

A NEWSLETTER FROM  
MANNHEIMER SWARTLING  
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# German News Flash



## GERMAN NEWS FLASH

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## „Outsourcing“ of distribution – cost savings vs. legal pitfalls

In times of economic crisis, money is tight and departments of many market established companies are subject to cost saving discussions. Saving distribution costs by “outsourcing” of internal distribution functions to third parties is one of the costcutting measures frequently applied. Traditional employees’ sales force is replaced amongst others by engaging cooperation partners such as licensees or commercial agents (Handelsvertreter). Additionally, working with cooperation partners may be an interesting cost reducing alternative to enable a costefficient market entry. Such cooperation models have in common that flexible fees rather than a fixed remuneration are agreed upon, the amount of which depends on the market success. As a result, the cooperation partner assumes the market and cost risk to a large extent.

However, cooperation models require careful legal implementation as otherwise considerable consequential costs may be imposed on the company upon termination of the cooperation, which most companies are not aware of. Depending on the kind of cooperation and the contractual wording, the cooperation partners are often entitled to compensation upon termination. Pursuant to section 89b of the German Commercial Code (Handelsgesetzbuch), commercial agents may claim such compensation if – upon termination of the agency contract – the company continuously and considerably benefits from customer relations which the commercial agent has established to the extent that the payment of such compensation is “equitable”. No compensation is owed, however, if the commercial agent terminated the contract without any reasonable grounds or if the company terminated the contract on reasonable grounds caused by the commercial agent. The amount of compensation owed may be considerable, as it can reach a maximum of an annual fee of the commercial agent.



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Due to the fact that German courts have applied the above mentioned compensation clause also to other forms of cooperation, it is worthwhile for companies to take a closer look at compensation issues and to make sure that cooperation arrangements are carefully drafted. German courts have ruled that franchisees (Franchisenehmer), authorized dealers (Vertragshändler) and commission agents (Kommissionsagenten) are entitled to compensation, provided that (i) such cooperation partners form an integral part of the distribution structure comparable to those of commercial agents and (ii) the company is entitled to take over the customer base upon termination of the cooperation agreement and thus continuously benefits from the acquired customers. The German Federal High Court of Justice (Bundesgerichtshof; "BGH") recently had to decide whether a licensee of a trademark may claim compensation upon termination of a licence agreement (BGH – decision of 29 April 2010 – I ZR 3/09). A company owned by the famous German fashion designer Wolfgang Joop licensed several products under its protected trademark "JOOP!". Joop's company sued a licensee, who was entitled to produce, sell and advertise specific clothes under the trademark, for allegedly outstanding licence fees after the termination of the cooperation. The licensee, however, set off with allegedly existing compensation claims. The BGH denied a set-off right due to the lack of a counterclaim: The court ruled that the licensee was not to be regarded as forming an integral part of the distribution structure, since the licence fee was solely intended to promote the reputation of the trademark, and Joop's company did not have an interest to generate sales of its own. A further point the court took into consideration was that the licensee was not obliged to transfer the customer base to Joop's company. Even though in this case the BGH denied a compensation claim, it expressly stated that also licensees of trademarks may in principle be entitled to compensation if the criteria (i) integral part of the distribution structure and (ii) transfer of the customer base as described above are met.

"Outsourcing" of distribution structures might furthermore entail liability risks. In a recent decision the Higher Regional Court (Oberlandesgericht; "OLG") of Cologne ruled that a company may be held liable for infringements of competition law caused by its cooperation partners even though in the underlying case these partners were freelancers as well as advertising partners of the company (OLG Köln – decision of 8 October 2010 – 6 U 69/10). The company's cooperation partners had sent e-mails to potential clients without their previous consent, which was objected to by a competitor as being an

infringement of German competition law. The OLG assumed a liability of the company regardless of its own fault and without opening any possibility of exculpation. The court argued that (i) the cooperation partners had been an integral part of the distribution structure of the company, (ii) the company benefited from their business efforts, and (iii) the company had significant influence on these cooperation partners. The company was therefore obliged to check measures of its cooperation partners by implementing a monitoring system.

It follows from the above that even though "outsourcing" of distribution structures may be an effective means of saving costs, it bears certain risks both in respect of possible compensation claims and liability. The tendency of German courts to extend the applicability of the compensation to other forms of cooperation than commercial agents underlines the necessity to draft such cooperation agreement with due care and – in case of doubt – to seek legal advice. Furthermore, the fact that companies may even be held liable for

acts of their distribution partners shows that it is highly advisable for companies to continuously monitor the activities and market behaviour of their cooperation partners.



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## Arbitration Opinions - A Way of Fast Track Dispute Resolution

Arbitration opinions (Schiedsgutachten) are very common in real estate and construction law, but also relevant in other areas. A third person with broad experience in a subject matter – usually not a judge or a lawyer – is appointed as an expert (Schiedsgutachter) and asked to provide an arbitration opinion, which will finally settle a dispute. Certain legal and factual aspects need to be considered in order to be able to determine whether an arbitration opinion can be an effective instrument of dispute resolution in a specific situation, and one also has to be aware of the potential risks of such proceedings.



First of all, it is crucial to identify in advance which kind of disputes qualify for an arbitration by arbitration opinions – and which disputes are better handled by “ordinary” arbitration or the courts. This should already be dealt with when agreeing on provisions in a contract on an arbitration opinion as a dispute settlement mechanism.

Arbitration opinions are commonly agreed upon, if there is a risk that a conflict between the parties regarding facts – not the law – might arise. It is, however, also possible to have legal issues decided by a legal expert first and factual issues by a second expert thereafter – in which case the decision on facts of the second arbitrator is based on the decision on the legal issues of the first arbitrator. In many cases, complex technical and economic projects requiring a high degree of professional knowledge and expertise qualify for an arbitration opinion in case of a dispute. Therefore, provisions on arbitration opinions are regularly found in large scale construction contracts, property transfer agreements, lease agreements with extensive tenant fit out and property development agreements.

The parties have to be in agreement that an expert opinion of a competent expert will have binding force on them. Under German law, the arbitration opinion agreement (Schiedsgutachtenvertrag) does not have to be made in writing; the parties may enter into such agreement verbally or even tacitly by conduct.

Arbitration opinions are regulated by sections 317 et seqq. of the German Civil Code (Bürgerliches Gesetzbuch). A party may challenge a binding arbitration opinion only in case of “gross inequity” (grobe Unbilligkeit). There are only few such cases in which a party can successfully challenge an arbitration opinion, e.g. if the expert did not take into consideration clear and obvious facts or an unambiguous agreement between the parties. It is controversial whether it is possible to file a claim with the ordinary courts without having obtained an arbitration opinion in advance, if the parties agreed on this form of arbitration. Unfortunately, it is not possible to serve notice to a third party in order for the opinion to have a binding effect on this third party (Streitverkündung), as it is in “ordinary” disputes. This is a major disadvantage and often relevant if there is a possibility that third parties such as subcontractors, suppliers or sub-suppliers might be liable for the damage in question and should therefore ideally be involved at an early stage of a dispute.

If the parties cannot agree on an expert, the provisions governing the arbitration opinion proceedings usually stipulate an appointment of the expert by a third person or neutral instance. A common way of proceeding is to have the expert selected by the local Chamber

of Industry and Commerce (Industrie- und Handelskammer). The Chambers of Industry and Commerce keep a register of publicly appointed and sworn experts. However, this does not guarantee that the most professional and experienced expert will be appointed, as it is not necessary for experts to provide evidence of their experience in order to be included in these lists. Another potential problem is that an expert may be biased if he was already in contact with one of the parties beforehand. It is therefore advisable to appoint a reliable and unbiased expert (and possibly a substitute) in advance. Otherwise, the parties should clarify that an arbitration opinion will not have a binding effect, if the expert is biased.

Oftentimes, a dispute needs to be resolved on short notice to avoid delays on the construction site or in important production processes in order not to endanger completion dates and risk fines. Therefore, it is important to inform the expert as soon as possible about the timeframe for his assignment and deadlines. The parties also need to ensure that the expert has the capacity to accept and fulfill such an assignment on short notice. When contacting an expert, all parties need to be open and transparent and inform each other of all contacts and exchanged information in order to prevent the expert from becoming biased.

The relationship between the parties and the expert is regulated by an “expert agreement” (Schiedsgutachtenvertrag). The parties to the agreement need to be named properly with full name and address. The scope of investigation needs to be described in the agreement very carefully due to the binding effect of the arbitration opinion. The agreement should also contain provisions on the expert’s fees and regulate in which way the expert can collect further information from the parties, if needed. Furthermore, it needs to be made clear whether the expert is allowed to consider the opinion of another expert in case he lacks expertise in a specific subject matter.

An arbitration opinion can be a good alternative to lengthy court proceedings and can be used for fast track dispute resolution. It is, however, crucial for the parties to identify in advance which potential disputes are suitable for an arbitration opinion, to appoint the appropriate expert, describe the involved parties and the scope of inquiry in the agreement properly and to carefully tend to the proceedings.



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## The UK Bribery Act 2010 enters into force – with consequences for companies worldwide

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The UK Bribery Act 2010 reforms the United Kingdom's criminal law to provide a new scheme of offences to combat corruption in the public or private sectors. The law received Royal Assent on 8 April 2010, but does not become effective until three months after the publishing of guidelines that help to interpret and implement the Act. On 30 March 2011, the British government has finally published the long awaited "Guidance". The Act will thus enter into force on 1 July 2011.

The Act replaces the present anti corruption laws dating back as far as 1889. The signing of the OECD Anti-Bribery Convention and perhaps the recent BAE corruption scandal provided the occasion to make a change. The new Act, however, has already been interpreted as going further than either the OECD Convention requires or even the U.S. Foreign Corrupt Practices Act (FCPA), upon which it is modelled.

Besides providing a new scheme for bribery offences, the Act – as a new concept – criminalises the failure of commercial organisations to prevent active or passive bribery by persons associated with the organisation or providing services for it. This does not only include officers and employees but also e.g. independent contractors, agents and subsidiaries. The territorial scope is also broad: The Act can apply to companies incorporated outside the UK that carry on business in the UK, even if the offence did not take place there. "Carrying on business" should be understood in the broadest of terms, it can mean any business operation, such as a branch, plant or distribution network. The Guidance states that it is designed to be of general application and not a "one size fits all" document. Therefore, it will most likely remain unclear whether or not a company falls under the Act in some cases until the first cases are decided by the British courts.

However, organisations that can prove that they have adequate procedures in place to prevent bribery will have an effective defence against criminal liability. To that effect, it is required (but also sufficient) that commercial organisations implement procedures proportionate to the risks they face: Where the risk of corruption faced by a business is low, not all of the procedures described in the Guidance may be relevant. On the other hand, where corruption is not entirely improbable, the organisation must take further steps, depending on the level of risk and on the nature, size and complexity of the business. Perhaps most important and time consuming is the required due diligence regarding individuals providing services for or on behalf of the organisation. This can range from Internet or authority inquiries via requiring a CV to checking references and financial statements. Although the Guidance points out the principle of proportionality as a general guideline, again, it can be expected that many lessons will be learned only through cases brought against companies under the Act.

For foreign commercial organisations, the entry into force of the UK Bribery Act 2010 might make an adjustment of company compliance procedures necessary, if they already have business operations in the UK or business transactions with partners in the UK. As the Act will enter into force on 1 July 2011, it is therefore high time for such companies to assess their corruption risk exposure and their compliance management systems.

For more information, please take a look at the published official material on the Act at <http://www.justice.gov.uk/guidance/bribery.htm>, or contact the author who is a member of Mannheimer Swartling's practice group Corporate Compliance & Investigations: <http://www.mannheimerswartling.se/en/Activity/Activity-groups/Corporate-Compliance-Investigations/>.



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## 4th Nordic Property Event in Berlin on 4 May 2011

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In cooperation with the Swedish Chamber of Commerce and Dansk Business Forum Berlin, Mannheimer Swartling's Real Estate Group is hosting the Nordic Property Event 2011. It is the fourth of its kind, this year with a panel discussion titled "Challenges and Opportunities in the German Real Estate Market – The Nordic Perspective" (held in English) followed by a buffet dinner and networking. The panelists are from ABG Sundal Collier ASA (Norway), Fastighetsbolaget Norrporten AB (Sweden), Nykredit Bank A/S (Denmark) and Sehested Group (Denmark) and the discussion will be moderated by Dr. Maria Wolleh from Mannheimer Swartling's Berlin office. The event will take place on 4 May 2011, starting at 6:00 p.m., at the Scandic Hotel Potsdamer Platz. If you are interested in participating, please send an email to [event-berlin@msa.se](mailto:event-berlin@msa.se) and we will be happy send you an invitation.

## Two lectures by MSA's specialists on environmental law in May

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Annika von La Chevallerie, Specialist Counsel for Energy and Environmental Law, and Maren Ropeter, member of Mannheimer Swartling's Real Estate Group, will be speaking on 18 May 2011 at the „Berlin Energy Days 2011“ about „Legal options for improving the use of heat from combined heat and power and waste

heat“ within the framework of an event organized by the Federal Environment Ministry on „Energy efficiency and climate protection – two faces of the same coin“.

In addition, Annika von La Chevallerie and Emma Österdahl, member of Mannheimer Swartling's Environmental Law Group, will be speaking about “The legal framework and the implementation of renewable energy projects in Sweden and Germany” at the spring meeting of the German-Nordic Lawyers' Association that will take place in Helsinki from 27 to 29 May 2011.

## MSA at Real Estate North in Hamburg on 14 and 15 June 2011

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Mannheimer Swartling's Real Estate Group will participate in the commercial real estate fair “Real Estate North” in Hamburg for the second time. The initiator, Deutsche Messe AG, is expecting about 150 exhibitors and 3,500–4,000 participants. The fair has moved from Terminal Tango at Hamburg Airport and will now take place on 14 and 15 June 2011 at the Congress Center Hamburg. After a successful road show together with Deutsche Messe AG in Oslo, Copenhagen, Stockholm and Helsinki to promote the fair in the Nordic countries, Mannheimer Swartling is going to be sponsor of the “Nordic Lounge” on the fairground. The Nordic Lounge will be a meeting point providing excellent networking opportunities for the Scandinavian-German real estate industry. Members of Mannheimer Swartling's Real Estate Group will be present as hosts and provide detailed insights into typical challenges faced by Scandinavian real estate investors when entering the German market.



## Corporate Compliance & Investigations: New practice group at MSA

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Mannheimer Swartling's latest practice group "Corporate Compliance & Investigations" was formally kicked-off with a round of seminars for clients in Stockholm, Gothenburg and Malmö in February. In total, several hundred guests joined us to discuss current topics concerning the mastering of legal risks in business. With the expertise and experience joined in one group, our firm offers services relating to all three key tasks of corporate compliance: prevent – detect – correct. For more information on the practice group and its activities, please refer to <http://www.mannheimerswartling.se/en/Activity/Activity-groups/Corporate-Compliance--Investigations/> or contact Oliver Cleblad (osn@msa.se) at our Frankfurt office.

## Swedish Bar Association (Sveriges Advokatssamfund) / International Section

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Dr. Christina Griebeler, a lawyer at Mannheimer Swartling's Frankfurt office, was elected secretary for the duration of one year at the annual meeting of the International Section of the Swedish Bar Association in Rome on 26 March 2011. In this function, she will be in charge of coordinating the section's affairs and the communication with the Swedish Bar Association's headquarters in Stockholm.

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Mannheimer Swartling is the leading Nordic commercial law firm. Our clients range from many of Sweden's and the world's leading companies to medium-sized businesses and organizations. Common to all our clients is that the law plays an integral role in their commercial success. This drives us to continuously maintain our position at the forefront of our industry and attuned to the needs of our clients.

Mannheimer Swartling has offices in Stockholm, Gothenburg, Malmö, Helsingborg, Frankfurt, Berlin, Moscow, St. Petersburg, Shanghai, Hong Kong, Brussels and New York.



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