

A NEWSLETTER FROM  
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# Focus German Employment Law

**MANNHEIMER SWARTLING  
FOCUS GERMAN  
EMPLOYMENT LAW**

## **CONTACT**

Dr. Christian Bloth, Fachanwalt für  
Arbeitsrecht, Frankfurt (Editor)  
Roland Weiss, Frankfurt  
Bettina Kreimer, Frankfurt  
Thereze Falkjær Jensen, Berlin  
Dr. Kerstin Kamp-Wigforss,  
LL.M., Stockholm

MannheimerSwartling  
Focus@msa.se

**MANNHEIMER SWARTLING**

### **FRANKFURT AM MAIN**

Bockenheimer Landstraße 51-53,  
60325 Frankfurt am Main,  
Phone: +49 69 974 01 20  
Telefax: +49 69 974 01 210

### **BERLIN**

Mauerstraße 83-84  
10117 Berlin  
Phone: +49 30 22 66 990  
Telefax: +49 30 22 66 9910

### **STOCKHOLM**

Norrländsgatan 21  
Box 1711, 111 87 Stockholm  
Tel +46 8 595 065 00  
Fax: +46 8 595 065 01

[www.mannheimerswartling.de](http://www.mannheimerswartling.de)

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## Serious negative consequences may occur in case of insufficient information of employees affected by a transfer of business (Betriebsübergang)

The involved (present and future) employers often underestimate the importance of detailed employee information in case of a transfer of business (e.g. in transactions involving an asset deal). The employees whose employment relationships are intended to be transferred from one legal entity (seller) to another (purchaser) have to be extensively informed in writing prior to the transfer.

The employees must for example be informed about the planned date of the transfer, the reason for the transfer and the (legal) identity of the new employer. Furthermore, the legal, economic and social effects and the prospective measures to be taken with respect to the employees have to be described in detail. Legal practice requires detailed and correct information on legal consequences, which often seems to be a source for mistakes. For example, the future applicability of possible works council agreements (Betriebsvereinbarungen) and/or collective bargaining agreements have to be explained. Such explanation can only be reliably rendered after a detailed legal analysis, especially if the transfer triggers the applicability of a new works council agreement that may collide with the stipulations of the formerly applicable works council agreement.

Only a complete and correct information letter triggers the one-month-period, during which an employee may object to the transfer of his employment relationship. This implies that in case of insufficient information, an employee may object to the transfer of the employment relationship even a considerable time after the transfer of business was concluded with the consequence that the objecting employee remains employed with the former employer.

A recent and famous case in which a labour court deemed the information being insufficient was the divestment of Siemens AG's mobile telephone division to BenQ. In the information letter to the employees, the new legal employer was not indicated. It was not pointed out in the information letter that the new legal entity would be a German BenQ affiliate (BenQ Mobile GmbH & Co. oHG) with a capital stock of only Euro 50,000, but not BenQ Taiwan itself. Also the address of the new employer was not mentioned.

When the imminent insolvency of BenQ Mobile GmbH & Co. oHG became apparent, the employees were therefore – due to insufficient information – in a position to successfully object to the transfer, although the one-month-period had elapsed long before (several decisions of the District Labour Court Düsseldorf of 29 April 2008; appeal to the German Federal Labour Court is pending).

From Siemens' point of view, the inconvenient effect is that the employees can "return" to Siemens as their former employer (with retroactive effect). This means that they can claim payment of their salary from Siemens instead of the insolvent German BenQ entity. The possibility of Siemens to terminate – with effect in the future – the employment relationships with the returning employees due to compelling business reasons (as Siemens does no longer hold the assets forming the mobile phone division) may of course be given, depending on the individual circumstances. Nevertheless, the negative effect is considerable and could have been avoided.

*Roland Weiß, rwe@msa.se*

# Valid limitation of employment contracts under German Law

Under German Law employment contracts can be concluded limited in time (with or without a material reason), which gives more flexibility when balancing varying demands of employment. The formal procedure which has to be passed, however, especially in respect to later prolongations, is difficult and raises many questions with regard to the requirements of “written form”.

First, to fulfil requirements of written form is not as easy as it looks at first sight. Not matching the legal requirements of “written form” leads to an unlimited employment. Generally, “written form” means that both signatures have to be executed before employment starts. “Written form” means not signing by exchange of fax copies or pdf-documents, but of original documents. A signing of a time limited contract after the employee has taken up his work leads – by law – to an unlimited employment. But how is the situation if only the employer signed before start of employment, but the employee signs after? Federal Labour Court decided on 16 April 2008 (7 AZR 1048/06) a case, in which the employer sent an employment contract already signed by him to the employee and requested him to send back a signed copy of it. The employee himself signed and returned a signed copy of the contract shortly upon start of the employment to the employer. The court decided that the requested written form was complied with because the employee could only accept the written contractual offer by also signing the document, but not by beginning the work. So the earlier start of employment has not led to the conclusion of an invalid not time-limited contract.

Second, the prolongation usually contains risks. By the beginning of the year, the Federal Labour Court (“Bundesarbeitsgericht”) made two decisions (7 AZR 603/06 16 January 2008 and 7 AZR 786/07 20 February 2008) in respect of a prolongation of time

limited employment contracts which were limited in time without material reason. Law allows to prolongate an employment contract time-limited without material reason three times up to a total duration period of two years. But a prolongation will only be regarded as such if it is still agreed during the duration of the contract to be prolonged, but not after. Additionally, therefore only the duration may change, but no other contract terms, e.g. work time or remuneration, a mistake to be seen quite often. Otherwise, the prolongation would be deemed as an unlimited employment contract.

In respect of the decision of 16 January 2008, the parties did not only change the duration at the moment of prolongation, but also changed the weekly hours of work from 20 to 30 hours. The employee was not entitled to claim such an extension, so that the last limitation of time was found to be invalid. The Federal Labour Court came to the same result in its decision of 20 February 2008. In a prolongation agreement between the parties, the right to give notice – during the limited contract period, as it was provided in the original contract – was not included.

Third, the wording of employment contracts must be clear and definite. On 16 April 2008, the Federal Labour Court decided (7 AZR 132/07) that a limitation of probation which was not typographically accentuated could be a “surprising clause” within these provisions. The standard form employment contract of the employee included a bold and heightened printed clause with a time limitation of the contract for one year, but in the following text also a non-particularly accentuated time limitation of probation for sixth months, which was regarded as “surprising” and therefore not being part of the contract.

*Dr. Christian Bloth, cbl@msa.se / Andreas Karl, krl@msa.se*



# Employment of Managing Director (MD) of GmbHs

## PART I: CONCLUSION OF THE SERVICE CONTRACT (TO BE CONTINUED)

A managing director, German notion “Geschäftsführer” (MD), of affiliates of foreign parent companies, which are operated as GmbH, can be either employed at the parent group or employed directly at the affiliate GmbH. In the second case, a service contract with the MD has to be formulated differently compared to ordinary employment contracts, since the MD is not regarded as employee, but as employer’s representative. The MD has – according to law – a powerful position, since he represents the company towards third persons, as authorities, customers and employees. This power can – in principle – not be limited with legal effect towards such third parties, but be limited “internally” by shareholder resolution according to which certain decisions and (legal) acts are dependent on the shareholder’s prior approval. German GmbH law does not know any kind of “board” (“Styrelse”) representing the company, which makes the MD even more powerful and a detailed and careful regulation of the cooperation with him so important. Further it has to be noted that the GmbH – and this is often the case with major companies – has got more than one MD which share responsibilities.

First, only natural persons are able to act as MD under German Law, but no legal entities. For natural persons it is not required that they are German citizens or are even residents in Germany, so that even persons normally employed by a foreign parent company can be appointed as MD, e.g. the parent company’s CEO or CFO.

Second, there exists a dualism between the service contract of the MD and its position according company law. The “installation” of an MD is – company law – executed by appointment by the shareholders. This appointment is not identical or cannot be replaced by signing of the service contract. This contract has to be signed separately. MD’s service contract is concluded if signed by the shareholders on behalf of the company, which formally have to pass a resolution on the contract.

The shareholders’ meeting, as it is nearly general practice, can of course give a proxy to third persons to negotiate and enter into a service contract. A conclusion between the future MD and another MD is invalid. Further, the appointment of the MD has to be registered in the Commercial Register, which however is of formal nature and no “condition” of his valid appointment or a valid service contract.

The MD is – besides being subject to his service contract – subject to the directives of the shareholders’ meeting and bound by both the company’s articles and of course statutory company law.

Since the service contract is not regarded as employment contract on which statutory or collective labour law provisions are applicable, it has to be negotiated with the MD. Contents of such service contract are subject to the next chapter in our next edition of the FOCUS.

*Dr. Christian Bloth, cbl@msa.se / Andreas Karl, krl@msa.se*



The Frankfurt office of Mannheimer Swartling has recently moved into this office building at Bockenheimer Landstraße.

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