

Real Estate Transactions and Share Deal – a German legal perspective

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Köln, 14. Oktober 2006



1. **Basic Situation: How to perceive the power over a property?**

2 ways to achieve aim: Asset Deal
 Share Deal

3rd way: Purchase of None-Performing-
 Loan

Each way has its advantages and disadvantages!



2. Asset Deal / Delimitation

Direct way to title to property

Germany: entry in land register, Abteilung / Chapter I.

But: diverse obstacles!

Reason: strict formal land register system

No original signing-closing-process with a due diligence in between



3. Alternative: Share Deal

Advantage at first sight:

more universal structure of SPA – similarity between Share-SPA / country A and Share-SPA / country B.

Essentials concerning assets are guaranteed by the seller

Focus on company and tax law issues

Need for tax and accounting specialist



4. Process / structure of a Share-Deal-Due Dilligence

- Company law of SPV, BGB, HGB, GmbHG, AG:
 - Group structure
 - Articles of association
 - Excerpt company register (usually Handelsregister)
 - Decisions of the share holder meeting / SPV
 - Decisions of the share holder meeting / Seller concerning SPV
 - Powers of attorney
 - Inner-Group-Contracts



4. Process / structure of a Share-Deal-Due Dilligence

- Accounting: esp. forward carried deficit
- SPA concerning properties
- Third parties contractual bindings: esp. labour law
- Financing documents: change of control, exit rights etc., interest security contracts (Swap etc.)
- Insurances: no special right for cancellation
- Tenant / lease contracts
- Diverse property rights
- Other Due Dilligences: technical, environmental, commercial



5. Special Issue: Thin capitalisation rules, §§ 30 f. GmbHG

“Kapitalerhaltungsrecht”
„Insolvenzrecht“

Liability of persons acting on behalf of SPV

Validity and enforceability of securities provided to financing parties



6. Design of Share-Deal-SPA / Remarks

- Guarantees (core of SPA!): company, property, liabilities / contractual bindings in general, tenant / lease contracts
- Calculation / Recalculation of Purchase Price
- Hold back sums
- Involved parties: more than two make a happy couple
- Tax provision
- Arbitration clause
- The last 6 %



7. Reason to choose Share-Deal / in Germany

- More universal structure
- Less formal and less cost intensive SPA, sometimes: smaller time frame
- More flexibility in tax and corporate finance structure issues, generally: Tax / accounting reasons
- Possibility of avoidance of transfer tax (“Gründerwerbsteuer”)
 - especially, if chain-deals are requested!
- Higher compatibility in purchase price offers
- Possibility of takeover of public grants
- Pre-contractual binding can be established



8. Share-Deals / Disadvantages

- Less “physical”
- Continuity of liability / company
- Tax / accounting insecurities
- Costs of chosen legal entity (“Rechtsformkosten”)
- Necessity of Re-Calculation of Purchase Price after some time
- Standard: one party remains (the 6 %er)



8. Conclusio

Share-Deal as perfect way to properties?

Well ...

- Avoidance of transfer tax
- “Buying the prepared dish”
- Tax and accounting arguments
- Take over of public grants

Risks are remaining ...

