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Germany: Law and Practice

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GERMANY



Law and Practice

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1. Loan Market Overview

1.1 The Regulatory Environment and Economic Background

Regulatory Environment

In recent years, developments in the German loan market have mainly been shaped by the Capital Requirements Regulation (CRR) and the UCITS V Implementation Act.

Since January 2025, the CRR III has also been applicable in Germany. Based on the Basel III framework, the CRR III imposes strict capital requirements on banks and obliges them to comply with specified leverage ratios. A key feature is the output floor, which is being phased in – set at 50% in 2025 and 55% in 2026 – and which will rise to its fully loaded level of 72.5% by 2030, subject to EU-specific transitional reliefs (for example, for mortgages and unrated corporate exposures) that will blunt its impact for longer.

Successive interest rate cuts by the European Central Bank (ECB) had, until 2025, improved lending conditions for companies, with the deposit facility rate reaching 2.00% in June 2025. Since then, however, the easing cycle has reversed: in June 2026, in response to renewed inflationary pressure, the ECB raised the deposit facility rate by 25 basis points to 2.25%, which remains the applicable rate as of August 2026. According to the July 2026 Eurosystem staff projections, average headline inflation for 2026 is expected to be around 3.0%, with economic growth of approximately 0.8%.

Nevertheless, German borrowers' interest in alternative lenders continues to grow.

Impact of Recent Economic Cycles

In recent years, strict regulation under the CRR has led to more cautious lending practices among regulated lenders – particularly banks. Following a return to positive growth in the second half of 2025, German GDP is forecast to grow by approximately 0.6% to 1.4% in 2026, supported by expansionary fiscal policy, including increased public investment, the German recovery and resilience plan and higher defence expenditure. Banks supervised by the ECB continue to meet the stringent capital requirements and remain well above the prescribed minimum thresholds. There is therefore cautious optimism that lending will continue to increase: credit growth is expected to accelerate through 2026 as interest rates remain contained, with corporate demand for debt staying high – fuelled in particular by investment in artificial intelligence and data centres – albeit with banks remaining selective.

Nevertheless, caution remains warranted: considering the higher-cost US trade regime and the ongoing strict requirements of the CRR, banks remain cautious in granting loans and companies are hesitant with investment decisions.

1.2 Impact of Global Conflicts

As mentioned in **1.1 The Regulatory Environment and Economic Background**, despite strict banking regulations, the economic climate has improved, reflected in modest growth in the loan market.

In addition to the ongoing trade conflicts of recent years, which continue to affect supply chains, the change in US administration in January 2025 and its economic agenda continue to shape the current market environment. The trade and deregulation policies pursued by the US administration have led to notable shifts in the global loan market, although the acute uncertainty of 2025 has since given way to a more settled – if higher-cost – trade regime.

A central element was the introduction and expansion of US tariffs, particularly on European and Chinese goods. Following a period of acute disruption, the position has partly stabilised: the US–EU trade framework announced in July 2025 entered into force on 1 July 2026, setting a tariff ceiling of 15% on most EU exports to the US (including automobiles, pharmaceuticals and semiconductors), while tariffs on steel and aluminium remained at 50%. In addition, in February 2026 the US Supreme Court struck down the tariffs imposed under the International Emergency Economic Powers Act, which were replaced by temporary Section 122 tariffs, initially set at 10% and lapsing on 24 July 2026. After they expired, the administration shifted to country-specific tariffs under Section 301 of the Trade Act 1974, with rates ranging from 10% to 12.5%. While these developments have reduced trade-policy uncertainty, they have not eliminated it and export-oriented economies such as Germany – with significant exposure in automotive and industrial machinery – remain disproportionately affected, driving up costs and periodically increasing volatility in the capital markets.

Moreover, banking deregulation in the USA is affecting the competitive landscape for European credit institutions: US banks are increasingly able to act more aggressively and flexibly in the European market, including through their European subsidiaries. This is increasing competitive pressure on European banks and necessitating structural adjustments on the supply side.

Growing uncertainty, exacerbated by unpredictable US economic policy, is also dampening investment activity. Companies remain cautious, with only certain sectors such as energy infrastructure and digitalisation currently showing robust demand.

On the borrower side, companies continue to seek to refinance existing loans in order to secure lower interest rates and better financing terms whenever possible. However, companies operating in particularly affected sectors are frequently engaged in lengthy negotiations with their lenders – for example, regarding the waiver of financial covenants, the extension of existing loans or the adjustment of existing terms.

A further source of macroeconomic uncertainty emerged with the outbreak of armed conflict involving Iran on 28 February 2026. While the situation continues to develop and its ultimate scale and duration remain unclear, the principal transmission channel to the German banking and finance market is expected to be through energy prices. A sustained rise in oil and gas prices could reignite inflation – already elevated in early 2026 – potentially constraining the ECB's room for further monetary easing and keeping funding costs higher for longer. For corporate borrowers, particularly in Germany's energy-intensive industrial base, this could pressure margins and refinancing conditions, while heightened risk aversion may widen credit spreads and slow primary issuance. The extent of any impact will depend on the conflict's duration, the response of energy markets and the scope of any sanctions or supply disruptions and market participants should treat the position as fluid.

1.3 The High-Yield Market

The high-yield bond market in Europe is also of considerable significance. In 2024, it reached a new record with total issuances amounting to EUR159 billion, a trend that continued in 2025 and has been sustained into 2026: against a tight-spread regime (spreads of around 300 basis points) and default rates in the range of 3% to 4%, the euro high-yield market returned approximately 3.7% in the second quarter of 2026, outperforming the US high-yield market.

Against the backdrop of current US trade policy and the associated unpredictability from an investor perspective, capital has shifted from the US market to Europe.

As a result, the European high-yield market is continuing to gain in attractiveness.

By mid-2026, market conditions had shifted. Following the outbreak of the Iran war in February 2026 and the resulting spike in energy prices, the wider fixed-income environment moved from a phase of monetary easing towards a "higher-for-longer" outlook, with the prospect of further rate cuts receding. Despite these headwinds, the European high-yield and subordinated-debt segments proved notably resilient, supported by solid corporate fundamentals and stable investor demand. With spreads at such tight levels, however, investors have little margin for error. High-yield instruments are accordingly now viewed less as a source of capital appreciation and more as a source of income, with returns driven primarily by coupons rather than price gains. For borrowers, this mix of strong demand and tight pricing, along with elevated base rates, has kept the primary market open while raising all-in funding costs relative to prior years' low-rate environment.

Over the years, the German high-yield and leveraged loan markets have gradually assimilated their covenant packages and overall documentation terms. As more high-yield bond issuances are secured, a growing number of large-cap leveraged term loans include typical "covenant-lite" provisions.

Despite this trend towards assimilating loan and high-yield documentation terms, certain differences are worth mentioning. In light of the interest rate volatility, some companies have considered issuing fixed-rate notes. Loans generally continue to have more extensive undertakings and events of default, allowing lenders to demand economic or legal adjustments if borrowers seek amendments or waivers.

1.4 Alternative Credit Providers

As mentioned in **1.1 The Regulatory Environment and Economic Background**, interest in alternative credit providers continues to rise in the German loan market in 2026. In particular, small and medium-sized enterprises are increasingly turning to alternative forms of financing.

Debt funds, which have traditionally focused on small- and mid-cap leveraged buyouts, are also playing an increasingly important role in corporate and acquisition financing in the large-cap segment. In addition to classic unitranche solutions for large transactions, they are increasingly competing directly with syndicated and high-yield markets. European private credit and direct lending continue to grow, with annual unitranche volumes heading towards EUR55–60 billion by 2027 (up from over EUR45 billion in 2024) and unitranche lending expected to account for 45% to 50% of mid-market leveraged finance. Germany contributes about 15% of European unitranche deal volumes, driven by policy-led demand in infrastructure, the energy transition and defence, despite its traditionally bank-centric financing landscape. As the market matures, pricing has become more competitive and lenders continue to hold substantial undeployed capital.

Direct lending by alternative credit providers typically offers certain benefits over traditional bank lending, including:

- no syndication risk, since the debt is held to maturity;
- flexible and borrower-friendly covenants;
- financing at higher leverage multiples; and
- greater execution speed.

1.5 Banking and Finance Techniques

The unitranche offerings have resulted in a high number of super senior bank products – typically revolving credit facilities and related hedging, though more recently also in the form of additional term debt. This trend has led to new intercreditor arrangements and the market is increasingly seeing hybrid financing structures that combine traditional bank facilities with unitranche options.

The recent trend toward reduced leverage via senior debt and the need for additional leverage in competitive auctions or distressed situations, has led to payment-in-kind (PIK) HoldCo or preferred equity structures. These products, provided by a growing number of flexible "capital solution providers", do not require intercreditor agreements because they are structurally subordinated to the senior loans; however, the higher risk triggers a substantial increase in pricing.

Venture debt is another popular form of financing, particularly in the German market, allowing an increasing number of start-ups to raise additional capital to

finance growth without further diluting their ownership and benefiting from flexible repayment terms.

1.6 ESG/Sustainability-Linked Lending

Environmental, social and governance (ESG) and other sustainability-linked lending is now firmly established in the European loan market, particularly in syndicated loans in the form of sustainability-linked loans (SLLs). SLLs are particularly important in investment-grade lending and the manufacturing sector.

Alongside SLLs, sustainable lending can take the form of green loans and social loans. As the names suggest, these must be tailored to finance an ecological or social target. They are mostly used in the relevant industry for the financing of environmental projects. However, Germany has yet to close its very first syndicated social loan transaction.

SLLs, by contrast, do not need to finance sustainable projects and can be used for general corporate financing. Companies and lenders typically agree on bespoke ESG performance indicators, assessed annually through company-produced or objective third-party reports.

ESG financing came under significant pressure in 2025: the sustainable debt markets contracted by approximately 20% over the year. The decline was concentrated in SLLs, with EMEA volumes falling from around USD122 billion to around USD77 billion, whereas use-of-proceeds green loans in the region grew from around USD72 billion to around USD92 billion. Germany shows a similar divergence, with a marked decline in new SLL business. For 2026, a modest recovery is anticipated, with sustainable debt issuance by non-financial corporates forecast to rebound by around 10%, albeit still below 2024 levels.

Several factors are driving this development: administrative costs and the impact on companies and banks are rising, particularly as a result of disclosure and audit requirements (CSRD, SFDR). In this respect, the EU Omnibus I package (Directive (EU) 2026/470, published in February 2026) has materially reshaped the regime: it raised the CSRD reporting thresholds, removed a substantial number of companies – particularly mid-market firms – from the mandatory reporting scope and postponed reporting obligations for certain large undertakings and EU-listed SMEs. While intended to reduce the reporting burden, the changes have raised concerns about the future availability of ESG data for investors and lenders. At the same time, SLLs offer only limited financial incentives for some borrowers and do not count towards lenders' green asset ratios. Secondly, ESG initiatives are becoming increasingly controversial in political debates, particularly in the USA, where large financial institutions and companies are scaling back their climate and diversity targets or communicating their ESG strategies less openly ("greenhushing") due to current political pressure. In Europe, too, the debate over reducing bureaucracy and rising regulatory pressure is creating uncertainty.

While individual sustainable projects can still be financed through green or social loans (although the latter has not yet established itself in the German syndication market), it remains to be seen how the regulatory and political environment for ESG loan products will develop and how stringent transparency and reporting requirements will be for companies in the future.

2. Authorisation

2.1 Providing Financing to a Company

In Germany, the granting of loans is subject to a banking licence. Banking licences are granted by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*) and, if they are combined with a deposit-taking licence, by the ECB. The licence application is a lengthy and burdensome procedure.

The regulatory environment generally does not allow non-banks (institutions that do not hold a banking licence) to act as lenders. However, some narrow exemptions apply. As such, non-banks may co-operate with credit institutions in order to be involved in the loan business (the "fronting-bank model" or the "white label model") or in certain circumstances may rely on the reverse-solicitation exemption (see **3.1 Restrictions on Foreign Lenders Providing Loans**).

Furthermore, no licence is required for the mere acquisition and holding of loan claims, albeit a very fine line exists between mere "holding" and other actions in respect of those claims (eg, extensions) that again trigger a licence requirement.

In addition, as described in **1.1 The Regulatory Environment and Economic Background**, German investment laws were amended to allow certain EU-regulated credit funds to grant loans under very specific circumstances, even if they do not hold a banking licence.

3. Structuring and Documentation

3.1 Restrictions on Foreign Lenders Providing Loans

The banking licence requirement applies equally to domestic and foreign lenders. Certain exemptions may apply for EU institutions that hold a banking licence in their home jurisdiction and that are supervised by competent authorities in their home jurisdiction within the EU. These institutions may passport their banking licence to Germany if they fulfil the relevant requirements.

Generally, the licence requirement applies if foreign lenders wish to provide services to customers who are considered German residents. One exemption to this rule ("reverse solicitation") applies if the customer explicitly seeks out the foreign lender and the foreign lender does not market or advertise its services to German customers as such.

3.2 Restrictions on Foreign Lenders Receiving Security

Generally, foreign lenders may receive security or guarantees in the same way as domestic lenders. Receiving real estate security may have certain tax implications for foreign lenders.

3.3 Restrictions and Controls on Foreign Currency Exchange

Germany has not implemented foreign currency controls, except for reporting obligations for incoming or outbound payments, regardless of currency. However, banks and payment institutions must freeze the assets of persons subject to EU sanctions lists. This affects all assets, including funds, regardless of currency. Funds subject to an asset freeze must be reported to the competent authorities, which in Germany is the *Deutsche Bundesbank*.

3.4 Restrictions on the Borrower's Use of Proceeds

By law, no restrictions on the use of proceeds arise, other than for non-compliance with sanctions or other applicable public laws and the financial assistance/capital maintenance requirements described in **5.3 Downstream, Upstream and Cross-Stream Guarantees** and **5.4 Restrictions on the Target**.

3.5 Agent and Trust Concepts

In syndicated financings, it is market standard to implement an agency and security agency concept. Germany does not recognise the trust concept. To allow the security agent to hold certain types of security, the financing documentation would include a parallel debt concept.

3.6 Loan Transfer Mechanisms

Loan claims can be transferred to a new lender by way of a transfer of rights and claims (*Vertragsübernahme*) or by way of an assignment of claims (*Abtretung*).

Transfer of Rights and Claims

The usual way to trade out of and into a syndicated loan is by transferring all rights and claims of an existing lender to a new lender. The new lender assumes not only the right to demand principal and interest from the borrower but also the lender's funding commitments and other obligations.

Assignment of Claims

When the lender has no remaining obligations (eg, in the case of non-performing loans), loan claims are usually assigned from the existing lender to the new creditor.

Transfer of Security

In both scenarios, certain security ("accessory" security, particularly pledges and mortgages) will, by law, transfer together with the secured claim. A novation of loan claims should therefore be avoided. For other security (the "non-accessory" security, particularly

security transfers, security assignments and land charges), the existing and new lender would need to expressly transfer the security to the new lender and in some cases certain actions from the security grantor could be required. To avoid this, such security is granted only to the security agent to secure the debtor's parallel obligations to the security agent and therefore need not be transferred.

3.7 Debt Buyback

A debt buyback is often contractually permitted but is usually accompanied by disenfranchisement of the borrower or sponsor; this means, among other things, that they cannot participate in lender decision-making (and are not counted for voting purposes). Sponsors must consider the risk of equitable subordination under German statutory law, as well as potential tax consequences.

3.8 Public Acquisition Finance

Acquiring a German public company requires including a certain funds concept in the financing documentation, as the purchaser must prove it will have the required funds available when the public offer is made. The financing is not published and is reviewed only by an intermediary (a recognised financial institution), which confirms the certain availability of the funds as required by law. For that purpose, strategic buyers will usually already agree on long-form documentation, while in most cases sponsors will agree on a term sheet and a precedent for the long-form documentation from a previous transaction (sometimes accompanied by an interim loan agreement as a fundable document).

3.9 Recent Legal and Commercial Developments

German legislation has established a comprehensive legal framework for voluntary out-of-court restructurings (for details, see **7.4 Rescue or Reorganisation Procedures Other Than Insolvency**). As a result, certain provisions of financing agreements are now subject to more negotiation, albeit such renegotiations must be closely monitored to remain compliant with the law. For example, some lenders have intended to include Stabilisation and Restructuring Act (StaRUG) proceedings as an event of default, even though such a provision would be void and could potentially cross-contaminate the rest of the facility agreement.

Sanctions

Sanctions imposed in connection with the Ukraine war are still drawing close attention to the sanctions clauses in financing agreements. While, in most cases, the previous market standard of flexible sanctions provisions is sufficient to address this increased awareness and does not require (extensive) changes, the ongoing development of sanctions laws and funds' internal policies requires a stronger focus on these provisions. Henceforth, loan documents are expected to include more detailed representations or covenants in this regard. More recently, the outbreak of armed conflict involving Iran in February 2026 has added a further dimension to this dynamic, reinforcing the case for financing agreements to accommodate a rapidly evolving sanctions landscape.

Bail-In

Credit agreements often include contractual recognition clauses that acknowledge the potential application of bail-in powers by resolution authorities. These clauses are intended to facilitate the smooth implementation of bail-in measures and are required in certain circumstances by regulations such as the Bank Recovery and Resolution Directive.

Jurisdiction Clauses

A further recent development concerns jurisdiction clauses in German law-governed facility agreements. In its decision of 27 February 2025 (C-537/23, Società Italiana Lastre SpA (SIL) v Agora SARL), the Court of Justice of the European Union clarified the precision requirements applicable to asymmetric jurisdiction clauses (that is, clauses under which the obligors submit to the exclusive jurisdiction of specified courts while the finance parties retain the freedom to sue elsewhere) in cross-border contexts. To reflect this decision, the current German law version of the LMA Multicurrency Term and Revolving Facilities Agreement (dated 5 September 2025) has revised its jurisdiction clause (Clause 40.1). The revised drafting confirms in paragraph (c) that, notwithstanding the obligors' submission to the exclusive jurisdiction of the German courts, the finance parties may bring proceedings in any other court of an EU member state or

of a state party to the Lugano II Convention, that has jurisdiction under the Brussels I Regulation (recast) or the Lugano II Convention, with the relevant definitions set out in a new paragraph (d). Parties remain free to opt for alternative jurisdiction clause structures where more appropriate – for example, a mutually exclusive jurisdiction clause in domestic scenarios or, where there are UK parties, a two-way exclusive jurisdiction clause under the Hague Choice of Court Convention following Brexit.

3.10 Usury Laws

In respect of a loan governed by German law, the parties may not agree upfront to compound interest (ie, interest may not be charged on interest) (Section 248 (1) Civil Code (BGB)) but can do so once the interest is accrued (ie, PIK toggle arrangements are possible). In the case of unpaid interest, default interest may therefore not be applied. However, the same result is reached by agreeing on an obligation to pay lump-sum damages (*pauschalierter Schadensersatz*) in the same amount.

3.11 Disclosure Requirements

In general, financing agreements do not need to be publicly disclosed. In initial public offerings (IPOs) and bond offerings, issuers may need to publish summaries of the underlying financial arrangements.

Separately, German banking regulations impose certain disclosure requirements. Among other requirements, financial institutions must notify the German Central Bank of loans of EUR1 million or more (large exposures), together with certain key information about the borrower. The CRR also includes disclosure requirements concerning risk management, capital adequacy and other relevant aspects, enhancing transparency.

4. Tax

4.1 Withholding Tax

Whether payments of principal, interest or other payments made to lenders are subject to German withholding tax depends on the financing structure. A "typical" loan agreement generally does not trigger withholding tax. However, certain exceptions exist – for instance, interest paid by a German tax resident debtor under profit-participating loans, convertible bonds or certain other hybrid financing arrangements is subject to withholding tax. Interest payments also trigger a limited tax liability if the underlying loan is secured by German real estate. Accordingly, structures to mitigate or manage withholding tax concerns are generally not required (ie, only in exceptional cases).

4.2 Other Taxes, Duties, Charges or Tax Considerations

Besides withholding tax and limited tax liability aspects (as noted in **4.1 Withholding Tax**), lenders are usually not subject to German tax by making loans to (or taking security and guarantees from) entities incorporated in Germany. In particular, Germany does not levy stamp duty nor a net wealth tax. VAT usually exempts these transactions.

4.3 Foreign Lenders or Non-Money Centre Bank Lenders

From a tax perspective, the lender should not be associated with a tax haven jurisdiction. Rather, a lender and beneficial owner of the loan should be tax-resident in a tax treaty jurisdiction with a favourable double tax treaty with Germany. This would give the lender the typical tax protection of a qualifying lender.

5. Guarantees and Security

5.1 Assets and Forms of Security

A comprehensive collateral package typically comprises collateral over all of the obligors' assets, to the extent the cost-benefit ratio and agreed security principles justify it. Although this scope may differ in certain transactions, the customary package offered in private capital financings consists only of share pledges to ensure the single point of enforcement (SPE), account pledges and assignments of certain receivables. Parallel debt structures are customarily used.

Most security agreements have standard terms, leaving little room for negotiation. With few exceptions (mentioned below), security agreements can be exe-

cuted by simple exchange of signatures (electronic, if agreed between the parties).

Shares/Interests/Stocks

Pledge agreements over shares in German limited liability companies (contrary to pledge agreements over interests in partnerships and over stock in corporations) must be notarised, which may result in substantial costs. The notarisation is usually attended by the legal advisers of each party under a power of attorney, which may require certification and legalisation depending on the represented party's jurisdiction.

The perfection of a pledge requires that the relevant pledged entity be notified of such pledge (implemented either by the relevant pledged entity becoming a party to the agreement for the purpose of such notification or by requiring notification to be sent and evidenced within a certain time period – eg, five business days). In the case of certified stocks, the stock certificates must be handed over or a substitute for such handover must occur. Sometimes, stock certificates need to be endorsed.

Bank Accounts

In correct legal terms, the account itself is not pledged, but the rights and claims the account holder has, from time to time, against the account bank in connection with the account.

The perfection of account pledges requires that the account bank be notified of the pledge (implemented by requiring such notification to be sent and evidenced within a certain time period – eg, five business days).

Movable Assets

Security transfer agreements require certain details on the location or identity of the assets and potential third-party rights (eg, landlords, suppliers or factoring providers). Obtaining the required information on those details from the security provider is a key timing item in this respect.

No perfection requirements exist. However, the transferred assets need to be clearly determinable (*bestimmbar*) by an independent third party. Therefore, close attention needs to be paid to a sufficiently detailed description of the location of the transferred assets or, if necessary, other features that set the transferred assets apart from others (eg, by way of labelling the transferred assets).

Intellectual Property

IP rights can be assigned or pledged for security, depending on the exact type of IP and its registration. Security rights over IP need not (but should) be registered with the competent registry to protect the lenders' interests.

Note that electronic signatures are not sufficient if the IP includes trade marks registered with the European Union Intellectual Property Office (EUIPO); in such cases, actual wet-ink signatures must be exchanged.

Receivables

Security assignment agreements need special attention if the assignor has previously assigned receivables (eg, to a factoring provider)). Obtaining the required information from the assignor is a key timing item.

A notification of the debtor of the assigned receivable is not required to perfect the security. However, prior to receipt of a notification, the debtor can effectively settle the receivable by way of payment to the assignor. Notifications are therefore common for intra-group receivables and receivables owed to professional parties (eg, insurers or report providers) but, for confidentiality reasons, typically not for customers.

Real Estate

Security over immovable assets is provided by way of land charges or mortgages. The land charge or mortgage is a standard document that contains only a formal description of the security right to be established. Therefore, a related security purpose agreement needs to be concluded that includes all other provisions, such as the security purpose and enforcement triggers.

The land charge or mortgage itself must be notarised and registered in the land register, which can create substantial additional costs. Land charges and mortgages can be certified or uncertified. For an uncertified land charge or mortgage, the security becomes valid only upon entry in the land register.

Asset Tokenisation

Tokenisation of collateral has considerable potential, but it is far from fully realised in practice. According to forecasts, tokens could represent up to 10% of all assets by 2030. The tokenisation of illiquid assets such as private equity or real estate is especially promising, as ownership rights can be documented efficiently, transparently and in a tamper-proof manner, which is expected to enable automated, rapid transfer of collateral as well as precise traceability in the event of defaults or reallocations.

Despite technical and regulatory hurdles, it can be assumed that, with further development of the technical infrastructure and clearer regulatory requirements, practical implementation and market acceptance will increase significantly in the coming years.

5.2 Floating Charges and/or Similar Security Interests

A floating charge typically describes an instrument that creates security over non-constant assets changing in quantity and quality. However, German law requires that a security interest relate to determinable assets such that these assets are identifiable by a third person. A floating charge would not meet these requirements.

Nonetheless, similar to a floating charge, German security usually covers all existing and future assets of a certain type (which is possible for all security types mentioned in **5.1 Assets and Forms of Security**, except for land charges/mortgages).

5.3 Downstream, Upstream and Cross-Stream Guarantees

Generally, any entity can provide downstream, upstream and cross-stream guarantees or security.

However, if the guarantee/security provider is a German limited liability company or a limited partnership with a limited liability company as its general partner, upstream and cross-stream guarantees/security may result in personal and criminal liability for the managing directors, to the extent that the granting or enforcement of such a guarantee/security would lead to a breach of capital maintenance rules (*Kapitalerhaltungsregeln*).

The capital maintenance rules prohibit the direct and indirect repayment (where this term includes payments pursuant to guarantees or security in favour of obligations of a direct or indirect shareholder) of the registered share capital of a German limited liability company to its shareholders. Accordingly, by way of so-called limitation language in the respective guarantee/security document, enforcement of an upstream and/or cross-stream guarantee/security will be limited (subject to certain exceptions) if and to the extent that payments under the guarantee or enforcement of the security would directly or indirectly cause the net assets (*Reinvermögen*) of the guarantee/security provider (or, in the case of a partnership, the net assets of the respective general partner) to fall below the amount of its respective registered share capital and, hence, to create personal or criminal liabilities for the management directors.

Recent case law has confirmed that limitation language remains effective even if the guarantee/security provider becomes insolvent. In its judgment in case 4 U 279/22, the Higher Regional Court of Frankfurt (*Oberlandesgericht* Frankfurt) held that a contractual right to refuse performance (*Leistungsverweigerungsrecht*) arising from the limitation language of a German limited liability company (GmbH) as guarantor continues to apply, in principle, even in the guarantor's own insolvency. Rejecting the argument that limitation language falls away on the opening of insolvency proceedings, the court reasoned that the language protects not only the managing directors from liability but also the company's capital that is protected by the capital maintenance rules, so that its protective purpose applies with particular force in insolvency; a detailed, professionally drafted guarantee containing no express carve-out for the insolvency scenario would not be read as disapplying it. For lenders, this confirms that market-standard German limitation language achieves its intended protective effect even where the guarantor itself is insolvent and should be factored into recovery expectations on upstream and cross-stream guarantees. The court granted leave to appeal to the Federal Court of Justice (*Bundesgerichtshof*), so the decision is not yet final at the highest instance.

If a stock corporation (*Aktiengesellschaft* or *Societas Europaea*) is involved, the general prohibition on repayment of contributions (*Verbot der Einlagenrückgewähr*) under the German Stock Corporation Act (*Aktiengesetz* – AktG) also requires specific language to limit enforcement of upstream and cross-stream security in such cases.

5.4 Restrictions on the Target

German law does not generally prohibit granting guarantees, securities or financial assistance, but certain restrictions apply depending on the target's legal form, to the extent it qualifies as a payment to the target's shareholders.

Restrictions for Limited Liability Companies and Limited Partnerships

If the target is a limited liability company or a limited partnership with a general partner that is a limited liability company, the granting of security or guarantees is subject to the capital maintenance rules set out in **5.3 Downstream, Upstream and Cross-Stream Guarantees**.

Restrictions for Stock Corporations

If the target is a stock corporation, capital maintenance rules provided in the AktG generally strictly prohibit payments to shareholders that qualify as a return of capital, unless a fully recoverable repayment claim against the shareholder(s) exists.

Solutions

There is no white-wash procedure in Germany, though the following procedures are – subject to certain requirements being met – usually implemented to avoid the legal consequences potentially arising from a breach of capital maintenance rules:

- inclusion of so-called limitation language in the financing documentation (see **5.3 Downstream, Upstream and Cross-Stream Guarantees**);
- a so-called debt push-down – ie, an assumption of the debt by the target company;
- a merger (*Verschmelzung*) of the target with the acquisition vehicle; or
- the conclusion of a domination and/or profit and loss transfer agreement (*Beherrschungs- und/oder Ergebnisabführungsvertrag*) between the target and its shareholder(s).

5.5 Other Restrictions

The articles of association of entities to be pledged sometimes include provisions requiring approval from all shareholders for pledges and/or the sale of any shares (*Vinkulierungsklausel*). In such cases, shareholder consent for the pledge and for a potential future enforcement of such pledge should be obtained. Ideally, the deletion of such provision is requested and implemented prior to or at least shortly after, the execution of the pledge agreement. Other restrictions – such as pre-emption or redemption rights – are less common but could be included in the articles of association.

German insolvency law provides for certain hardening periods that should be considered in release-and-retake scenarios and distressed financings. For further details, see **7.5 Risk Areas for Lenders**.

5.6 Release of Typical Forms of Security

All types of security mentioned in **5.1 Assets and Forms of Security** can be released by way of a release agreement, which can be executed by simple signature (ie, no notarisation is required in respect of the notarised security rights).

The release of a land charge/mortgage must be entered into the land registry to become effective. All other security rights cease to exist at the time agreed in the release agreement. The release of the pledges and assignments is usually (but need not be) notified to the relevant debtors (if they have also been notified of the pledge or assignment).

5.7 Rules Governing the Priority of Competing Security Interests

Certain security interests (in particular, security transfers of movable assets and assignments of receivables) can be established only once and therefore can exist in only one rank. However, it is possible to ensure that the proceeds of such security are applied in a different order to groups of creditors, by providing the security to a security agent and contractually agreeing on the order of application – for example, in an intercreditor agreement. Such an arrangement will,

however, not have an in rem effect on the ranking of said security interest but will survive the insolvency of the borrower.

Security interests over shares/interests/stocks, bank accounts and land can be provided multiple times in different ranks. Such security interests rank in the order of their valid establishment (priority rule). Nonetheless, in non-distressed financings, usually only one rank of security is established and the order of application is agreed in an intercreditor agreement, as described above. In deviation thereof, where different secured claims face different insolvency claw-back rights, it is common to provide individual, different-ranking security rights to different creditor groups.

Further, lenders may require security confirmations and junior ranking pledges when doing an upsize or amend/extend transaction. For add-on acquisitions financed by incremental debt, borrower's counsel should ensure that securing such incremental debt is pre-baked into the security documents to the extent legally possible.

5.8 Priming Liens

In practice, two types of security usually rank ahead of lenders' contractual security rights.

Pledge by the Account Bank

Account banks usually have a right of pledge over the accounts opened with them based on their general terms and conditions for any claims arising against the pledgor. Account pledge agreements therefore usually request the pledgor to undertake reasonable efforts such that the account bank waives or subordinates such pledge. A strict requirement for such waiver or subordination is usually not included, given the limited scope of the secured obligations under such pledge pursuant to the general terms and conditions.

Landlord's Right to Movable Assets on Leased Premises

A landlord of leased premises has a statutory right of pledge over the lessee's assets brought onto the premises for any claims arising in connection with the lease. Given the limited scope of the secured obligations under such pledge, it is unusual to include a requirement that such pledge be waived. However, recent transactions have sometimes required the lessee to regularly provide proof of rent payments so lenders can assess the risk associated with the landlord's prior-ranking pledge.

6. Enforcement

6.1 Enforcement of Collateral by Secured Lenders

By law or under the relevant security agreement, German collateral may be enforced only once the secured claims have become due and payable. In many cases, security agreements contain (additional) conditions, requiring an event of default to have occurred and be continuing and/or the loan to have been accelerated. However, certain pre-enforcement securing steps are sometimes permitted without a due-and-payable claim, as long as an event of default is continuing.

Enforcement by law generally requires the enforcing creditor to obtain an enforcement title in court. This requirement is often waived (eg, in share pledges) or avoided by immediate submission to foreclosure (eg, in land charge deeds).

The further enforcement procedure depends on the type of security, as follows.

- A security assignment over claims is enforced by the secured party collecting any claims from the debtors.
- A surety or guarantee is enforced by seeking a court title for payment against the debtor.
- A share pledge is enforced by way of a public sale (ie, an auction). This is subject to a prior notice period typically limited to five business days. After the secured debt becomes enforceable, the pledgor and pledgee may also agree on a private sale; a forced private sale or appropriation is not permitted.
- An account pledge is enforced by instructing the account bank to pay any amounts standing to the credit of the account to the pledgee.
- Land charges/mortgages are primarily enforced by way of public auction. This process can take at least 12 months. Where the charged real property generates income, it is also possible to place the

property into forced administration and to use the generated income to pay down the secured debt – this is often quicker. In any event, the enforcement of a land charge requires that six months' prior notice be given to the debtor.

6.2 Foreign Law and Jurisdiction

In general, parties may contractually agree on the governing law of their agreements. Under the Rome I Regulation (Regulation (EC) No 593/2008), parties generally have the right to choose any governing law, even without a specific connection to the case.

Similarly, the parties may contractually agree to submit to a foreign jurisdiction. Depending on the chosen foreign jurisdiction, this submission will be legally binding under the applicable regulations, conventions or laws.

German courts will generally uphold a waiver of immunity. However, assets that serve a specific public purpose generally benefit from sovereign immunity under German law, according to Section 882a of the German Code of Civil Procedure (*Zivilprozessordnung* – ZPO).

For recent developments regarding the drafting of (in particular asymmetric) jurisdiction clauses, see **3.9 Recent Legal and Commercial Developments**.

6.3 Foreign Court Judgments and Arbitral Awards

Under the Brussels I Regulation recast (Regulation (EU) No 1215/2012), judgments in civil and commercial matters delivered in an EU member state are automatically acknowledged in all EU member states (with very limited reasons for rejection), regardless of whether the judgment is final and binding.

In addition, the Hague Judgments Convention 2019 provides a framework for recognising and enforcing judgments in civil and commercial matters between contracting states (which, since 1 July 2025, include the United Kingdom). Unlike the Hague Convention on Choice of Court Agreements 2005, the Hague Judgments Convention applies regardless of the existence of exclusive jurisdiction agreements and, subject to certain exceptions (such as family law, insolvency or arbitration), enables simplified cross-border enforcement. When recognising judgments from other contracting states, German courts apply the criteria and grounds for refusal set out in the Hague Judgments Convention.

When the fundamental criteria for recognition (or rejection) are governed by an international treaty, German courts will apply those criteria.

In all other cases, the foreign judgment must be both final and binding. According to Section 328 of the ZPO, a foreign judgment will be acknowledged in Germany if no grounds for rejection (delineated in Section 328 (1) of the ZPO) are applicable. The party seeking recognition bears the responsibility of proving that the elements required for recognition are present.

6.4 A Foreign Lender's Ability to Enforce Its Rights

A foreign lender can generally enforce its rights in the same way as a domestic lender.

7. Bankruptcy and Insolvency

7.1 Impact of Insolvency Processes

The German Insolvency Code (*Insolvenzordnung* – InsO) provides the statutory framework for initiating, conducting and terminating insolvency proceedings.

The court order opening insolvency proceedings customarily imposes an automatic stay on any enforcement actions by unsecured creditors against the company. Unsecured creditors can only enforce their rights within the legal framework of insolvency proceedings – ie, substantially filing their claims to the insolvency table with the insolvency officeholder to receive the insolvency dividend (pro rata payment). In practice, the court often imposes such a stay even prior to the formal commencement of insolvency proceedings in so-called preliminary insolvency proceedings.

The InsO does not impose an automatic stay on the enforcement by third parties/certain (secured) creditors. Generally speaking, the following rules apply.

- Third parties who can demonstrate that they have ownership (title) in an asset or similar rights in rem

or other absolute rights which, therefore, are not part of the insolvency estate (segregation right, *Aussonderungsrecht*) have a claim for restitution of the relevant asset – eg, suppliers with (simple) reservation of title rights (*einfacher Eigentumsvorbehalt*).
- Creditors with security interests in assets forming part of the insolvency estate have a right to separate satisfaction (*Absonderungsrecht*) – ie, they may seek preferential satisfaction of their claims from the proceeds of the liquidation of the relevant asset. The InsO provides specific rules on the responsibility for and processing of, the enforcement of such security interests.

7.2 Waterfall of Payments

The proceeds realised by the insolvency officeholder (note the exceptions under **7.1 Impact of Insolvency Processes**) will generally be distributed to the creditors pursuant to the following waterfall:

- costs of insolvency proceedings and so-called administrative claims (*Masseverbindlichkeiten*) – ie, specifically including claims arising from transactions executed by the insolvency officeholder after the commencement of insolvency proceedings;
- unsecured claims (*Insolvenzforderungen*) pari passu; and
- subordinated claims (*nachrangige Insolvenzforderungen*) – eg, interest accruing after the commencement of insolvency proceedings or claims of shareholders holding more than 10% of the registered share capital.

7.3 Length of Insolvency Process and Recoveries

The sale of a company on a going-concern basis out of insolvency (asset deal) is typically consummated within three to six months. The completion of corporate insolvency proceedings, including any litigation, admission of claims, distribution of the insolvency estate, etc, can take several years, depending on the size of the company and/or the complexity of the matter. If the insolvent company implements an insolvency plan, the timeframe also varies from a few months to several years.

The amount of insolvency dividends distributed in German insolvency proceedings varies significantly. Further, insolvency statistics in Germany usually do not include rights of segregation and rights to separate satisfaction. These depend on the value of the collateral in each individual case. For insolvency proceedings commenced in 2011 and concluded by the end of 2018, the average dividend of unsecured creditors amounted to 6.1%, noting that this statistic includes the full spectrum of insolvency proceedings.

7.4 Rescue or Reorganisation Procedures Other Than Insolvency

StaRUG

Since 1 January 2021, the Stabilisation and Restructuring Act (StaRUG) (implementing the EU Restructuring Directive of 20 June 2019 – Directive (EU) 2019/1023) provides for a comprehensive legal framework for voluntary out-of-court restructurings.

In principle, a debtor with its centre of main interest (COMI) in Germany has access to StaRUG proceedings if it faces imminent illiquidity (*drohende Zahlungsunfähigkeit*) but not yet illiquidity (cash flow insolvency, *Zahlungsunfähigkeit*) or over-indebtedness (balance sheet insolvency, *Überschuldung*) (each as defined in the InsO).

StaRUG enables the debtor to implement a financial restructuring and bind all creditors, including classes that do not approve the plan, through a cross-class cram-down. Operational restructuring measures, however, continue to require a consensual agreement of all affected parties (for example, long-term contracts such as lease agreements cannot be varied under StaRUG).

If new financing is required to implement the restructuring, StaRUG cannot afford super senior status. However, such financing will, in principle, be excluded from claw-back and lender liability in subsequent insolvency proceedings. However, as these privileges apply only for a limited timeframe until the debtor is sustainably restructured, lenders in practice continue to rely on a restructuring opinion (*S6-Sanierungsgutachten*) to reduce risk (see **7.5 Risk Areas for Lenders**). If required, the debtor may apply for a morato-

rium, which applies a stay on enforcement measures by creditors.

SchVG

The German Bond Act 2009 (SchVG) provides an out-of-court restructuring procedure for bonds governed by German law. Provided the bond's terms and conditions allow amendment, to an extent, by bondholders' resolution, the SchVG permits a wide range of restructuring measures. These include:

- a waiver of principal and/or interest;
- deferrals;
- a debt-for-equity swap; and
- modifications of the terms and conditions of German bonds.

For major decisions (such as waivers or debt-for-equity swaps), the resolution of bondholders generally requires a quorum of 50% by value of the bonds in the first bondholders' meeting and, if the quorum is not met, 25% by value in a second bondholders' meeting. No quorum is required for other decisions in a second bondholders' meeting.

The majorities required to approve the resolution for major decisions are 75% of bondholders by value present and voting at the bondholders' meeting and more than 50% for other decisions (such as the appointment of a joint representative). The bondholders' resolution is subject to appeal within one month. A successful appeal will nullify the resolution.

7.5 Risk Areas for Lenders

Insolvency Claw-Back

Certain pre-commencement transactions are subject to insolvency claw-back actions by the insolvency officeholder, provided certain conditions are met. Generally, to be subject to claw-back, the relevant transaction must have occurred prior to the commencement of insolvency proceedings and must have disadvantaged the debtor's creditors (with indirect effects being sufficient).

Finance documents therefore typically contain information obligations aimed at providing regular and – in the event of arising difficulties – early visibility of the borrower's financial situation.

Lender Liability

Under German law, if a lender refuses to grant a (new) loan to the distressed company, accelerates its (existing) loans or refuses to (partially) waive its claims, thereby causing the company's insolvency, the lender generally cannot be held liable, as it has no legal obligation to participate in the restructuring or remediation measures of the company. Nonetheless, lenders need to carefully consider the legal implications of their actions for the borrower's directors, given the relatively strict personal/criminal insolvency liability regime.

However, liability can, under certain circumstances, be construed on the basis that granting or extending a loan caused or assisted the debtor's delay in filing for insolvency. When granting new loans or extending maturities of existing loans to borrowers in distress, lenders therefore typically request the issuance of a restructuring opinion pursuant to an industry standard (IDW S6) by independent experts, essentially objectively confirming that the borrower can be restructured.

8. Project Finance

8.1 Recent Project Finance Activity

Project finance activity in Europe spans many sectors but continues to show a clear tendency toward infrastructure projects. In the near- to mid-term, a particular focus will be on infrastructure required for the energy transition and transportation.

Energy Transition

Germany's energy transition targets include renewable energies making up 60% of gross final energy consumption and 80% of gross electricity consumption by 2050. To achieve this, it is estimated that around EUR600 billion in investments will be required in (among others) energy production, electricity grid expansion, energy storage and electrification of the transport sector.

Transportation

In the 2030 Federal Transport Infrastructure Plan, the German government identified the need for EUR270 billion to renew and expand various federal motor-

ways, railway infrastructure and waterways until 2030 and the current government is strategising on substantial allocations for the enhancement and expansion of the rail network following the "Germany Pulse" (*Deutschlandtakt*) framework.

8.2 Public-Private Partnership Transactions

Legal Framework

In Germany, public-private partnerships (PPPs) are usually based on a civil agreement between a public partner and a private entity. The public partner can be the Federal Republic, a federal state or one of its authorities or a local community, while the private partner is a legal entity or a joint venture with several entities as shareholders. No specific laws on PPPs have been enacted, though general corporate and financing laws (and, because of the public aspect of the partnerships, EU and national public procurement rules) apply. The PPP Acceleration Act of 2005 (*ÖPP-Beschleunigungsgesetz*) introduced several amendments to existing legislation to facilitate PPPs.

Identification of Possible Projects

At first, the public partner in respect of a project needs to assess the overall justification for a PPP. Federal and state budget laws require the public partner to substantiate economic efficiency through a detailed economic plan for the project and a comparison with implementing the project through a "conventional" procurement process. In addition, compliance with EU subsidies law must be ensured.

Preparation Phase

Thereafter, the public partner develops the main project contracts and specifications of the project and determines the project's main aspects, such as:

- its term;
- its corporate set-up;
- its equity and financing;
- a suitable contract model; and
- the required level of public control.

The PPP's administrative framework may require a specific structure to retain certain levels of public control over the project.

Award and Negotiations

Once the main terms are prepared, the public partner selects a private partner through a contract award procedure. Under Section 2 of the Procurement Ordinance (*Vergabeverordnung*), the PPP project is subject to a formal award procedure if its volume exceeds a certain threshold, while budget laws may require a tender even if the project remains below that threshold. Procurement regulations frequently necessitate a Europe-wide tender and grant the applicant the right to pursue legal remedies before a public procurement tribunal.

Implementation

Once the project is awarded and the PPP is finally negotiated and established, implementation begins. During this phase, all laws applicable to the relevant project matter need to be observed.

8.3 Governing Law

Generally, parties are free to agree on the applicable law governing the agreements (see **6.2 Foreign Law and Jurisdiction**). However, if the project is (or the relevant assets are) located in Germany, parties usually prefer German law to govern all or some of the agreements to ensure consistency and enforceability in Germany.

The parties can also agree to submit the contract to arbitration proceedings. Germany is a party to several dispute resolution agreements, including but not limited to:

- the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention");
- the Energy Charter Treaty of 1964;
- the Geneva Protocol on Arbitration Clauses of 1923; and
- the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965 (the "ICSID Convention").

8.4 Foreign Ownership

Germany generally embraces foreign investment and maintains an open, accommodating stance, imposing minimal restrictions. In general, no restrictions exist on foreign entities owning real property or other

resources in Germany. However, in certain exceptional cases, the government needs to be notified and may veto a transaction.

8.5 Structuring Deals

Project finance transactions are commonly structured as non-recourse financings in which the project company is set up as a special purpose vehicle. The project company repays the financing fully through its free cash flow; sponsor guarantees are uncommon.

The project company is most commonly a limited partnership (*Kommanditgesellschaft*) in which a limited liability company (*Gesellschaft mit beschränkter Haftung*) (GmbH) serves as the general partner (GmbH & Co KG). Equity contributions are typically made by the sponsors as limited partners. The sponsors typically hold the general partner's shares pro rata to their limited-partner interests. Alternatively, the limited partnership itself (*Einheitsgesellschaft*) can hold them, which facilitates transferability.

Further structuring will depend on the risk allocation between the parties and will be subject to all German and EU laws and regulations applicable to the sponsors, the lending entities, the project company and the sector.

8.6 Common Financing Sources and Typical Structures

Financing is usually provided by way of a (senior) bank financing to the project company and subordinated shareholder loans. In certain structures, the project company's holding company may take up mezzanine or subordinated PIK HoldCo financing.

Alternative debt providers play an increasingly important role in debt funds funding into German project financings, by way of:

- subordinated or mezzanine financing;
- bridge loans refinanced upon the conclusion of senior financing;
- refinancing the equity made available upfront; and
- in select cases, functioning even as senior lender.

The mix of available financing instruments is sometimes accompanied by project bonds or other sources of financing, such as export credit agency financings.

8.7 Natural Resources

Land ownership itself does not require a licence and resources found on the property generally belong to the owner. Nonetheless, the extraction of metals, salt and similar resources requires authorisation from the mining authority. Likewise, the establishment and operation of energy pipelines, electrical transmission lines and related infrastructure must receive approval from the relevant authority of the relevant federal state in which the assets are located.

Usually, the granted permit will be time-limited and subject to a number of conditions, such as compliance with environmental, health and safety laws. Royalties, taxes and other fees payable in connection with the extraction of natural resources vary depending on the type of natural resource. There are no general limitations, charges or taxes associated with the exportation of natural resources. However, specific regulations may be applicable to particular exports contingent on the nature of the natural resource in question.

8.8 Environmental, Health and Safety Laws

As a general rule, projects with the potential to cause adverse environmental impacts or pose hazards to the environment or individuals necessitate a permit, typically obtained from the relevant local authority. The execution of such projects is subject to various regulations, including occupational health and safety guidelines, which are overseen by multiple authorities.

Authority over specific projects varies by sector. For instance, regional authorities oversee regulatory oversight for projects in the oil and gas sector. The process for oil and gas exploitation in Germany follows a two-step approach, requiring an initial permit for exploration and a separate one for actual extraction. For offshore wind farms, an operating permit issued by the Federal Maritime and Hydrographic Agency of Germany is mandatory, while the Federal Network Agency (*Bundesnetzagentur*) manages the energy grid.

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