FREE CHAPTER

Chapter 1. What you are actually buying

Buying a Small Business in Germany

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On October 5, 2011, in a notary's office, a buyer paid €4,188,000 for half of a company.

That is the largest sum in this book, and the business you are looking at is almost certainly smaller: on the state exchange, 83.9 % of the listings that name a headcount have ten people or fewer. The case opens the book anyway, because the question it turned on is exactly the same at €50,000 as at four million, and because at four million the parties had lawyers, auditors and seven years of court time to argue it — and still got it wrong.

He was not a stranger to it. Two trading companies had run this energy business together since 2001, 50 % each. They fell out, and one of them decided to take the whole thing. Before agreeing a price, the buyer commissioned a valuation from an audit firm. The seller filed his objections. The two sides worked through the figures together and settled on a value for the whole company as at December 31, 2010: €8,377,000.

Half of that is €8,377,000 ÷ 2 = €4,188,500. The price in the contract was €4,188,000. So the number he paid was not haggled out of the air. It came straight off an agreed valuation, built on the company's own annual accounts.

Afterwards, a second audit firm went through the 2011 accounts. Relying on its report, the buyer told the court that over the years 2008 to 2010 the company had run up a deficit of €12,951,000. He also said the 2009 annual report — the one the valuation had been built on — had shown revenue far too high, because income and costs had been booked into the wrong periods. On the correct figures, he said, the price would have been set at zero at best. Those are the buyer's assertions as the judgment records them, not findings any court has made: the case never reached the stage where they would be tested.

The buyer went to court. He first asked for a further €4,897,000 to put the company back on its feet, which together with the price comes to €4,188,000 + €4,897,000 = €9,085,000, then dropped everything except getting his money back.

We will come back to how that ended. First, the question the case turns on, and it is the question this whole book starts from:

What was he buying — the business, or the company that owned it?

There is no "sale of a business" in the German civil code

You will look for it. It is not there.

German law has an article for buying a thing, and an article for buying a right. A working business is both at once, so a German purchase is assembled out of the two.

Here is the first one.

> **§ 433 Vertragstypische Pflichten beim Kaufvertrag**
>
> 1. Durch den Kaufvertrag wird der Verkäufer einer Sache verpflichtet, dem Käufer die Sache zu übergeben und das Eigentum an der Sache zu verschaffen. Der Verkäufer hat dem Käufer die Sache frei von Sach- und Rechtsmängeln zu verschaffen.
>
> *The seller has to hand the thing over, make you its owner, and deliver it free of defects.*

> 2. Der Käufer ist verpflichtet, dem Verkäufer den vereinbarten Kaufpreis zu zahlen und die gekaufte Sache abzunehmen.
>
> *You have to pay the agreed price and take the thing.*

That covers the oven, the lift, the van, the stock on the shelves. It does not cover the supply contract, the customer list, the trademark or the lease. Those are rights, and rights have their own article.

> **§ 453 Rechtskauf; Verbrauchervertrag über den Kauf digitaler Inhalte**
>
> 1. Die Vorschriften über den Kauf von Sachen finden auf den Kauf von Rechten und sonstigen Gegenständen entsprechende Anwendung. […]
>
> *The rules for buying things apply, by analogy, to buying rights and "other objects".*

And a going business is made of those.

> 2. Der Verkäufer trägt die Kosten der Begründung und Übertragung des Rechts.
>
> *The cost of creating and transferring a right is the seller's, not yours.*

That one is worth a pencil mark.

> 3. Ist ein Recht verkauft, das zum Besitz einer Sache berechtigt, so ist der Verkäufer verpflichtet, dem Käufer die Sache frei von Sach- und Rechtsmängeln zu übergeben.
>
> *Where the right sold carries the possession of a thing, the seller has to hand that thing over free of defects too.*

Put the two articles side by side and you have the shape of the thing you are about to buy. It is not an object. It is a bundle: machines and stock on one side, contracts and permissions and goodwill on the other, held together by a person who gets up every morning and opens the door.

What this means for you: there is no single act that moves a business in Germany. There are two routes, and you choose between them before you discuss price, not after.

Route one: you buy the things and the rights

The market calls this an asset deal. German law does not use the term, so you will not find it in a statute. What you will find is the consequence: every item in the bundle moves separately, under its own rule, and each one can fail to move on its own.

The machines move under § 433. The contracts are sold to you under § 453 — one by one, named in a list. A supply agreement the seller forgot to list stays with the seller.

But read what that list does and does not do, because this is the costliest misunderstanding in an asset deal. Naming a contract in the schedule settles what you bought from the seller. It does not bind the other side of that contract. A running contract only moves to you when the other party agrees — the supplier, the leasing company, the franchisor, the insurer, each one separately. It is the same mechanism as the lease in Chapter 8, where the landlord has to agree, and the same as § 415 below, where the creditor has to agree. A buyer who signs a schedule of thirty contracts and collects no consents has a list, not a business: the work looks done, and it is not.

One thing the law does not say here, and we will not say it for the law. None of the articles we opened puts that consent in any particular form. § 415 below asks for the creditor's „Genehmigung", his approval, and is silent about writing; the federal court in Chapter 8 says outright that a landlord's consent to a contract takeover „kann formlos erfolgen" — may be given informally. So take every consent in writing because you may have to prove it two years later, not because a statute demands it. That sentence is our advice. The rule is only that the other side has to agree.

The lease has its own chapter in this book, and so do the staff, the permits and the trading name, because each of them moves in a different way and for different reasons.

Then there are the debts. This is the paragraph to read twice.

> **§ 415 Vertrag zwischen Schuldner und Übernehmer**
>
> 1. Wird die Schuldübernahme von dem Dritten mit dem Schuldner vereinbart, so hängt ihre Wirksamkeit von der Genehmigung des Gläubigers ab. Die Genehmigung kann erst erfolgen, wenn der Schuldner oder der Dritte dem Gläubiger die Schuldübernahme mitgeteilt hat. Bis zur Genehmigung können die Parteien den Vertrag ändern oder aufheben.
>
> *If you and the seller agree that you take over one of his debts, that agreement works only if the creditor approves it. Until he does, the debt stays where it was — with the seller.*

> 2. Wird die Genehmigung verweigert, so gilt die Schuldübernahme als nicht erfolgt. [...]

> *And if the creditor refuses, the takeover of the debt counts as never having happened at all.*

Read that from both sides of the table, because it cuts both ways.

For you as buyer, it is protection. A debt the seller has to the builder who redid the shop front does not become yours because you bought the shop. Somebody has to ask the builder, and the builder has to say yes.

For you as buyer, it is also a trap in the other direction. Sellers offer debt takeovers as a discount: *take on the equipment loan and I'll drop the price*. You can write that into the contract and the price can drop, and the bank can still refuse — at which point the seller is still the debtor toward the bank, you are still whatever your contract with him says, and the two of you are in a relationship neither of you priced.

What this means for you: when a debt takeover is part of the price, the creditor's approval is part of the deal. Not a follow-up. Not a formality for after the signing. Ask for it on the same page as the price. And take it in writing — that part is our advice and not the statute's, exactly as with the contract consents above: § 415 asks for the creditor's „Genehmigung" and says nothing about the form it comes in.

The one debt rule that does not need anyone's approval

There is an exception, and it is the most expensive one in German small-business buying. It is not about debts at all. It is about a name.

> **§ 17 HGB — Handelsgesetzbuch**

> 1. Die Firma eines Kaufmanns ist der Name, unter dem er seine Geschäfte betreibt und die Unterschrift abgibt.
>
> *In German law die Firma is not the company. It is the **name** the merchant trades and signs under.*

Hold on to that, because the English word "firm" and the German word *Firma* look like twins and mean different things. And then read this sentence, which is the opening line of § 25 of the commercial code:

> Wer ein unter Lebenden erworbenes Handelsgeschäft unter der bisherigen Firma mit oder ohne Beifügung eines das Nachfolgeverhältnis andeutenden Zusatzes fortführt, haftet für alle im Betriebe des Geschäfts begründeten Verbindlichkeiten des früheren Inhabers.
>
> *Carry the business on under its old trading name, and you are liable for **every** business debt of the previous owner.*

Not the ones you agreed to. All of them, including the ones you never heard about.

No creditor has to approve anything for that to happen. It happens because you kept the sign. There are exactly two ways to switch it off, they both involve paperwork you file yourself, and Chapter 5 does nothing else but this — with the full text, the two exits, and a case where a buyer paid €76,160 of somebody else's debt for keeping a name.

For now, one line in your notebook: **the sign over the door is a term of the contract.**

Route two: you buy the company

The market calls this a share deal. Here you do not touch the business at all. The bakery keeps its name, its contracts, its licenses, its debts and its bank account. What changes is who owns the company that owns the bakery.

For a GmbH, the German private limited company, that transfer has a form requirement you cannot work around. Both articles below are from the GmbHG, the act on private limited companies — not from the civil code, so quote them to a notary by that name.

> **§ 15 Übertragung von Geschäftsanteilen**
>
> 1. Die Geschäftsanteile sind veräußerlich und vererblich.
>
> *A GmbH share can be sold and it can be inherited.*

> 2. Erwirbt ein Gesellschafter zu seinem ursprünglichen Geschäftsanteil weitere Geschäftsanteile, so behalten dieselben ihre Selbständigkeit.
>
> *If a shareholder buys further shares alongside his original one, each of them stays a share in its own right.*

> 3. Zur Abtretung von Geschäftsanteilen durch Gesellschafter bedarf es eines in notarieller Form geschlossenen Vertrags.
>
> *A transfer of shares by a shareholder needs a contract recorded before a notary.*

> 4. Der notariellen Form bedarf auch eine Vereinbarung, durch welche die Verpflichtung eines Gesellschafters zur Abtretung eines Geschäftsanteils begründet wird. Eine ohne diese Form getroffene Vereinbarung wird jedoch durch den nach Maßgabe des vorigen Absatzes geschlossenen Abtretungsvertrag gültig.

> *The promise to transfer a share needs that same notarial form (notarielle Beurkundung) — and a promise made without it becomes valid once the notarized transfer itself is made.*

Chapter 11 covers what the notary step does to your timetable and in what order the papers have to be signed.

> 5. Durch den Gesellschaftsvertrag kann die Abtretung der Geschäftsanteile an weitere Voraussetzungen geknüpft, insbesondere von der Genehmigung der Gesellschaft abhängig gemacht werden.
>
> *The company's own articles may add conditions on top, including that the company itself has to consent to the sale.*

Paragraph 5 is the one buyers skip. The articles of the company can make the sale depend on the consent of the company itself — which in a family GmbH can mean the consent of the seller's brother. Ask for the articles before you ask for the accounts.

And then there is who counts as the owner, and what comes attached.

> **§ 16 Rechtsstellung bei Wechsel der Gesellschafter oder Veränderung des Umfangs ihrer Beteiligung; Erwerb vom Nichtberechtigten**
>
> 1. Im Verhältnis zur Gesellschaft gilt im Fall einer Veränderung in den Personen der Gesellschafter oder des Umfangs ihrer Beteiligung als Inhaber eines Geschäftsanteils nur, wer als solcher in der im Handelsregister aufgenommenen Gesellschafterliste (§ 40) eingetragen ist. [...]

> *As far as the company is concerned, the shareholder is whoever is written on the shareholder list filed at the commercial register (Handelsregister).*

> 2. Für Einlageverpflichtungen, die in dem Zeitpunkt rückständig sind, ab dem der Erwerber gemäß Absatz 1 Satz 1 im Verhältnis zur Gesellschaft als Inhaber des Geschäftsanteils gilt, haftet der Erwerber neben dem Veräußerer.
>
> *And if the seller never paid in the capital he promised the company, you are liable for it alongside him — from the moment you go on that list.*

That is a debt that needs nobody's approval either. It rides along with the share.

What this means for you: the two routes carry opposite risks. In an asset deal your problem is that things fail to arrive — the supplier contract nobody listed, the lease the landlord will not sign over. In a share deal everything arrives, and that is the problem: the company's whole past comes with it, including what is not in the accounts.

Which brings us back to the man who paid €4,188,000.

What happened to the buyer of the second half

His contract had warranties in it. They covered that the shares existed, that they were not pledged, that they belonged to the seller, and that the capital contributions were half paid up. Liability for quality under the general law was excluded as far as legally possible.

Look at that list again. Every warranty is about the paperwork of the share. Not one of them is about the numbers the price was calculated from.

The case went to the federal court of justice (BGH, September 26, 2018, file VIII ZR 187/17). The court's own third headnote settles the point this chapter turns on:

> „Ein solcher Erwerb sämtlicher oder nahezu sämtlicher Anteile an dem Unternehmen liegt nicht vor, wenn ein Käufer, der bereits 50 % der Mitgliedschaftsrechte an einer GmbH hält, weitere 50 % der Geschäftsanteile dieser Gesellschaft hinzuerwirbt."
>
> *Buying the remaining 50 % when you already hold 50 % is **not** an acquisition of all or nearly all the shares.*

And that matters, because the ordinary German rules about a defective thing reach the business behind the shares only when somebody buys all or nearly all of them — and when the purchase counts, in the words of the court's second headnote, „sowohl nach der Vorstellung der Vertragsparteien als auch objektiv bei wirtschaftlicher Betrachtungsweise als Kauf des Unternehmens selbst", *both in the parties' view and objectively, on an economic view, as a purchase of the business itself*. Both conditions together, not one. Here the buyer had bought a shareholding, not a business, so those rules were out from the start — whatever his contract said.

That closed one door and opened another. The Federal Court set the appeal judgment aside and sent the case back to the Higher Regional Court in Karlsruhe, to examine whether the price could be adjusted under § 313 BGB, the article for a contract whose shared assumption turns out to be wrong. It added a sentence the buyer had waited seven years to hear: the sweeping exclusion of statutory warranties in his own contract did **not** shut that route off, because the contract „enthält aber gerade […] keine näheren Angaben zur wirtschaftlichen Lage der E. GmbH“ — it says nothing at all about the company's financial position, so it never allocated that risk to either side.

What this case is not. It is not authority that share buyers are unprotected — the buyer won this round. It is one dispute, decided on its own facts, still running when it entered our file, and sent back for findings that had not been made.

What you can take from it and rely on. Almost seven years after signing, the buyer had neither his money nor a final answer, and he was still arguing about which body of law applied. Every warranty he had bargained for was about the paperwork of the share; none of them reached the thing that went wrong, which was the revenue in one annual report. The saving line in the judgment is also the warning: his contract said nothing about the company's finances. Silence left him a route, and it left him seven years of arguing about it. If the figures matter to your price — and they always do — the figures need their own warranty, in writing, with a consequence attached: if the accounts turn out to overstate revenue, the price is recalculated. That takes a paragraph to write and seven years to litigate. Chapter 12 shows what to ask for and how to read it.

What the German market you are buying into actually looks like

We read the whole German succession exchange, nexxt-change, on September 25, 2026 and counted what is on it. Five listings in six are businesses with ten people or fewer: 83.9 % of those that state a headcount. The full tables are in Chapter 2 and Appendix B, and they are not repeated here.

What follows from that for this chapter. At this size the table is small. The choice between the two routes will not be made for you by a corporate finance department; it gets made by whoever raises it first. If you do not raise it, the seller's tax adviser will, and he is not working for you.

What does not follow from it. The exchange does not record which route each listing ended up using, and no German register publishes that. Anyone who tells you that German small businesses are "usually" sold one way or the other is quoting something that, as far as we could find, is not published anywhere.

What to do, before you talk about price

1. **Ask what legal form the business has.** Sole trader, GmbH, partnership. One question, and it decides which half of this chapter applies to you.
2. **If it is a GmbH, ask for the articles and the shareholder list.** The list is at the commercial register; the articles are with the company. You are looking for two things: who is really on the list, and whether the § 15 Abs. 5 consent conditions are in the articles. (*Abs*. is short for *Absatz* — the numbered paragraph inside an article. § 15 Abs. 5 means article 15, paragraph 5. The book uses the German form throughout, because that is the form a notary or an official will expect you to write.)
3. **If it is an asset deal, start the list of what moves.** Machines, stock, vehicle, contracts, customer data, trademark, domain, lease, permits. Anything not on that list when you sign stays with the seller. Then put a second column beside it: who

has to agree before that line actually moves, and whether you have it in writing.

4. **Put every debt takeover in one place**, with the creditor's name next to it, and the words *approval required* next to that — then get that approval in writing, for your own proof, not because § 415 asks for a form.
5. **Decide about the name now, not at the notary.** Keeping it triggers § 25; Chapter 5 tells you both ways to switch it off and how long each takes.
6. **Write down the one number the price is calculated from** — turnover, profit, a multiple of either — and mark it as needing its own warranty in the contract.

What to say to the seller

Say this, word for word:

> »Verkaufen Sie mir die Geschäftsanteile oder das Geschäft?«
>
> *Are you selling me the shares, or the business?*

Not »how are we structuring this«. That invites a discussion about structuring. You want him to name one of two things, in one word, so that you can ask the follow-up:

> »Welche Verbindlichkeiten bleiben bei Ihnen, und wer von Ihren Gläubigern hat schon zugestimmt?«
>
> *Which debts stay with you, and which of your creditors has already agreed?*

If he will not answer. Some sellers genuinely do not know, because their adviser handles it. That is an answer too: ask him to put the question to the adviser in writing and send you the reply. A seller who will not put a one-line question to his own adviser has told you something about how the next six months will go.

That is information, and information has a price. It moves one thing: how much of the price you leave where he cannot reach it until the answers arrive in writing. Say so at the table, while the price is still being discussed.

Where the money goes in this chapter

> **You keep the name and inherit the debts.** § 25 of the commercial code does this by itself, with no creditor's consent and no signature from you. In the case in Chapter 5 it cost a buyer €76,160.
>
> **You "take over" a loan that never transfers.** The price drops by the loan amount, the creditor refuses under § 415, and the discount you were given was for something that did not happen.
>
> **You buy a schedule of contracts and get none of them.** The supplier, the leasing company and the franchisor never agreed, so they are not yours. You paid for a customer base and a supply chain, and you own a list of their names.
>
> **You buy shares and inherit unpaid capital.** § 16 Abs. 2 makes you liable alongside the seller for contributions he never paid in. Nobody has to tell you about it first.
>
> **You warrant the wrapper instead of the contents.** A warranty that the shares exist and are unpledged is cheap for a seller to give. Warranties of that kind were the only ones in a contract worth €4,188,000.

Check before you go further

- ☐ I know the legal form of the business, from a document and not from conversation.
- ☐ I know which route we are on — the things and rights, or the shares — and it is written down.
- ☐ If it is a GmbH: I have the articles, and I have checked whether the sale needs the company’s consent.
- ☐ If it is a GmbH: I have the shareholder list from the commercial register, and the seller’s name is on it.
- ☐ If it is an asset deal: I have a written list of everything that moves, and I know what happens to anything left off it.
- ☐ Every debt takeover has a named creditor next to it and a plan to get his approval, in writing so that I can prove it.
- ☐ Every contract on the schedule has the other party’s name next to it and a plan to get that party’s consent — supplier, leasing company, franchisor, insurer.
- ☐ The decision about the trading name is made, and I have read Chapter 5 before making it.
- ☐ The number my price is built on is identified, and I have written “needs its own warranty” next to it.

Not one of those nine lines costs money or needs a lawyer. They are questions and documents, and every one of them can be settled before you make an offer. Work down the list and you know, in one word, which of the two deals you are in — and that word decides everything the rest of this book asks you to do.

The whole book — every chapter, every source with its address — is on Amazon.

https://www.amazon.de/dp/B0HL9N118P