



# THE ENGLISH LTD. AS AN ALTERNATIVE TYPE OF COMPANY IN GERMANY

Advance of the English Ltd. in Germany

Advantages compared to the German Limited Liability Company: No minimum capital

Disadvantages: Risks of liability and costs

By: Dr. Hans-Jörg Krämer

RA Christian Schröder

Zirngibl Langwieser

Munich, Germany

In Germany a fierce discussion has broken out about the future of capital companies according to the German law, particularly of the Limited Liability Company (GmbH). "The GmbH will become a non-seller" - with this slogan and similar ones the advantages of the English Ltd. (Limited Liability Company) are lately specifically pointed out on the internet and in newspaper ads. The foundation of an English Ltd. by persons living in Germany shall be the "most ordinary thing in the world" and is offered at "limited24.de" and many other providers with a "discount price". Now there is the question, if this type of company is really suitable for the use in Germany and if it should therefore be recommended. After all the enthusiasm in the beginning, the number of critical voices rises and the picture has become a much more realistic one:

## Overview

### Advantages of the Ltd.

no minimal capital  
minimal cost for foundation  
possibly no workers' participation

### Disadvantages of the Ltd.

bad reputation  
risks of liability  
high costs of administration  
high costs of legal advice

### No differences compared with a GmbH

regarding tax law  
obligatory membership in the Chamber of Commerce

Since the European Court of Justice cleared the way for an English Ltd. with its actual corporate domicile in Germany, the number of Ltd. foundations by persons living in Germany has increased rapidly. The English company is considered a cheap alternative to the German GmbH, an alternative with which one can supposedly avoid the strict requirements of the German law. In case of founding or restructuring a company, there will now always be the question if a Ltd. represents an alternative. And, because of the further increasing number of Ltd.-foundations by persons living in Germany, companies and consumers have to prepare themselves to have a Ltd. (according to the English law) as a business partner or as a creditor on the other side.

Besides being holder of the company, the Ltd. can also be appointed as partner being liable to unlimited extent of a (German) limited partnership (KG). This company operates as Ltd. & Co. KG and combines the advantages of a partnership and a capital company in the same manner as the GmbH & Co. KG. In so far, also new possibilities of corporate forms arise.

The European Court of Justice as door opener

With three decisions in the last years (keywords "Centros",

"Überseering" and "Inspire Art") the European Court of Justice has created the possibility of moving the real corporate domicile of EU-foreign companies to Germany. Until then those companies were not accepted by German courts and were subjected to the rules of the German law. Now they have to be accepted as a full legal entity according to the law of the founding country if they were legally founded according to the law of that country. This applies generally for all types of companies of the different EU-Countries. Until now, however, the English Ltd. attracts the main interest in Germany. At best, only the Dutch BV is also considered as an alternative.

### Advantages of a Ltd.

The highly recommended advantages of a Ltd. on the internet and many other platforms seem to be tempting compared with the German GmbH: No minimal capital needs to be raised, meaning, that the German provisions regarding the raising and maintenance of capital and its risks of liability do not apply. The problem of the conversion of loan capital into equity is not known in English law. Particularly the small cost for foundation of an English Ltd. are extolled. And the argument, that the Ltd. is generally not subject to the German workers' participation, seems to be a very interesting advantage under special circumstances. But so far there are different opinions on that matter and until today there does not exist a secured legal position.

Tax Law, Compulsory Membership in the Chamber of Commerce: No differences

Someone who links Great Britain with a favourable tax law in comparison to Germany and therefore pins hopes on the Ltd. has to be disappointed. That particularly applies, if the company has its actual corporate domicile in Germany. In that case, the company is completely subjected to the rules of the German tax law, so there are no advantages over the GmbH.

One argument, which always plays a role in the discussion about the Ltd., is the allegation that with a Ltd. the compulsory membership in the Chamber of Commerce can be avoided. But that only applies if the Ltd. has its actual corporate domicile in England and does business in Germany only on an occasional basis. If its administrative centre is in Germany, the Ltd. is subject to the laws of Germany, therefore also to the compulsory membership in the Chamber of Commerce.



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#### Disadvantages of the English Ltd.

A non-negligible disadvantage of the Ltd. arises directly from its advantages. Because of the missing minimum capital, the Ltd. has a bad reputation among creditors in Germany: How poor must the financial circumstances of the company be if the minimum capital of € 25.000,00 for a GmbH cannot be raised? Specially banks are going to react carefully and will often demand personal securities, which may even be more than those for a GmbH. Furthermore, the Ltd. was in the past often used to bypass several provisions of approval in Germany. That also did not improve the reputation of the Ltd. A general insecurity of the business partners regarding the possibilities of legal protection, notification and enforcement adds to that.

A further crucial disadvantage is the legal complexity, which follows the use of the legal form of a Ltd. in Germany. Against the partly very one-sided and not always objective reporting, the English corporate law is not necessarily understandable and clear. Shareholders and directors of the Ltd. with corporate domicile in Germany always have to be informed about the legal position and the progress of the legislation in England, particularly regarding the provisions for liability, which are different and partly even stricter than those in Germany. Of particular importance is the liability because of wrongful trading. That liability leads to the general liability of the director after the opening of the insolvency proceedings if he/she could have realised the inevitability of the insolvency and had not done all to minimise possible bad debt losses for the creditors.

Beside the risks of liability, the English corporate law also is not always more beneficial for the shareholders than the German provisions. For example, the provisions of the dividend payout for the Ltd. are clearly more restrictive than

those for the GmbH. Furthermore, it is completely unclear, how far the English corporate law is applicable and at what point the German law of torts, insolvency law and contract law applies. The costs for legal advice, which arise under these circumstances, may by far consume the advantage of the smaller cost for foundation.

Also the ongoing costs for administration, which arise if the Ltd. was founded with its real corporate domicile in Germany, should not be underestimated. The Ltd. has to have an office in England, where the documents of the company can be viewed, a secretary (an organ of the company with no counterpart in German law) has to be appointed. A factor, which adds to the costs, is the double fulfilment of the duties for financial statement and public disclosure (according to the English and German law).

Another point that is often underestimated is the place of jurisdiction for the Ltd. in England. An English Ltd. with statutory domicile in England and real domicile in Germany has two general places of jurisdiction in Germany and England. For legal actions concerning validity, nullity or liquidation of the company or the validity of decisions by the organs of the company, the exclusive place of jurisdiction is England. This could also cause substantial further costs if one suddenly is sued in or has to sue in England.

#### **Result**

Founding a Ltd. for the use in Germany should be carefully considered. Weighty disadvantages exist. The supposed cost savings and the limitation of the risks of liability could change later into the opposite. But for those, who are familiar with the English legal system and already have existing connections to England, this legal form can truly be an alternative.

Dr. Hans-Jörg Krämer, Munich / RA Christian Schröder, Solicitor (England & Wales), Munich

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#### **Prior permission of RBI in certain cases for transfer of Shares/convertible debentures:**

A person resident in India who proposes to transfer any share or convertible debenture of an Indian company by way of sale or gift to a person resident outside India will have to obtain prior approval of FIPB, Ministry of Finance and Company Affairs, Government of India followed by permission from RBI. The above two-stage approval is applicable even when the transfer is made on a non-repatriation basis. A person resident outside India holding shares/convertible debentures of an Indian company may

transfer by way of sale to a person resident in India by obtaining prior permission from RBI in form TS I.

The Government is thereby making efforts in order to simplify and further expand the scope for foreign investment in Indian Companies with respect to transfer of shares and convertible debentures, making India an attractive destination for foreign investors.

• Sumesh Dewan may be reached at [hchawla@krcco.com](mailto:hchawla@krcco.com)

