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Attention, Sellers of Goods on Credit: A "Retention of Title" (Eigentumsvorbehalt) is Not Sufficient Under U.S. Law, and the U.S. Equivalent is Changing

When a company sells goods on credit in Germany, it usually retains title in the goods until payment has been made in full (Eigentumsvorbehalt). But, when a German company sells goods on credit to a buyer in the U.S., it cannot assume that it will be protected in the same manner. Rather, if the German seller ships goods to the buyer in the U.S. before full payment has been made, it runs the risk of losing title to the goods if the buyer becomes insolvent. The law in the U.S. does not recognize a retention of title as a matter of course – rather, the seller must take certain affirmative steps to protect itself before shipping its goods to the buyer. The precise requirements of the protection are a matter of state law, and the state of New Jersey recently issued a noteworthy amendment to its law on this issue.

The Law in the U.S.

In the U.S., sellers of goods on credit can obtain a security interest in the sold goods under Article 9 of the Uniform Commercial Code (UCC). A version of Article 9 of the UCC has been adopted in all 50 states and Washington, DC; however, there are some differences among the jurisdictions. A security interest under Article 9 of the UCC requires two things – "attachment" and "perfection." One method of satisfying a critical element of "attachment" is to have express language in a written contract between the seller and the buyer granting the security interest. Perfection of a lien on goods may be accomplished with the filing of a Form UCC-1 financing statement, generally with the Secretary of State of the state where the buyer entity is incorporated or organized. Filed financing statements are publically available, survive for an initial period of five years, and can thereafter be renewed.

In general, a secured party will conduct a UCC lien search to determine whether there are existing perfected security interests filed against the debtor with regard to the collateral in question. This is important, as, between competing security interests in the same collateral, "first to file" usually governs the priority of the security interests. However, a seller of goods on credit can also obtain a purchase money security interest (PMSI), which provides a higher priority interest over competing creditors in the same collateral, even if the other creditors' competing security interests were recorded first. Simply put, a PMSI is a super priority security interest in goods in favor of the creditor who has financed the purchase price of the goods.

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The requirements to obtain a PMSI differ depending on whether the security interest is in "inventory" or "equipment." For example, a PMSI in inventory requires, without limitation, notification to the holders of conflicting security interests prior to delivery of the goods. In contrast, a PMSI in equipment must merely be filed within 20 days after the transfer of the goods to be perfected, without any such notice requirement. Inventory under Article 9 of the UCC refers to specific goods purchased for resale or further processing, whereas any other goods generally are deemed to be equipment.

Recent Changes in New Jersey

Although Article 9 of the UCC is largely the same throughout the different jurisdictions, a recent change in New Jersey is worth noting. Specifically, New Jersey adopted a change to Article 9 of its UCC to address fraudulent UCC and lien filings being made against judges and court personnel. There are two primary changes that may impact how liens are perfected in New Jersey. The first change arguably requires a secured party or representative to use its proper legal name or a filed (in New Jersey) trade name on the Form UCC-1 (as opposed to an unfiled trade name or DBA). The second change alters the requirements for the indication of the collateral in N.J.S.A. § 12A:9-502(a)(3). Under the new law, the Form UCC-1 must indicate not only the collateral covered by the security interest, but also that "the collateral is within the scope of this chapter."

Conclusion

Similar to a retention of title in Germany, a filed security interest or PMSI pursuant to Article 9 of the UCC is an effective means of creditor protection. However, a seller must ensure that it complies with the requirements of Article 9 of the UCC in the relevant U.S. jurisdiction.

* Marius Scherb, a Referendar with Gibbons P.C. (while in the process of taking the German Bar Examination) at the time this article was authored.

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FDA's Recent Supplemental Proposed Rule Focuses on Added Sugars

In a Supplemental Proposed Rule issued on July 27, 2015, the U.S. Food and Drug Administration (FDA) proposed more changes to the Nutrition Facts and Supplement Facts labels in addition to those the Agency proposed last year.

Importers of food and dietary supplements should be aware of all of these proposed changes since they must comply with the same labeling requirements that are imposed on domestic manufacturers. Products offered for import that are not properly labeled will be detained and may be subject to seizure.

FDA believes that these additional changes to food and dietary supplement labels will allow consumers to make more informed choices when purchasing products which will also help them maintain a healthier diet. The changes are based on scientific evidence about the nutrients we consume and their effect on our health.

Changes Proposed in 2014

In March 2014, the FDA first proposed to revamp the Nutrition Facts and Supplement Facts labels. This is considered the first major revision to these labels since they were first introduced over 20 years ago. The only other major change to the Nutrition Facts label has been the requirement to declare "trans fat" back in 2006.

The major changes suggested in the 2014 proposed rules include:

- Declaration of the *amount* of "added sugars."
- Declaration of "Calories from Fat" *not* required. However, the declaration of "Total Fat," "Saturated Fat," and "Trans Fat" would still be required.
- Declaration of the amount of potassium and Vitamin D. Calcium and iron still required, but the declaration of Vitamins A and C would be voluntary.
- Updated reference amounts customarily consumed (RACCs) to reflect how much of a food or beverage is actually consumed today.
- "Dual Column" label requirement for foods sold in larger packages that could be consumed in one or multiple sittings (*e.g.,* a pint of ice cream and a 24-ounce bottle of soda).
- Calorie and serving size information would be made more prominent on the label.
- Percent Daily Value (%DV) would be moved to the left side of the label.
- Revision of the footnote that explains what "%DV" means.

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Additional Changes Proposed in 2015

FDA recently proposed the following additional changes while reviewing the comments submitted on the 2014 proposed rules and following the release of a report by the 2015 Dietary Guidelines Advisory Committee:

- Establishment of a "Daily Reference Value" (DRV) of **10%** for added sugars. Based on an average 2,000 calorie diet, this means that the DRV for added sugars would be **50 grams** (for adults and children 4 years and older).
- Declaration of the %DV for added sugars, ***not*** just the amount of added sugars. This means that not only would the label need to list how much added sugar is in a serving, but it would also need to list what percent of the DRV it represents.
- The footnote explaining what the %DV means would read, "[t]he percent daily value (%DV) tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice."

FDA is accepting comments until ***October 13, 2015*** on the Supplemental Proposed Rule ***only.*** The Agency has said that the comments it has received (and will receive) on all of these proposals will help it craft the final rule on the subject.

Using a Delaware Limited Liability Company (LLC) to Structure an International Joint Venture has Gained Considerable Advantage with the Arrival of the Delaware Rapid Arbitration Act

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If you are a non-U.S. entrepreneur planning on building a joint venture operation in a territory outside of the U.S., you may already know that although the U.S. remains the most active venture financing market in the world, U.S. venture funds generally will not invest into local operating companies in many foreign territories (think Latin America) because of concerns regarding taxes, rule of law and contractual interpretation. To keep your financing options open, you may wish to structure your business entities to create an international holding company into which investors will invest. A fiscally transparent Delaware limited liability company ("LLC") that owns the local operating companies combines compelling tax advantages with the newly created opportunity to resolve internal disputes between owners of the company in a streamlined, cost-effective manner under the Delaware Rapid Arbitration Act.

Tax Advantages of Joint Venture LLCs

An LLC is a distinctive business entity that combines the corporate advantages of limited liability with the partnership advantage of pass-through taxation (fiscal transparency). An LLC is not itself subject to federal income tax on its income but rather passes its income through to its owners (unless a special election is made to change the tax status of the LLC). If the LLC does not earn income effectively connected with a U.S. trade or business there is no reason for the LLC or the foreign owners to even file a Federal tax return. If the LLC is formed in Delaware, there would be nothing to pay other than an annual fee to Delaware (currently $300). In other words, two or more non-U.S. parties may form a U.S. international holding company for conducting operations wholly outside the U.S. and not incur any U.S. tax liability (other than the annual Delaware filing fee).

Governance

There is no minimum capital investment required to form a Delaware LLC. The LLC does not have to maintain a Delaware business office address aside from the address of its Delaware registered agent which is required for service of process. Thus, a Delaware LLC may be headquartered in any country in the world. In addition, the LLC legislation in Delaware does not permit public access to information concerning corporate structure and beneficial ownership. If an international investor owns a corporation in their own country,

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they may form a Delaware LLC as the operating company of this foreign corporation by transferring all its shares into that Delaware LLC.

All the details and arrangements of the LLC are handled by a private operating agreement that affords the owners significant contractual flexibility. The Operating Agreement of a Delaware LLC may be formulated or altered at any time by its directors or members.

Delaware Rapid Arbitration Act

The Delaware Rapid Arbitration Act (the "Act") came into effect on May 4, 2015 and provides business owners with the opportunity to engage in a fast, relatively low-cost dispute resolution process without the burden of extensive discovery and out of the public eye. In order for the Act to apply to disputes arising among the members/owners of an LLC, the Operating Agreement must (i) be signed by each member of the company and include the company as a signatory, (ii) specifically reference the Act, and (iii) be governed by Delaware law.

How It Works

Under the Act, arbitrations must be completed within 120 days unless another time limit is provided in the parties' agreement. During the arbitration, the parties can agree to one 60-day extension, but not more. Thus, most disputes will be resolved within six months. To provide an incentive for resolving disputes within the timeframe established an arbitrator's fees are reduced by 25% if the award is one to 30 days late, 75% if the award if 30 to 60 days late and 100% if the award is more than 60 days late.

The arbitration may take place anywhere "within or without the United States," not just in Delaware. In addition, the parties may select any arbitrator to resolve their dispute. The arbitrator will only have authority to issue third party subpoenas or to require depositions if the parties provide for such authority in the arbitration agreement. While the parties will generally have the opportunity to present witnesses and documentary evidence and to cross-examine witnesses of the opposing party, the arbitrator has discretion to limit the amount of evidence presented to ensure that the time limits specified in the Act can be met. The parties may provide by agreement, prior to the arbitrator's appointment, to present evidence via submission rather than live witness testimony.

Any challenge to an arbitration award under the Act must be brought in the Delaware Supreme Court within 15 days of issuance of the award, and the grounds for challenge are very limited. If no such challenge is brought, the award is deemed confirmed 5 days after this period expires.

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"It´s the little differences" – Comparison of CTM and German Trademarks in litigation cases

For foreigners, Europe must appear as a strange thing: it is more than an organization but definitely less than an independent state. Thus, there are two legal systems coexisting in each member state. On the one hand are the EU-regulations, one of which being the Community Trademark System – CTM; on the other hand, there are the older national legal systems. This might raise some problems in trademark litigation matters but it also offers chances and options for both, plaintiff and defendant.

Let´s look in more detail into these differences and options.

Let´s assume a case: a proprietor owns a CTM and an identical German Trademark. He encounters a cross-border infringement with a German, a French and an Italian infringer having conducted different infringement actions, each in his own country. To be more specific, the Italian infringer has sold infringing goods to the other two, delivered it to France whereas the German infringer has fetched the infringing goods in Italy himself.

Very advantageously, the CTM gives a decision with effect in the whole EU. Using the CTM normally requires to use the local court of the infringer´s place of business. This often results in unfamiliar court language and practice. If the proprietor opts for a court in the country, in which the infringing action took place, for instance Germany, the decision of this court is limited to Germany. Thus, the non-German infringers of our example cannot be sued in Germany. The plaintiff may avoid this by trying to sue the three defendants as joint defendants. Nevertheless, this is limited to cases of the same factual and legal position. In our example, there is only an infringement chain between a set of two of the three infringers, that is the Italian and the German or the Italian and the French. Thus, the plaintiff may sue only two out of the three infringers in one court suit. For the German-Italian chain of infringers, the situation is even worse: since the place of performance of the infringing act was Italy, there is no link between the Italian and the German defendant according to CTM-law. The Italian place of performance results in the necessity of a court suit against the French and Italian infringer as joint infringers either in France or Italy and a second court suit against the German infringer in Germany.

On the other hand, also the German Trademark offers the possibility to obtain a decision with a cross-border effect, at least in some cases. For some reason one of them is the example above. Thus, if the plaintiff would choose his German trademark, he would be able to sue the German and Italian infringer as joint defendants in

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Germany and effecting a decision being valid in Germany and Italy. Thus, the German trademark offers a more effective way of litigation than the CTM does.

Another difference between CTM and German Trademarks is the topic of forfeiture of rights. Since there is no such thing in the CTM-regulations, a proprietor with a trademark vulnerable to forfeiture, for example due to a longer period of peaceful coexistence, should definitely use his CTM.

Yet another difference between CTM and German Trademarks is the lack of possibility for an invalidity counter claim within the infringement suit for the CTM. Since Germany has the bifurcal system, a counter claim for invalidity due to absolute grounds of refusal has to be brought up before the German Patent- and Trademark Office. The infringement courts are bound by the existence of the German Trademark and very often refuse suspend their infringement suit until a decision is reached by the GPTO. Ten years after registration, a German Trademark becomes invulnerable against absolute grounds of refusal. In the CTM proceedings, a counter claim switches the role of defendant and plaintiff, often to the plaintiff's disadvantage. Thus, trademarks vulnerable to invalidity should be used before national courts.

Summing up, a CTM is very useful for obtaining a EU-wide decision. EU-wide law enforcement is only available by CTM´s. Depending on a cases circumstances, the use of national trademarks may be more promising. These circumstances include the place of jurisdiction and for vulnerable trademarks due to absolute grounds of refusal, the protection of status quo and the reduced risk of counter claims.

Sometimes, the little differences may decide upon success and failure.

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The "Reed Amendment" and Admissibility to the United States: Will I Be Barred From Reentry After Renunciation?

A common concern about renunciation of United States citizenship is that of admissibility to the United States thereafter. Many people tell me that they have read about a permanent ban on reentry to the United States following renunciation.

There is no automatic ban on reentry following renunciation. (Renunciations must be made outside the United States, typically at a U.S. consulate.) There is a provision of the law that justifies the concern, but an understanding of that law will reveal why there is very little to worry about.

One of the consequences of renunciation of citizenship is the conversion of one's immigration status from citizen to "alien." Nowhere is the stark reality of that conversion more apparent than at the border during one's first attempt to reenter as a visitor. Many former citizens continue to have friends, relatives, or even seasonal vacation property in the United States, and return visits are not unusual. Without U.S. citizenship, the alien no longer has the right to enter the United States, and there are no presumptions in his/her favor. For the first time, the newly converted alien must prove that he/she is a legitimate visitor (not intending to live or work in the United States) and that he/she is admissible.

There are many grounds of inadmissibility to the United States contained in section 212 of the Immigration and Nationality Act (INA), ranging from criminal convictions, prior immigration violations, terrorism, public health concerns, and others. Tacked on to the end of section 212, in subsection 212(a)(10)(E), is a curious provision often referred to as the "Reed Amendment" after the name of the congressman who proposed it. The measure was a legislative reaction (many would say overreaction) to a billionaire named Kenneth Dart who renounced his U.S. citizenship in 1994 and moved to Belize. It was apparent that Mr. Dart was doing so to limit U.S. income tax liability. The case received media attention that happened to coincide with movements in Congress to strengthen the immigration laws regarding illegal immigration and the tax laws regarding treatment of "expatriates."

Twenty years ago, renunciations were less frequent than today. In the mid-1990s, there were only a few hundred renunciations annually worldwide. A New York Times article from 1995 estimated that "a dozen or more of those who [renounce annually] are multimillionaires".

The Reed Amendment was aimed at those multimillionaires. It gained enough bipartisan support to be enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The measure in its entirety states:

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> Any alien who is a former citizen of the United States who officially renounces United States citizenship and who is determined by the Attorney General to have renounced United States citizenship for the purpose of avoiding taxation by the United States is inadmissible.

Passage of the measure was its high-water mark because its history since that time has been marked by ineffectiveness and disuse. The executive branch never issued implementing regulations, and in 2002, the Attorney General's authority to make the tax avoidance determination was transferred to the Department of Homeland Security (DHS). At that time, six years after the law's enactment, not one person had ever been excluded from entry to the United States for renouncing citizenship for tax avoidance purposes. The same is true today. To our knowledge the DHS has never made a formal determination of inadmissibility under INA §212(a)(10)(E).

In 2003, the Staff of the Joint Committee on Taxation issued a report to Congress on the "Tax and Immigration Treatment of Relinquishment of Citizenship and Termination of Long-Term Residency," which explained the "operational complications" involved in implementing the Reed Amendment. At the heart of the problem was the need for the Internal Revenue Service (IRS) to share information with DHS and other agencies to facilitate a determination of tax avoidance. However, tax information is highly confidential. Internal Revenue Code (IRC) §6103(a)(3) prohibits IRS employees from disclosing "any return or return information" to any other person or agency unless permitted under the statute. There was, and still is, no such provision to allow the sharing of tax return information with DHS for Reed Amendment purposes, and neither the IRS or DHS has promulgated any implementing regulations to make it happen. Accordingly, there currently are no procedures in effect to implement the law.

In 2014, there were 3,415 renunciations worldwide, which was a 13 percent increase over the previous year and close to ten times the average number of annual renunciations in the mid-1990s. And the trend is upward: There were more than 1,000 renunciations in the fourth calendar quarter of 2014 alone. There have been at least 15,000 renunciations since the passage of the Reed Amendment in 1996—many of whom can be presumed to be multimillionaires—but no reported case during that time of a finding of inadmissibility for tax avoidance purposes.

The consular officer does not collect any tax information at the renunciation appointment and does not make a determination, or even a recommendation, concerning future admissibility. The renunciation process does not require the applicant to state a reason for renouncing. Unless the applicant decides to volunteer such information, the

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application is devoid of any express statement regarding the person's motivation for renouncing. We generally advise against making such a voluntary statement.

The prudent former citizen would be careful about making any inflammatory comments about the U.S. tax system or taxes in general, whether at the consulate or at the border. It is within the authority of the inspecting Customs and Border Protection officer to make a finding of inadmissibility on any of the grounds contained in INA §212. During the inspection process, a person's place of birth or prior U.S. citizenship may give rise to questions about nationality, because a U.S. citizen is required by statute to claim U.S. nationality and present a U.S. passport. Someone who has renounced citizenship need only present a copy of the Certificate of Loss of Nationality to confirm that he/she is no longer a U.S. citizen. No explanation or reason is required or recommended. Despite its disuse, the Reed Amendment is still a valid law and therefore has the potential for use and misuse, even in the absence of the formal determination contemplated by its terms. For obvious reasons, a port of entry to the United States is not the place to make political statements or constructive criticisms of the U.S. tax system.

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Alter Egos in International Litigation

For globally active companies a major concern is whether they can be sued for any wrongdoing before a court in the US although they have their legal domicile in Europe. This is particularly the case of subsidiaries of US companies in Europe.

In all jurisdictions, the answer is relatively easy if the incident that gives rise to a legal action happened in the country where the plaintiff sues the company for its allegedly wrongful actions or omission. But also in cases where there is no obvious connection between the incident and the US territory, plaintiffs have tried again and again to sue European companies before US courts, mainly due to the most times enormous difference that US courts award in terms of damage compared to the majority of European jurisdictions which do not know the concept of punitive damages.

The most recent case which came to the headlines in Germany is the action for damages brought by the relatives of US citizens who died in the Germanwings crash in the French Alps earlier this year. Plaintiffs are suing the German carrier before US courts although there is no obvious connection with the United States other than that the victims were US citizens. The Germanwings case, however, is not so typical for the problem that is outlined here, since airplane accidents are governed by the Montreal Convention which clearly states where victims can take legal actions against the carrier; an action for damages can only be brought before a court at the domicile of the victim if the carrier operates services to or from this place. This is not the case of Germanwings as it does not operate any routes to or from the USA. It is more than doubtful whether the court will see a sufficient contact of the carrier with the US for the only fact that Deutsche Lufthansa, its parent company, regularly operates flights to US destinations. The case is pending and the outcome is open, though.

In a recent decision delivered in July 2015, the US Court of Appeals for the Ninth Circuit, however, defined again the criteria under which a European subsidiary can possibly be sued at the domicile of its US parent company – and when not. In the case at stake, a former female employee of Nike European Operations Netherlands, B.V. ("NEON"), a wholly owned foreign subsidiary of Nike, Inc. (Oregon / USA), brought claims in the District of Oregon against NEON (and the US parent company) for an alleged case of sex and age discrimination by her employer in the Netherlands (which she had unsuccessfully sued in the Netherlands already). The motion was dismissed by the Court of Appeals. It held that the foreign subsidiary did not have sufficient contacts with Oregon as to make the subsidiary amenable to general jurisdiction there. The fact that a number of the subsidiary's employees travelled regularly to the parent company's seat, that there were commercial transactions between the parent Nike, Inc. and NEON, was not seen as sufficient to render the subsidiary at home in Oregon. But also the "alter ego" test

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Alter Egos in International Litigation

failed. The plaintiff argued that NEON and Nike, Inc., the first being the wholly owned foreign subsidiary of the latter, were not really separate entities and thus Oregon should be considered as the real home of NEON. To satisfy the alter ego test, a plaintiff "must make out a prima facie case '(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud and injustice.'" The Court stated that there was no evidence that Nike and NEON failed to observe their respective corporate formalities; it held that the foreign subsidiary was completely independent from its parent company as it leases its own facilities, maintains its own accounting books and records, and, last but not least, pays its own taxes in the Netherlands. In short: NEON is not the alter ego of Nike, Inc.

This recent decision shows the complexity of situations between parent companies and its foreign subsidiaries. The result is in line with what a German court would have ruled in a similar situation here.

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Real Estate Project Developments: Everybody wins

Bread and butter business deals will tend to yield bread and butter results. In real estate investments so called project developments offer more opportunities in comparison. Often such projects – i.e. typically new, tailored buildings on already established locations or revitalized old building structures – will be attractive to almost all parties involved during the process of realization.

The developer

The developer's asset in such a deal is usually the elaborated idea combined with the knowledge about the appropriate property – or vice versa. By putting together a package usually containing acquisition, planning, building works and leasing such property, the developer can typically "sell" a product with a margin while putting very little capital on the line. This allows for the planning and implementing of several projects at the same time, spreading the risk while multiplying the leverage.

Furthermore, project developments are attractive because the revitalization of such properties – either by tearing down old, unattractive substance or by revitalizing a standing building – is often politically desired and supported. Project development can even reuse formerly existing upsides when relying on Bestandsschutz (operating in non-compliance under a variance and continuation permit) and thus realizing opportunities that are not open for regular contractors.

As the developer takes the lead he has to focus on all particular issues of the development: Besides the technical and constructional/architectural issues he is responsible for the commercial success of the entire development. This includes the draft, negotiation and conclusion of several contracts, e.g. (as major contracts) the building/construction contracts, the Sale and Purchase Agreement concerning the real estate and lease agreements.

The junior/mezzanine lender

The existing equity gap for such projects is often covered by junior/mezzanine loans, which offer commercially attractive conditions for lenders. They are usually involved in the entire planning and implementation process, which enables them to secure the investment against many adverse conditions and to steer and control the entire process according to their particular needs. Should the borrower default, typical contracts will give lenders options to sell the promising project or to finish it with own means.

As a rule, the junior/mezzanine lender is not secured by a land charge. Therefore, other guaranties should be given by the developer. But even then, the junior/mezzanine lender bears a high commercial risk. Thus, it is necessary for him to examine the

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development especially from an economic and legal perspective to identify and estimate any commercial and legal risk. If this examination is performed at a very early stage of the development planning, the minimization of the identified risks might be negotiable.

The senior lender

The senior lender is typically secured by a land charge on the property. The relationship with the mezzanine lender is regulated by an intercreditor agreement. In comparison to the junior/mezzanine lender, the senior lender's engagement is less risky because of the land charge that usually will be granted in his favor. Nonetheless, a due diligence is recommended.

The tenant(s)

Prospective tenants of such developments are also involved very early on and can introduce a lot of their needs and specifications in the process. Their crucial position as the "asset of the asset" gives them a lot of bargaining power, which they typically put to use to achieve very modern, tailor-made and representative lease objects.

The acquirer

In the end out of all the players involved the acquirer profits most from the careful and professional work of all prior stages of the project as he receives a fully finished and custom made product. The purchase price may be higher than for regular properties comparable in size and location, but is justified by the typically very stable cash flow from the leases and a package of warranty claims to keep the property in good shape over the coming years.

Of course the acquirer needs to perform a technical and legal due diligence and should examine the development from a commercial perspective. This provides him with the essential details for the pricing.

Real estate project developments offer profitable opportunities for the involved parties. However, such real estate project developments are a complex undertaking and therefore need to be examined with care.

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Hereditary Building Rights in Germany – a historical vehicle as a modern solution for real estate investments

Introduced in 1919 hereditary building rights (hereinafter "HBR") were originally considered as an opportunity to stimulate housing for the poor suffering from Word War I. While inexpensive accommodation is still one of the drivers of HBR, the commercial usage of HBR significantly increased in the recent years. HBR are an attractive instrument to gain possession of a property, especially for the purpose of erecting facilities for a certain period. Accordingly, HBR play a major role in the context of renewable energy projects (such as wind-, photovoltaic- or fermentation-plants) as well as in public private partnerships or in private investments in warehouse.

As mentioned above, from an economic standpoint HBR are to a certain extent comparable to Ground Leases. However, as a specific German legal institution HBR have their own characteristics that need to be identified in case HBR shall serve as an instrument in a real estate project. The key facts can be summarized as follows:

- HBR include the right to erect and maintain buildings on a property for a long period. Whereas commercial HBR often show a term of 40 to 50 years, a term of up to 99 years is permissible. Conventional lease contracts are legally limited to an initial maximum duration of 30 years and can be terminated thereafter. HBR therefore allow long-standing planning reliability.
- Granting HBR allows the owner of the property to generate profits from the property without losing the ownership while the beneficiary of HBR is entitled to erect buildings on the property and to use them. Economically the beneficiary therefore is in a position similar to an owner of the property.
- Payments to be made for HBR – the ground rent – are, of course, subject to negotiations between the parties. They are typically determined based on the so-called standard ground value of the property set forth by public committees. The ground rent amounts to a certain percentage of this standard ground value per year. In order to link the ground rent to the price trend it is usually subject to an indexation.
- Finally, subject to the owner's approval which can be given in the underlying contract, HBR can be encumbered with mortgages or land charges and are transferable to third parties. Therefore, HBR can serve as a security for lenders of the beneficiary and have a higher fungibility than lease contracts, both being of significant importance for the project financing and exit scenarios.

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Generally spoken, the parties are free to negotiate the content of HBR. However, there are some restrictions which limit the parties' autonomy: For example, the amount of a mortgage may not exceed half the value of the respective HBR. In addition, HBR may only be encumbered with a mortgage if the underlying loan has to be repaid 10 years prior to termination of the respective HBR. Furthermore, it is often agreed in HBR contracts that the beneficiary needs to remove the building upon termination of the HBR. Finally a US investor can face legal challenges unknown in the United States: The German "Law of Standard Terms and Conditions" which limits the parties' freedom of contract in case such contract is intended to be used several times.

Anyway, given the advantages of HBR, it should in particular be kept in mind in case,

- it is neither intended nor possible to acquire ownership of a certain property;
- a certain facility shall only be used for a certain duration and
- the beneficiary needs an HBR for funding because a lease does not provide sufficient security.

Due to the challenges along with HBR it is crucial to examine carefully the possibilities at hand.

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Foreign Corporations Owned by U.S. Taxpayers – Form 5471

German nationals who are tax residents of the United States may be required by the taxing authorities to complete many different information forms. Some of these forms are so complex that it is difficult to even determine who is required to complete the form and which parts must be filled out. One such form is Form 5471, "Information Return of U.S. Persons with Respect to Certain Foreign Corporations". This form is required so that the IRS can obtain information about foreign corporations from certain U.S. owners so they can monitor compliance with international tax rules such as Subpart F income.

Previous articles have discussed the onerous penalties that can be assessed when these forms are not timely filed ($10,000 per Form 5471 due). In addition to penalties for not timely filing, penalties can be assessed for inaccurate or incomplete returns. Another negative side effect of failing to file Form 5471 is that the statute of limitations remains open which allows the IRS to audit your entire tax return indefinitely until the required 5471 is filed. These penalties make it even more important for taxpayers to review the Form 5471 filing requirements to determine whether a filing requirement exists.

There are four categories of filers that must complete Form 5471 for each applicable foreign corporation. The category type determines which sections of Form 5471 must be completed.

The first category (referred to as a Category 2 Filer since the Category 1 filing requirement has been repealed) applies to U.S. citizens and residents who are officers or directors of a foreign corporation in which a U.S. person has acquired stock which meets the 10% stock ownership requirement with respect to the foreign corporation or an additional 10% or more (in value or voting power) of the outstanding stock of the foreign corporation.

The next category ("Category 3 Filer") includes a U.S. citizen or resident ("U.S. person") who acquires a 10% ownership interest during the taxable year, sells stock during the year that causes the ownership interest to drop below 10% or becomes a U.S. person during the taxable year while owning 10% of the stock. This category often applies to German nationals in the year of their move to the U.S. if they hold 10% or more of the stock of a foreign corporation and if they become residents of the U.S. or hold U.S. citizenship.

Category 4 Filers are U.S. persons that had "control" of the corporation for at least 30 uninterrupted days during its taxable year. Please note that U.S. persons include domestic partnerships, corporations and trusts, as well as U.S. individuals who are citizens or residents. A U.S. person has control of a foreign corporation if at any time during that

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person's tax year it owns stock possessing more than 50 percent of the total combined voting power of all classes of stock

Category 5 filers include any U.S. person who was a "United States shareholder" of a "Controlled Foreign Corporation" for at least 30 uninterrupted days, and who owns stock on the last day of the foreign corporation's taxable year. A "controlled foreign corporation" is any foreign corporation if, <u>on any day during its taxable year</u>, U.S. shareholders own more than 50 percent of the total combined voting power <u>**or**</u> value of all of the corporation's stock. For this category, a United States shareholder is defined as any U.S. person who owns (or is considered to own after application of constructive ownership rules), 10% or more of the total combined voting power of all classes of stock entitled to vote of the foreign corporation.

As for preparing the form, your filing category determines which sections must be filled out. Significant information about the foreign corporation can be required, especially for Categories 4 and 5 filers. The financial statements usually must be presented using U.S. GAAP and the functional currency of the foreign corporation which is then converted to U.S. dollars. Schedule H which requests the Current Earnings and Profits of the foreign corporation can also be very complicated to prepare. Each category 4 or 5 filer must complete Schedule I, "Summary of Shareholder's Income from Foreign Corporation") which is used to compute the Subpart F income that must be included on the shareholder's income tax return. Subpart F income is income that is taxed currently even though the foreign corporation has not made any actual distribution of the income to the shareholders.

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The unfinished U.S. tax reform

With both chambers of Congress controlled by one party, a major impediment to the passage of tax reform and other significant legislation over the last several years has been removed. Other obstacles remain, however. The new leaders on the congressional taxwriting committees need time to develop and build support for their own tax reform proposals; moreover, the complexities of the Senate's procedural rules and ongoing questions about the president's commitment to overhauling the tax code make it difficult to determine whether tax reform can be enacted in the near term.

In theory, the fact that Republicans control the House and Senate means that it could be easier for tax reform legislation to clear both chambers and make its way to the White House. But the reality is that even though Republicans now hold 54 of the 100 seats in the Senate, they do not have the 60-vote supermajority that will be necessary to avert the threat of a filibuster and ensure the passage of tax reform — or almost any other major legislation.

Another ongoing source of uncertainty around the prospects for tax reform is the extent to which President Obama wishes to be seen as a leader in debate. Although the White House has come out in support of business tax reform, it has not released a detailed, comprehensive proposal of its own nor has it demonstrated a sustained commitment to getting tax reform enacted into law.

The last comprehensive rewrite of the U.S. tax code was enacted in 1986 when Republicans controlled the White House and the Senate, and Democrats controlled the House of Representatives. A key component of the 1986 tax reform effort was then-President Ronald Reagan's willingness to negotiate with congressional Democratic leadership as well as his willingness to use the White House as a bully pulpit to pave the way for tax reform by getting in front of the issue, making the case to the public, and bringing Congress and Treasury together to work out a plan. By the time Congress began to focus on tax reform in 1985, the Reagan Treasury Department had already released hundreds of pages of analysis, distributional tables, and revenue estimates covering various options for tax reform, and the president had sent a nearly 500-page report to Capitol Hill detailing his recommendations.

The plans and discussion drafts put forward by former Ways and Means Committee Chairman Camp, Sen. Wyden, and former Finance Chairman Baucus and the corporate tax reform framework released by the Obama administration may provide useful building blocks for tax reform going forward, but they also reveal the hard choices that policymakers need to make before tax reform can be enacted into law:

- Congress must settle the long-standing question of whether reform should produce more overall revenue for deficit reduction or other spending priorities or whether it should be revenue neutral.

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- Congress and the White House must come to an agreement on the general parameters of tax reform — specifically, whether tax reform should be "comprehensive" and encompass corporate entities as well as pass-throughs and individuals or whether it should be limited to "business-only" reform that focuses on corporate rate reduction offset by elimination of key expenditures.
- Congress must also decide whether tax reform should be used to address income inequality or whether the tax code is already sufficiently progressive and doesn't need to be made more so.
- Congress must decide whether to adopt a territorial system with appropriate safeguards for the U.S. tax base or whether to maintain the worldwide system with more stringent rules.
- Congress must evaluate how tax reform might affect different industry sectors. For example, many of the largest business base broadeners that will be used in tax reform (like slowing cost recovery, repealing the section 199 manufacturing deduction, etc.) hit manufacturing much more heavily than the retail or service sectors.
- Congress has yet to fully explore what sort of transition rules would be necessary to prevent tax reform from creating economic shockwaves.

Congress will also have to decide how to address the dozens of expired tax extenders provisions from 2013 that it renewed retroactively for one year in the Tax Increase Prevention Act of 2014 and that are now expired once again.

And of course this all takes place in the seemingly never-ending cycle of elections that cause Washington to focus more on the next campaign than on what some would see as more pressing policy matters. With the 2016 elections ahead the near-constant campaigning offers only limited windows for policymakers to dive deep into complex and contentious issues like tax reform.

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