

When considering entering into a transaction in a foreign country, choosing a law firm and an individual lawyer to advise you is one of your most important decisions. The lead partner of the law firm representing the client is usually one of the key individuals in “driving the deal home.” There are few, if any, best practice standards to follow when selecting a law firm in a foreign jurisdiction. Using the example of the German legal market to illustrate complexities, this article argues that the development of best practices is highly advisable, and explores some of the issues that arise when using simple referrals or law firm directories to choose a law firm in foreign jurisdictions. *By Rolf Giebeler*

Decisions

in

Deutschland:

**Choosing a Law Firm for Corporate Transactions
in Germany (and Elsewhere)**





30-SECOND SUMMARY Foreign investors planning corporate transactions in Germany face a large, diverse market of potential legal advisors. Selecting a law firm solely based on a recommendation may be the right thing to do. Directories may also be a good starting point; however, they shouldn't serve as a determinative guide. Best practices and a structured selection process with clearly defined criteria will result in improved transaction time, quality, cost and professionalism.

Finding the right firm and lawyer in Germany

When looking for the right firm in Germany, and specifically for the right partner to offer advice on a transaction, you will probably not find a lack of references, be they personal recommendations from colleagues and lawyers, or law firm directories.¹ However, this abundance of information is matched by a heterogeneous — albeit nontransparent — market. While there is a wealth of available information, it doesn't necessarily lead clients to more informed or rational decisions.

Over the past 25 years, the German legal market experienced rapid expansion and development, making it more diverse. Today, there are roughly 70 to 100 law firms that, in principle, are capable of doing corporate transactions. Their abilities in terms of size, complexity and client demands vary widely. In most countries, there is one major city to go to for legal advice, but Germany is different. Most would agree that Frankfurt, Düsseldorf and Munich are the main legal hubs, with comparatively similar capabilities in terms of expertise and sophistication for corporate transactions. Many would add more cities, such as Hamburg, Berlin, Stuttgart and Cologne to that list. Physical location is not everything, but local knowledge and physical proximity to the deal is important. There are good reasons for large international firms to have up to four offices in Germany.

There are many categories of law firms: German independents, large, medium and small, M&A boutiques, UK Magic Circle firms, Wall Street firms, second- and third-tier UK and US firms, and legal branches of the audit firms, just to name a few. The various cultures and internal structures of those firms create a universe of different abilities, styles and attitudes toward clients and their needs.

If you add categories like reputation for quality, client service, cost

consciousness, breadth and depth of expertise, and experience to the mix, it is easy to see that finding the right firm and the right partner is not trivial.²

From the perspective of a prospective client, no two firms are alike, and ending up with the “wrong” firm can, at best, result in excessive fees or, at worst, put a transaction at risk.

The buddy system

A foreign investor planning a corporate transaction in Germany faces a large, diverse market when looking for the “right” law firm to advise on the transaction. If the investor follows the recommendation of his trusted home country law firm, the likelihood (although not always) is that the law firm will recommend a German law firm:

- to which they are linked in a network or with whom they are “best friends,”
- with whom they have worked in the past, or
- to whom they owe a favor because the German firm referred a client to the home firm in the past.

None of these motivations has to do with the needs of the specific client. It is rare that the client or his primary law firm will arrange for a structured search to find the right firm for a transaction.

In some cases, selecting a law firm solely based upon a recommendation may be the right thing to do, especially when only a small subsidiary or other lesser asset in Germany is concerned. However, in cases where the main asset is located in Germany and where the seller is a German owner, this approach is surprising.

From the perspective of the client, the key criterion for selecting a law firm should be the client's specific needs and the requirements of the transaction at hand — nothing else. Most will agree that just because a firm and its partners belong to the same worldwide firm or network, that does not guarantee quality or indicate that the requirements and needs of a client will be fulfilled.

Past experience in the context of working together, being acquainted with, or even being personal friends with a firm lawyer may be an important selection criterion, but it should not replace an objective selection process that encompasses all relevant criteria (even if one is convinced that one's own partners in a network or a worldwide firm are invariably the best). While positive past experience with specific firms or their partners, or membership in a network or worldwide firm, may be a strong indicator of quality, given the diversity of law firms and their partners, this does not replace a full analysis of the client's transaction and its specific needs. Clients should have a procedure to ensure that the “right” firm and the “right” partner are found.

Similar caveats apply to recommendations received from other in-house colleagues. Although such recommendations are certainly more unbiased than those from law firms, they also have their limits. The main concern in this respect is that a colleague's recommendation is necessarily based on his personal requirements and preferences, which may or may not be those needed in the case at hand. Also, in an early stage of the search, your own objective requirements for legal advice are



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frequently less than clear. Thus, a colleague's recommendation is ultimately a good lead to use in a structured selection process, but not more.

A health warning: law firm directories and their limitations

There are several law firm directories, such as JUVÉ Handbook, Chambers Europe, *Kanzleien in Deutschland* and others,³ that list and describe law firms with different degrees of detail. These directories provide a useful start; however, there are serious limitations in using directories as a primary tool for selecting a law firm in Germany.

First, their selection criteria are not calibrated using empirical sources. The selection criteria are based on personal views and impressions given by fellow lawyers and clients. These publications express views on lawyers and law firms without using the same criteria or quantitatively

calibrated criteria for their views and assessments. What is seen as a "high-quality firm" lies largely in the eye of the beholder.

There is an unavoidable bias in directory research. Even in good directories, the sample of views reflected is by no means representative, meaning that only those who are willing to express views on lawyers or colleagues are heard. Many sources of good information do not contribute to such directories. In addition, if there is research effort, a substantive part of it is based on interviews with members of the law firms themselves, who, rightly or wrongly, have a certain view of their past performance that they convey to the researchers.

A related point is that directories have to be, and usually are, quite careful in expressing critical views about law firms and lawyers. To begin with, most peers will be extremely

reluctant to express critical or negative views of their colleagues. Even if they do, the publications will be reluctant to print anything particularly negative or critical in order to avoid trouble and to keep law firms cooperative (not least as customers).

Finally, the quality of research varies wildly, and it is not easy to judge the quality independently. Some publications do a lot of research; some do little; some do no research at all; some are quite explicit about their methodology; and some are more idiosyncratic. Given the nature of such publications and the wealth of data, the publishers have to take a generalized view of law firms and individual lawyers, and therefore, do not and cannot take account of all criteria that might be relevant for an individual client and an individual transaction.

All of this does not necessarily reduce the value of law firm directories,



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2013 list of National Tier One "Best Law Firms" in Securities Regulation

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| <ul style="list-style-type: none"> Arnold & Porter LLP Baker Botts LLP Bingham McCutchen LLP Cadwalader, Wickersham & Taft LLP Covington & Burling LLP Cravath, Swaine & Moore LLP Davis Polk & Wardwell LLP Debevoise & Plimpton LLP Fried, Frank, Harris, Shriver & Jacobson LLP Gibson, Dunn & Crutcher LLP Hogan Lovells US LLP K&L Gates LLP Kirkland & Ellis LLP Latham & Watkins LLP Mayer Brown LLP | <ul style="list-style-type: none"> Morgan, Lewis & Bockius LLP Morrison & Foerster LLP Murphy & McGonigle, P.C. Ropes & Gray LLP Schulte Roth & Zabel LLP Shearman & Sterling LLP Sidley Austin LLP Simpson Thacher & Bartlett LLP Skadden, Arps, Slate, Meagher & Flom LLP Sullivan & Cromwell LLP Troutman Sanders LLP Weil, Gotshal & Manges LLP Willkie Farr & Gallagher LLP WilmerHale LLP *Source U.S. News & World Report |
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but it puts some relativity into how they should be used. In conclusion, it can be said that while using directories may be a good starting point for finding the right law firm, they should not serve as a determinative guide as to which law firm to hire in Germany or elsewhere.

The need for best practices

Best practices for finding and selecting law firms in foreign countries are evolving. Globally acting corporations with large legal divisions are mostly developing and applying them. Members of these legal divisions put considerable effort and professionalism into developing standards and procedures for finding law firms and partners that suit a specific transaction. They are focused on improving the quality and cost efficiency of the legal services they need.

Of course, not all companies can afford such elaborate management systems for external lawyers. In many cases, this would not be efficient in terms of time and cost. However, best practices do not require elaborate systems and infrastructure. Planning and common sense will go a long way. Also, best practices are not a “cookbook.” They should just provide guidelines; individual circumstances can always permit for deviations and modifications.

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The starting point should be to select potentially suitable law firms and lawyers when there is sufficient time to choose. Once a transaction begins to pick up speed, procurement decisions will be made quickly and improvised without the necessary factual basis. The likelihood of selecting a law firm that may not turn out to be quite right later on, increases dramatically under such circumstances.

The next step is to conduct some market research for the jurisdiction(s) concerned. Keeping in mind the caveats pointed out above, recommendations from colleagues and other lawyers can be helpful but should not replace a structured research and selection process. Recommendations can then be backed up with more specific information provided by good law firm directories (keeping their limitations in mind) and phone or in-person interviews.

Regardless of the outcome of such initial research, it is important to note that these are all views of other people for other transactions; this cannot replace the informed judgment of the in-house lawyer in charge to find the right firm for a specific transaction and a specific client. Therefore, it is indispensable at an early stage to prepare a rather specific list of hard and soft requirements based on the needs of the company, its staff and the specific transaction. Those specifications should cover a wide range of issues, starting with more technical requirements, such as physical location and commercial conflicts, then moving onto experience and technical expertise, ending with soft issues like personality, negotiation skills and personal chemistry.⁴ Of course, these requirements need to be weighted for their relevance. This exercise is often neglected and is one of the main causes for a misfit between client and law firm.⁵

The benefit of such a specification list is at least threefold:

- It forces you to define needs early on, so that there are fewer surprises during the transaction;
- The “spec list” protects against falling prey to particularly skillful sales pitches, which sometimes have little substance in terms of addressing the real issues; and
- It serves as a basis for the engagement letter with the law firm.

ACC EXTRAS ON... Choosing a law firm for corporate transactions

ACC Docket

Global Relationships, Collaboration and Value—Cost Savings and Better Results (July 2011). www.acc.com/docket/global_july11

QuickCounsel

Selecting and Managing International Law Firms (June 2009). www.acc.com/quickcoun/ilf_jun09 

Survey

How In-house Counsel in Central & Eastern Europe Select and Retain their External Counsel (Jan. 2008). www.acc.com/survey/select-counsel_jan08

Presentation

How to Manage International Legal Staff & Outside Counsel (March 2005). www.acc.com/manage-staff_mar05

Leading Practices Profile

Leading Practices in Knowledge Sharing and Management: How Companies and Law Firms Manage Knowledge (Aug. 2012). www.acc.com/knowledge&mgmt_aug10

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Do not assume that the larger firms are more likely to meet all those requirements.

The next step is creating a short list of potentially suitable law firms and partners. Such a short list may be composed of firms recommended by others, firms that may be suitable based on research in law firm directories, or firms found to be suitable by someone with deep market knowledge. The short list includes those firms and individuals to be invited for a written or, preferably, personal interview.

The last step is the interview process, which should be based on clear specifications and requirements. It should not be a platform for a general presentation. There is little sense in participating in the interview process if the short-listed firm has not reviewed the specifications. In such cases, the interview process ends up leading to a situation where each law firm presents itself according to its own criteria and in the most positive light. You will fail to learn about the things you are really interested in and instead are bombarded with information about the things the law firms want you to know.

Because each firm speaks about different aspects of the firm or its core strength according to its own preferences and interests, the interview process becomes virtually incomparable, which defeats the entire purpose of organizing and participating in the interview. In the end, this frequently results in the client choosing the “nicest” or the “toughest” lawyer, regardless of whether that person will actually work on the transaction or whether your needs and requirements are met. Ideally, the interview process will be interactive, and experience has shown that a discussion about real-life issues provides a good indication of how a firm or individual will tackle an issue.

Of course, in the end, your decision will also be based on soft issues, such as personal chemistry and sympathy. These factors are of extreme

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importance in the course of a transaction. This means that a firm's presentation should include personal appearances by the lawyers who will do the deal. This is nearly indispensable. Be sure that sympathy and chemistry as ultimate criteria only come into play when all other “hard” criteria are met. Often, the order of decision-making is turned upside down when a decision is made based upon personal chemistry and everything else is then “accommodated.”

It is essential to negotiate the engagement letter with a law firm parallel to the selection process and to make the results of such negotiations part of the decision criteria for selection. The reasons are obvious; you only have sufficient negotiation leverage with respect to the engagement letter prior to the decision to select a particular law firm. The terms and conditions a law firm is willing to honor might well influence the selection decision one way or another. The content of the engagement letter should describe the mandate, billing principles and practices, and many other items in detail. There is no reason to treat law firms differently from other service providers.

Taking time in the beginning yields better results in the end

Your satisfaction with a particular law firm will increase dramatically in proportion to the time and effort you invest in the selection process. Hiring a

firm purely based upon recommendations, directory information or past experience is, in most cases, insufficient to make an informed decision. The likelihood of not finding the right firm for your needs and those of the transaction is very high. Developing best practices and investing in a structured selection process along clearly defined criteria will result in improved transaction time, quality, cost and professionalism. In this regard, the best practices of leading corporations are evidence for truth of this claim. **ACC**

NOTES

- 1 The same is probably true for all developed legal markets worldwide.
- 2 Arguably, if the target is a German “Mittelstand” company, the personality of the target's owner is an important criterion to consider when seeking a compatible lawyer.
- 3 There are a variety of web sites that contain general listings of firms in the form of placed advertisements with varied amounts of detail about their areas of expertise (www.martindale.com, www.lawyers.com, www.lawsociety.org.uk/choosingandusing/findasolicitor.law, www.lawfirmsslawyers.eu, www.hg.org, www.internationallawoffice.com/directory). A more rare source of information is a website tailored to selective clients, that gives more detailed information as to the type of transactions a firm or individual is known for, along with commentary from past clients (www.legal500.com/c/germany). A third source of information for finding a law firm is hardbound guides. An example of one guide that can be purchased for €340 and is put together by legal journalists is *The International Financial Law Review* (www.iflr1000.com/Jurisdiction/54/Germany.html).
- 4 Other matters to be covered in the specifications are special legal or industry expertise, expected staffing levels, organizational capabilities, location requirements, service quality, billing practices and much more.
- 5 A good analogy would be the choice of a car. Depending on where and how you drive, a Porsche or a Land Rover could be the right (or wrong) choice, and often a Toyota will suffice for the task at hand.