company on its present or future assets?

Bankruptcy. Has the company or any of its owners filed for or declared bankruptcy in the past several years?

Title. Does the company hold title to the assets, including intellectual property, that it uses in its business?

Use of a Subsidiary by the Contracting Company. In some cases, a U.S. company will use a wholly owned subsidiary in its relationship with another company. This is not necessarily bad, and is often used to allow the U.S. company to segregate the operations of the venture that is being entered into. It is important, however, to understand all of the points above for both the parent and subsidiary companies.

Use a Letter of Intent. A well-drafted letter of intent can be one of the best protections to ensure that the parties and their lawyers do not waste needless time negotiating and documenting the relationship. The letter of intent in fact “forces” the parties to identify and at least outline the major deal, legal and accounting issues before the lawyers begin spending time (and money) drafting the agreements. There is a marginal advantage to “controlling” the drafting, which allows for the inclusion of more favorable terms beyond what is standard in the Letter of Intent. Examples of this are the extent of the representations and warranties, which may provide additional protection for the German company.

Translating the Agreement. The documents will be drafted in English and can, if necessary, be translated into German or another language if required (either for parties who may not understand English or if there are filing requirements in Germany that require documents to be
in German). This is a relatively simple task, and there are several reputable firms that can prepare the translations at reasonable cost.

CREATING A JOINT VENTURE
Joint ventures can be very advantageous for German companies. A joint venture typically is thought of as a newly created, separate entity in which both of the venture partners own approximately equal amounts. The type of entity will almost always be a corporation incorporated under the laws of a particular state; a limited liability company typically is not the best form of entity, and general or limited partnerships are only rarely used and then in very specific circumstances.

Typically, joint ventures are incorporated in the state where operations will take place; however, they may also fall under the State of Delaware. Delaware is often used because it historically has been sympathetic to businesses, and an extensive body of case law and precedent exist in the Delaware court system which provides much certainty in how various issues are treated and how they would be resolved in the event of a dispute. That said, incorporating in the state in which the operations will occur is a very frequent choice and is marginally more cost effective as well.

There are various types of joint ventures (JVs) that may be right for the business opportunity at hand.

Research and Development. Set up to allow collaborative efforts in the area of research and development. These entities can also allow for manufacturing in the future if the R&D is successful.

Distribution. Structured so that one or both entities may contribute existing resources toward the distribution of goods which they do not manufacture. This type of JV is typically longer in duration and more difficult to unwind than distribution agreements.

Manufacturing. In this case, the JV will actually engage in the manufacture of a product. One party may have a production facility that it will contribute to the JV (or contract with the JV to use the facility) or the JV may buy or lease a manufacturing facility in the U.S., Canada or even Mexico.

Important Note on Economic Incentives. Many communities and regions in the U.S. offer economic incentives to locate manufacturing facilities in their areas because of the jobs and economic development that results. These incentives should be carefully analyzed when determining where to operate the JV.
Key Points of the JV Agreement should include:

*Location*. Where will the JV be incorporated?

*Shares*. What classes of shares will be issued and what percentage ownership will each party have?

*Capital Contributions*. What capital and/or assets will each party contribute to the JV? What are the arrangements for future capital needs? Will the parties commit to invest more capital or make loans to the Venture to satisfy capital needs?

*Governance*. How will the board of directors and officers be selected? If the ownership percentages are not equal, consider giving the minority shareholder some kind of approval rights only for extraordinary events, such as a merger. This arrangement, if properly structured, provides protections for both parties.

*Required Approvals*. What types of contracts and other agreements, expenditures, etc. can be approved by the officers? By the Board of Directors? By the shareholders? Consider placing a dollar limit on expenditures that can be made without approval. It is relatively easy to include these limits in the governing documents.

*Transfer Restrictions*. It is very important to have transfer restrictions on the shares of the joint venture corporation so the parties have reasonable assurance that the other party cannot transfer its ownership interests to someone else without the consent of all of the shareholders. There is a fairly standard “laundry list” of these types of restrictions that can be included in the governing documents.

*Buyout Options*. Consider how to structure buyout options if one party wants to sell some or all of its interest. This can also be addressed by saying that any proposed transfer of ownership interests will cause the venture to be dissolved.

*Dispute Resolution*. The resolution of disputes and claims must be addressed. See “Choice of Law and Tribunal of Disputes” below.
SALES AND DISTRIBUTION IN THE UNITED STATES
With some basic preparation and negotiation, German companies can leverage the U.S. markets for the sale and distribution of their products. In doing so, companies must address the following checklist.

*Products and Services.* Before the sale of products or services commences, take steps to ensure that all items may be lawfully sold in the U.S. and that all required permits and licenses have been secured. Further, make sure that export and import documentation is in order.

*Trademarks.* If products under a trademark, logo, brand name, etc. are to be sold, make sure those products do not infringe on other existing trademarks, logos, brands, etc. This can be easily done through a U.S. lawyer. It may be worthwhile to consider applying for trademark protection in the U.S. by filing an application for unique mark or marks.

*Sales or Distribution Agreements.* Remember that having a Letter of Intent will help in preparation of the Sales or Distribution Agreement just as it will for the agreements referred to above. This will minimize risk and ensure that the parties have identified all key points.

*Products.* The products subject to the agreement should be clearly defined. Additionally, if new products are developed during the term of the sales or distribution agreement, determine whether they will be covered automatically or become subject of another agreement?

*Territory and Exclusivity.* These items must be set forth in the agreement. Will the territory be all of the U.S. or North America or will it be divided into regions? Regions covering several states are often used, probably more so than dividing territory by each specific state. Will the sales agent/distributor have exclusive rights in the territory? If the territory is large, it may be advisable to consider multiple non-exclusive arrangements.

*Right of Distributor to Appoint “Sub-dealers” or “Sales agents.”* The decision to use a particular distributor or sales agent will be based on the company’s knowledge of the agent and/or business. To the extent the distributor or sales agent wants the ability to appoint “sub dealers” or “sub agents,” verify the quality of those sub agents or personnel. If people or firms of inferior quality are hired, that can have an adverse effect on the business.

*Delivery Terms.* Make certain the delivery terms are clear. In particular, when and where does risk of loss pass? Who is responsible for shipping and insurance costs? U.S. contracts use a number of specific terms that have different consequences, so make sure those items are understood.
**Payment.** When does the company receive payment for product provided to the distributor? Upon shipment? Upon sale or collection of sales?

**Quotas.** It is common to require the distributor/sales agent to achieve certain quotas. These quotas can be certain minimum sales or minimum purchases. This is most often used when there are exclusive relationships but can also be used in the non-exclusive context.

**Advertising and Promotional Allowances.** Will there be a budget for advertising or promotion? How will those moneys be split between the company and the distributor/sales agent?

**Warranties.** In the U.S., there are specific types of language that can limit a manufacturer’s liability. This requires careful drafting and negotiation.

**Duration of Agreement.** The parties should consider carefully the duration of the agreement. Typically, it should be a period long enough for the parties to determine if the relationship will be a successful one. Between one and three years is most common. Further, be aware of “evergreen” provisions, which are common in U.S. agreements and provide that the agreement will automatically renew unless one party notifies the other of its intent not to renew within a specified period of time prior to expiration of the contract term. But beware: failure to give notice of termination may result in the company remaining bound by the agreement for a longer period of time that intended.

**Termination Provisions.** It is important to agree on the circumstances that will allow for the termination of the agreement. For example, consider provisions that allow termination if the distributor/sales agent is not performing at certain levels, as well as provisions that address what happens to any of the supplier’s stock of goods that the distributor may have at the time of termination. Include a right (but perhaps not an obligation) to take over any existing contracts for sale of goods to the ultimate user if those contracts have not yet been performed.

**Keep Control of Accepting Orders.** Require that company officers are the only party authorized to accept or decline orders. Avoid allowing the sales rep or distributor the authority to accept orders on behalf of the company, which can cause both legal and business problems.

**Choice of Law and Tribunal for Disputes.** For contracts in the U.S., it is required that the company’s officers select a court that will hear any disputes or agree to arbitration in a certain location. If possible, choose a city for the arbitration or court that is relatively convenient, as the time and expense of traveling to the venue can be costly.
Arbitration is generally thought of as more “business friendly” than the court systems, largely because the arbitrators are generally more familiar with business concepts and issues than judges in courts.

*Important Note on Security for Payment.* Consider obtaining a security interest in any of the company’s products that a distributor or sales agent may possess. This will give the company a “first position” in its products or collateral and prevent any other creditors of the distributor or sales agent from having a claim to the company’s products.

**BARRIERS TO ENTRY & COMPETITIVE ADVANTAGES**

While the European Union has some barriers to entry for drug and medical device manufacturers due to the research and manufacturing startup costs, the U.S. Food and Drug Administration, or FDA, and significant health care regulations make the U.S. a special case.

If you are a medical device company seeking to make or market your device in the United States, we can help you every step along the way, starting with a solid regulatory strategy to determine whether your device requires FDA clearance (or whether it is exempt) and, if yes, which type of clearance is required as well as the timing and cost involved with obtaining it. FDA clearance, once obtained, can provide a competitive advantage for your device and your business in the United States marketplace.

The economies of Germany and the United States are strong. Capital is readily available to finance the operations of bilateral investment in these countries, and the governments of both countries have facilitated the ability to do business. As mentioned earlier, there are many economic incentives available in the U.S. for companies that can demonstrate the potential for economic growth, and this is an excellent time for German companies to take advantage of them. We would be delighted to partner with you and guide you every step of the way to success in the U.S.
Gerken-Morgan Legal Advisors provides the corporate legal and business expertise German companies need to successfully establish operations in the United States.

Ms. Gerken and Mr. Morgan have a combined 45 years’ experience in law practice, with expertise spanning the areas of corporate and commercial law, compliance, mergers and acquisitions, foreign transactions, and structuring and financing joint ventures. Additionally, Ms. Gerken and Mr. Morgan have an expansive network of national and regional accounting, human resources, and immigration firms prepared to support German organizations in the setup and maintenance of critical business functions.

Gerken-Morgan Legal Advisors embraces a boutique model powered by technology, enabling the delivery of high-quality, responsive legal services in an efficient, cost-effective manner. Its team has the legal IQ, global execution experience, acute understanding of the German culture, and access to a bench of other experienced, high-quality lawyers and regulatory professionals that are standing by to support our clients’ U.S. business ventures.

We look forward to being your business partner, providing guidance at every turn as you establish and grow your business in the United States. *Vielen herzlichen Dank!*

**About Jana Gerken**
Ms. Gerken has been practicing law for more than 20 years and has extensive experience with a broad range of commercial contracting and transactional matters. She was formerly General Counsel for GE Healthcare’s $5 billion diagnostic imaging businesses and was the primary point of contact for all strategic matters on a global scale. Prior to joining GE, Jana practiced law at two major law firms in New York City, where she specialized in Mergers & Acquisitions, venture capital deals, and general commercial transactions. She was born and raised in Berlin and holds both German and U.S. Passports.

**About Geoff Morgan**
Mr. Morgan is a transactional lawyer with over 25 years’ experience and has been lead counsel in the structuring and financing of several foreign companies and joint ventures and acquisitions. He has served as de facto or “fractional” General Counsel for companies, a role that allows companies to have the benefit of an experienced lawyer without the expense of a full-time employee. Geoff was a partner at two major law firms for over 20 years, serving in leadership roles in both firms, and has been named one of “The Best Lawyers in America,” since 2007 in the area of corporate governance and compliance and corporate law.