Das
Rechtswörterbuch der internationalen Wirtschaftspraxis

The
Legal Dictionary of International Business Practice

Deutsche Rechtsbegriffe mit Erläuterungen in Englisch
German Legal Terms with Comments in English

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Vorwort

Die Bedeutung von Rechtsbegriffen in einer anderen Sprache und Rechtsordnung ist oftmals nicht deckungsgleich mit der der eigenen Muttersprache oder Heimatrechtsordnung. Reine Übersetzungen von Rechtsbegriffen ohne Erläuterungen helfen oftmals nicht weiter, insbesondere, wenn bei grenzüberschreitendem Geschäftsverkehr Personen unterschiedlicher Nationalität involviert sind. Oft ist die Neigung feststellbar, dass Adressaten Begriffe nach dem Verständnis der eigenen Heimatrechtsordnung interpretieren und dabei möglicherweise eine abweichende Bedeutung in einer anderen relevanten Rechtsordnung nicht berücksichtigen. Missverständnisse, die hierdurch entstehen, können eine Geschäftsbeziehung nicht unerheblich beeinträchtigen. Den Autoren ist aus ihrer eigenen langjährigen Beratungspraxis bekannt, dass ein großes Bedürfnis für eine praxisorientierte Arbeitshilfe besteht. Das Ziel dieses Wörterbuchs besteht daher darin, eine an den tatsächlichen Bedürfnissen der Wirtschafts- und Rechtspraxis orientierte Zusammenstellung von relevanten deutschen Rechtsbegriffen zur Erleichterung einer sachgerechten Kommunikation mit einem ausländischen Geschäftspartner in Englisch zu erläutern und diesem deutsche Rechtsbegriffe näher zu bringen.

Die Liste der deutschsprachigen Begriffe wird um gesonderte Kapitel mit Begriffen aus dem schweizerischen und österreichischen Recht ergänzt, die in Englisch kommentiert werden.

Soweit die nachfolgenden Begriffe mehrere Bedeutungen haben, ist nur die im Wirtschaftsleben relevante ausgewählt worden.

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Preface

The meaning of legal terms in another language and/or another jurisdiction is not always the same as in one’s native language or home jurisdiction. A mere translation of legal terms without comments often might not be clear, especially when people from different jurisdictions are involved in cross-border transactions. In many cases, people interpret terms based on the usage and meaning in their home jurisdiction and, thereby, might not take into consideration a different meaning from another, relevant jurisdiction. This can lead to misunderstandings, which can hurt a business relationship. During their longstanding practice as legal advisors the authors of this dictionary realised that there is a great need for a tool to help prevent such misunderstandings in practice. This dictionary is designed to meet the needs of daily business and legal practice by providing a compilation of regularly used German legal terms explained in English for the purpose of making it easier to communicate reasonably with foreign business partners in English and making him familiar with German legal terms.

The dictionary also includes special chapters discussing Swiss and Austrian legal terms, with comments in English.

When terms have several meanings, the author has chosen to discuss only the definition that is relevant to business life.

Absonderung (Insolvenz) separation in case of insolvency. Unlike the *Aussonderung,* which in case of insolvency allows a separation of third party assets in case of an insolvency of another party, the *Absonderung* allows a separation in favour of the creditors of an insolvent party who are secured by a right *in rem* with regard to an asset of the debtor that is part of the insolvency estate. Such rights may be enforced outside of insolveny proceedings. Typical rights to allow an *Absonderung* are, for example, *Hypotheken* (mortgages), *Grundschulden* (land charges), liens created by contract or law, *Sicherungseigentum* (security by transfer of ownership), other security rights and rights of retention. Creditors which are entitled to execute into immovables have a right of separate satisfaction under the provisions of the Gesetz über die Zwangsversteigerung und die Zwangsverwaltung (Act Governing Auctions and Sequestrations of Immovables).

Abstraktionsprinzip Principle of separateness of contracts and relating rights *in rem.* German law distinguishes between *schuldrechtliche Verträge* (obligatory contracts) and *dingliche Verträge* (contracts *in rem).* By way of the obligatory contract a duty of the debtor to perform or to refrain from performing and concurrently the corresponding rights of the creditor are established. In order to perform the obligation under the obligatory contract a further separate contract *in rem* may be required under German law. The reason for that is the German *Abstraktionsprinzip,* a principle whereby rights over objects (= *in rem)* are separate from any rights against a person (= *in personam)* in terms of any related contract to effect a change in title such as the transfer of ownership or the creation of an encumbrance over land *(Sachenrecht).* See *Sachenrecht.*

Akzessorietät accessory. Accessory in German civil law means the strict connection with respect to a claim and security rights, for example, the connection of obligations to be secured and special types of security (*e.g. Bürgschaften* (guarantees), *Hypotheken* (mortgages) and *Pfandrechte* (liens)). When the secured claim extinguishes for whatever reason (*e.g.* payment of a secured loan) the accessory security right extinguishes simultaneously.

Anfechtung (Insolvenz) avoidance (insolvency). Transactions made in the period before the opening of insolvency proceedings that are disadvantageous for the insolvency creditors may be contested by the *Insolvenzverwalter* (insolvency administrator) if several preconditions are fulfilled that are set out in secs 130 to 146 of the *Insolvenzordnung* (German Insolvency Statute). In general, a transaction granting or facilitating an insolvency creditor a security or satisfaction (congruent coverage) may be contested under certain circumstances. It has to be distinguished between avoidances prior to and after the application to open insolvency proceedings. If (i) the transaction was made during the last three months prior to the application to open insolvency proceedings, (ii) the debtor was illiquid on the date of the transaction and (iii) the creditor was aware of this illiquidity on this date the transaction may be contested. The same applies if the transaction was made after the application to open insolvency proceedings, if the creditor was aware of the debtor's illiquidity on the date of the relevant transaction or of the application to open insolvency proceedings.

A transaction granting or facilitating an insolvency creditor a security or satisfaction without being entitled thereto (incongruent coverage) may be contested if such transaction was made during the last month prior to the application to open insolvency proceedings or after such application. The same applies if such transaction was made either within the second or third month prior to the application to open insolvency proceedings and the debtor was illiquid on the date of the transaction or within the second or third month prior to such an application and the creditor was aware of the disadvantage to the insolvency creditors. Legal transactions of the debtor which constitute a direct disadvantage to insolvency creditors may be contested if they were made, for example, during the last three months prior to the application to open insolvency proceedings, if the debtor was illiquid on the date of such transaction and the other party was aware of this fact. A transaction of the debtor during the last ten years prior to the application to open insolvency proceedings which was made with the intention to disadvantage his creditors may be contested if the other party was aware of this intention. Such awareness is presumed under certain preconditions. In general, a gratuitous benefit granted by the debtor within four years prior to the application to open insolvency proceedings may be contested.

Anwartschaftsrecht expectant right. Under German law the transfer of ownership due to the *Abstraktionsprinzip* (principle of separateness of contracts and relating rights *in rem*) requires an agreement on a transfer and the delivery of the relevant movables or – insofar as immovables are concerned – the registration in a public register. Already the agreement on the transfer provides an *Anwartschaftsrecht* in favour of the acquirer. In commercial practice the acquisition of an object subject to a retention of title is the most important case which leads to an *Anwartschaftsrecht*. It provides no full right *in rem* howewer, may be disposed of, for example, by transfer of the *Anwartschaftsrecht.* It changes to a full right *in rem* as soon as the conditions of the sale subject to retention of title are fulfiled. By payment of the last part of the purchase price the buyer acquirers the full right *in rem.*

Aussonderung (Insolvenz) separation of third party assets in case of the insolvency of another party. See *Refinanzierungsregister.* Unlike the *Absonderung,* which in case of insolvency allows a separate enforcement of the debtor's assets under certain circumstances, the *Aussonderung* allows a separation of those assets that are in possession of the insolvent party but are not part of the insolvency estate. Especially, the right of ownership of a third party enjoys the right of *Aussonderung. Sicherungsübereignung* (security by transfer of ownership) and *Eigentumsvorbehalt* (retention of title) only allow for an *Absonderung.* A person being entitled to claim separation with respect to an object under a right in rem or in personam *is not included in the group of* insolvency creditors. Insofar general legal provisions outside the insolvency proceedings apply. Under certain circumstances the right to separation extends to the consideration received as a substitute for the object of separation. See *Ersatzaussonderung.*

Bürgschaft guarantee, suretyship. Under a *Bürgschaft* (guarantee) a *Bürge* (guarantor) takes responsibility for the fulfilment of a debtor's obligation under an underlying contract. Unlike a *Garantie* (indemnity) under German law a *Bürgschaft* requires the existance of a debt under a contract as it is a strictly accessory security.

Culpa in contrahendo pre-contractual liability. The principle of *culpa in contrahendo* comprises the liability for beach of protective duties during negotiations preceding the conclusion of a contract. It is now codified in sections 311 subsection 2, 241 subsection 2 of the *Bürgerliches Gesetzbuch* (German Civil Code). A liability under *culpa in contrahendo* is independent of the fact whether a contract is actually concluded because the period for negotiations is deemed to be governed by fiduciary duties growing out of both parties' particular preparations for a later contract. *Culpa in contrahendo* was designed to acknowledge the exposure of potential contract partners to risks arising in pre-contractual settings.

Eigentumsübertragung transfer of ownership. On the basis of the *Abstraktionsprinzip* (principle of separateness of contracts and relating rights *in rem)* a transfer of the ownership of movables pursuant to section 929 of the *Bürgerliches Gesetzbuch* (German Civil Code) requires an agreement between the parties that the title will be transferred and in addition the delivery of the movable object to the acquirer. The delivery may be substituted by a *Besitzkonstitut* (constructive possession of chattels based on an agreement). If the acquirer already is in possession of the relevant movable object an agreement on the transfer of the ownership is sufficient. Pursuant to section 930 of the *Bürgerliches Gesetzbuch* (German Civil Code) the delivery may be substituted by a legal relationship by which the acquirer gets into the position to have indirect possession. Furthermore, pursuant to section 931 of the *Bürgerliches Gesetzbuch* (German Civil Code) delivery may be substituted by the assignment of the claim of delivery of the movable object by the owner. German law comprises several rules with regard to good faith acquisition.

Eigentumsvorbehalt retention of title. The transfer of the ownership in movables may be made under a condition. In practice the most important condition is the retention of title pursuant to section 449 of the *Bürgerliches Gesetzbuch* (German Civil Code) by which the transfer of the ownership depends upon the full payment of the purchase price. If the seller of movables has retained title until payment of the purchase price it is assumed that ownership is transferred subject to the condition that the purchase price is paid in full. A person being in possession of a *Sache* (object; literally "thing") that has been transferred under the condition of full payment of the purchase price is entitled to use the relevant movable object. At the time when the last part of the purchase price is paid the acquirer of the relevant object gets the new owner and the retention of title in favour of the previous owner automatically distinguishes without taking any further measures. A simple remark, for example, on an invoice is sufficient to create a retention of title, if the acquirer receives such a declaration at the latest when he receives the relevant object.

The acquirer has an *Anwartschaftsrecht* (expectant right) with respect to the ownership of the relevant object that changes to a full ownership right at the time the condition is fulfiled. Special types of retention of title are the *verlängerter Eigentumsvorbehalt* (extended retention of title to cover any resale) and the *erweiterter Eigentumsvorbehalt* (extended retention of title to cover any and all claims by the seller arising from the commercial relationship). While in the case of an *erweiterter Eigentumsvorbehalt* the transfer of title requires the payment of all existing claims, in case of a *verlängerter Eigentumsvorbehalt* the acquirer of the relevant object may sell or process it in his ordinary course of business. However, in the last mentionend case as a consideration the title of the new object which came into existense by processing or transformation and/or the profit of the acquirer will be transferred by way of a *Sicherungsübereignung* (security by transfer of ownership) to the seller or the future claim with regard to the purchase price will be assigned to him. Basically, a person who, by processing or transformation of one or more substances, creates a new movable object acquires the ownership of it.

Fixhandelskauf commercial sale to be performed at a fixed time. Pursuant to sec 375 I of the *Handelsgesetzbuch* (German Commercial Code) the *Fixhandelskauf* denotes a commercial sale where in accordance with the agreement at least one of the parties has to effect performance at a specific time or within a

specified period of time. Sec 376 of the *Handelsgesetzbuch* relates to a relative *Fixgeschäft* (transaction to be performed at a fixed time), *i.e.* a transaction where in accordance with the relevant agreement the time of performance is so important that the adherence to it is a strict condition of the entire agreement, even though the fulfilment would be also possible after the agreed time of performance. Unlike a relative *Fixgeschäft* the performance of an absolute *Fixgeschäft* is no longer possible after the lapse of the specified time.

Globalzession blanket assignment. The *Sicherungsabtretung* (assignment for security) in German banking practice to secure a loan may comprise any and all current and future claims of the borrower and of his business. This type of *Abtretung* (assignment) is called *Globalzession.* The claims must be determined or at least determinable with the necessary degree of certainty.

Grundschuld land charge. Pursuant to section 1191 of the *Bürgerliches Gesetzbuch* (German Civil Code) a plot of land may be encumbered with a *Grundschuld* that is a special type of a property charge. In this case the person in whose favour the encumbrance is created, *i.e.* the holder of the *Grundschuld,* is paid a specific sum from the plot of land. In practice it is usual to create the *Grundschuld* with the content that interest on the specified sum and other supplementary payments have to be paid. The *Grundschuld* is a right *in rem* with respect to a plot of land. A *Grundschuld* may be created in such a manner that a certificate is made out to the bearer. To serve as security for an obligation of the owner of the plot of land or a third party the *Grundschuld* may be foreclosed it in case of the non-fulfilment of the secured obligation. However, it is a non-accessory right that is independent of an underlying contract. Thus, German banks prefer a *Grundschuld* to a *Hypothek* (mortgage) as security.

When and insofar as an underlying loan has been repaid the *Grundschuld* may be used as collateral for other obligations within its amount. The underlying obligation and the *Grundschuld* may each be transferred separately. *Grundschulden* are abstract and – unlike *Hypotheken* (mortgages) – do not relate to a claim under an underlying contract. This means they are independent of an underlying claim and may be used to secure different claims, for example, different loans, within their maximum amount. The statutory content of the *Grundschuld* also comprises future and conditional claims. The *Haftungsverband* of the *Grundschuld* (statutory scope of a *Grundschuld* with respect to securing assets) does not only comprise the plot of land but, for example, also the *Zubehör* (appurtenancies) and claims under loan agreements and insurance agreements. The realisation of the *Grundschuld* is effected by foreclosure.

Handelsbrauch commercial usage. Pursuant to sec 346 of the *Handelsgesetzbuch* (German Commercial Code) *Handelsbräuche* are mercantile custom and serve as an important tool for the interpretation of declarations in commercial business. They characterise a common usage of commercial law in terms of custom and practice, which are established by a common appreciation and a continued application within the relevant group of *Kaufleute* (merchants). *Handelsbräuche* have to be distinguished from *Gewohnheitsrecht* (customary law) because the former have no prevalence, are lacking the intention of general application in law and are only applicable for specific business sections. In principle, *Handelsbräuche* are only applicable between *Kaufleute, e.g.* the meaning of a certain behaviour like the *Schweigen* (non-reaction) of a *Kaufmann* to an offer of another *Kaufmann (*see *Kaufmännisches Bestätigungsschreiben)*. *Handelsbräuche* cannot override statutory mandatory law.

Handelskauf commercial sale of goods. The *Handelskauf* denotes a contract concerning the sale of goods which is for at least one of the parties of the contract a commercial business. The general rules for civil law purchase contracts which are laid down in secs 433 *et seq* of the *Bürgerliches Gesetzbuch* (German Civil Code) and the special provisions of secs 373 *et seq* of the *Handelsgesetzbuch* (German Commercial Code) are applicable to a *Handelskauf.* The *Handelskauf* is a particular kind of *Handelsgeschäfte* (commercial business). Subject of the purchase contract must be goods or securities. Goods within the definition of a *Handelskauf* are *unbewegliche Sachen* (real property) and *bewegliche Sachen* (movable property) except those objects which do not qualify as a *Sache* (object) under sec 90 of the *Bürgerliches Gesetzbuch*.

Handelsregister commercial register. The *Handelsregister* is a public register that is maintained by the German *Amtsgerichte* (local courts). It is designed for publicity and control functions. The *Handelsregister* contains relevant information about legal facts concerning *Kaufleute* (merchants) who operate an individual enterprise, companies (*e.g. Aktiengeselschaft* and *Gesellschaft mit beschränkter Haftung)* and commercial partnerships (*e.g. Offene Handelsgesellschaft* and *Kommanditgesellschaft)* such as the formation of companies and partnerships, details about the shareholders or partners and the authorised individuals who legally represent the company or partnership. Pursuant to sec 9 of the *Handelsgesetzbuch* (German Commercial Code) anyone may inspect the *Handelsregister* but only for information purposes and apply both authorised abstracts from the *Handelsregister* and documents attached to it. Inspection is possible at *www.handelsregister.de*.

Facts which are of significant importance for a *Handelsgewerbe* (commercial business) have to be entered in the *Handelsregister*. A distinction has to be drawn between *eintragungspflichtige Tatsachen* (facts to be registered mandatorily), *eintragungsfähige Tatsachen* (facts capable of being registered) and, ultimately, *nicht*

eintragungsfähige Tatachen (facts not capable of being registered). Basically, the public may trust on the content of the *Handelsregister* in a positive sense *(positive Publizität)* and a negative sense *(negative Publizität).* The registration of details may create a new legal status by entering into the *Handelsregister* with constitutive effect or may validate an already existing legal status with declaratory effect.

Hypothek mortgage. To secure a claim to which the creditor of the underlying contract is entitled, a plot of land may be encumbered in a way that the creditor in whose favour the encumbrance is created is to be paid out of the land the amount which is specified in the *Hypothek*. When creating a *Hypothek* property and land is put up as security for a loan, which may be enforced by the creditor in case the mortgagor fails to fulfil his payment obligations. A *Hypothek* is a right *in rem* on a plot of land that is used to safeguard a specific sum of money that is based on the amount the debtor has to pay under the underlying contract. Unlike a *Grundschuld* (land charge) that is the customarily used security right in German banking practice for real estate financing this type of charge is an accessory right. As a result of the transfer of the claim under the underlying contract the *Hypothek* passes to the new creditor as the *Hypothek* is an accessory right. On the one hand the claim may not be transferred without the *Hypothek* and on the other hand the *Hypothek* may not be transferred without the claim.

After entering of the *Hypothek* in the *Grundbuch* (public register of land records) it constitutes a lien on real estate to safeguard the creditors' claims. A first-ranking mortgage entered in the *Grundbuch* enjoys priority over all other registered rights. Basically, the validity of the assignment of the claim that is secured by a *Hypothek* requires a declaration of assignment in writing and the handing over of the mortgage certificate. The *Hypothek* also secures future and conditional claims. In case of a *Buchhypothek, i.e.* a mortgage without the issuance of a mortgage certificate, an agreement between the parties and the registration of all relevant points such as the amount of the mortgage in the *Grundbuch* is necessary. The *Haftungsverband* of the *Hypothek* (statutory scope of a *Hypothek* with respect to securing assets) not only comprises the plot of land but, for example, also the *Zubehör* (appurtenancies) and claims under lease agreements and insurance agreements. The creditor may enforce the *Hypothek* in case of an event of default under the underlying contract. The realisation of the *Hypothek* is effected by foreclosure.

Kaufmännisches Bestätigungsschreiben commercial letter of confirmation. Within the mercantile business world it is common practice that a person confirms by written communication to another the result of their verbal negotiations. The primary purpose of the commercial letter of confirmation is to facilitate the proof of the conclusion of a contract and its content. It is used following verbal negotiations (*e.g.* by phone) between the parties. The letter of confirmation repeats and summarises the parties' agreement. If, however, the commercial letter of confirmation also presents changes to the prior verbal agreement it establishes a new contract unless the recipient of the letter objects promptly. Therefore, in the absence of any objection, the failure to reply to a letter of confirmation is deemed an approval of its content.

Kaufmännische Rügepflicht duty to object under a commercial sale. The buyer under a commercial sale has the duty to examine the goods after their delivery. Pursuant to sec 377 of the *Handelsgesetzbuch* (German Commercial Code) the buyer under a commercial sale is only entitled to remedies if he has objected in a timely manner to the defects of the delivered goods. However, the objection to defects is not a real obligation of the buyer but he is forced to object if he wishes to use the remedies available in case of material defects.

Negative Publizität negative publicity. See *Handelsregister.* Pursuant to sec 15 I of the *Handelsgesetzbuch* (German Commercial Code) facts which have mandatorily to be registered in the *Handelsregister* (commercial register) but are not actually entered in the *Handelsregister* or announced, have no legally binding effect against third parties acting *bona fide.* Third parties, basically, can rely on the so called *Schweigen* (missing entries) of the *Handelsregister.* If a relevant fact is not registered or announced, third parties may rely on the legal situation effectively not displayed in the *Handelsregister.* Generally, the good faith of third parties is presumed. The mere *Kennenmüssen* (constructive knowledge) or positive knowledge of those facts, from which the facts that have to be registered emanate, is not sufficient to constitute bad faith which is only given in case of positive knowledge of those facts which have to be registered.

Positive Publizität positive publicity. See *Handelsregister.* Pursuant to sec 15 II of the *Handelsgesetzbuch* (German Commercial Code) the facts that have been entered in the *Handelsregister* (commercial register) and published have legal effect against third parties. Only legal transactions within fifteen days following the publication are not affected if the relevant third party proves that he neither knew nor ought to have known the fact, meaning that his lack of knowledge was not based on negligence. After the expiry of fifteen days after the publication third parties will be treated as if they knew the registered fact. Sec 15 III of the *Handelsgesetzbuch* deals with the situation where a fact which has to be registered has been published incorrectly. Then, third parties may claim reliance on the fact as published against the one to whom the entry pertained, unless the relevant third party knows that the publication was incorrect. Third parties may rely on the published facts and will enjoy the legal protection of good faith in relation to the correctness of the publication. They have the choice of invoking the published incorrect fact or to invoke the true legal situation.

Prokura procuration. Pursuant to sec 49 I of the *Handelsgesetzbuch* (German Commercial Code) the *Prokura* is a general commercial power of attorney. It permits the *Prokurist* (procurator) to enter into every kind of judicial and non-judicial business and legal transaction related to the operation of a commercial business. A limitation of the *Prokura* is set out in sec 49 II of the *Handelsgesetzbuch* according to which the *Prokurist* is authorised to transfer and charge real property only if this power has been specifically conferred upon him. Pursuant to sec 50 II of the *Handelsgesetzbuch* the *Prokura* may only be used under certain circumstances, for a limited period of time or at certain specific locations. Furthermore, the *Prokura* does not comprise *Grundlagengeschäfte* (basic business transactions), *i.e.* transactions where the fundamentals of the mercantile business are affected. The *Prokurist* may, for example, not decide on the termination of business, the sale of the enterprise or the application for the opening of insolvency proceedings. In case of a *Gesamtprokura* (joint procuration) as provided for in sec 48 II of the *Handelsgesetzbuch* a *Prokura* is conferred jointly to several persons. Pursuant to sec 50 III of the *Handelsgesetzbuch* a limitation of the *Prokura* to the operation of one of several branches operated by the business owner is only effective as to third parties if the branches operate under different *Firmennamen* (company names). This kind of *Prokura* is a *Filialprokura* (procuration confined to a branch). See *Gesamtprokura.*

Sachenrecht rights *in rem*; "law of things" (literally). German law distinguishes between the law of obligations and the law of rights *in rem* (*Abstraktionsprinzip).* The latter is concerned with rights a person has in direct relation to a *Sache* (object; literally "thing"). The term *"Sachenrecht"* covers both movables and real estate property. *Sachenrecht* primarily focuses on the right of a person, total or partial, in relation to an object. It encompasses a slightly wider field than right of property as such. It is characteristic of rights *in rem,* the subject matter of *Sachenrecht,* that its effect is "absolute" in relation to third parties. This means that these rights are effective with respect to anyone who interferes with the object. On the contrary, an obligatory contract has a legal effect only to the parties of such an agreement. It exists a *numerus clausus* of rights *in rem.* They do not only concern legal ownership of a property but also, for example, rights such as pledges, mortgages, retention of title, preemptive rights of purchase *in rem* and security by transfer of ownership for security purposes *(Sicherungseigentum).* Such *numerus clausus* of rights *in rem* means that the contractual freedom in relation to the legal situation of an object is basically limited by the alternatives offered by statutory law, here the German *Bürgerliches Gesetzbuch* (German Civil Code).

Sicherungsabtretung assignment for security. In commercial practice the assignment for security is one of the most important types of an *Abtretung* (assignment). Except some special cases there are no formal requirements for an assignment for security that is also possible as *stille Abtretung* (undisclosed assignment).
Stellvertretung agency. A declaration of will which a person (the agent) makes within the scope of his power of agency in the name of a principal takes a legal effect directly for the principal. Thereby, it is irrelevant whether the declaration by the agent is made explicitly in the name of the principal. Also cases where the agency may be derived from the circumstances may constitute a true agency. However, an undisclosed agency generally is not recognized under German Law. In this latter case the declaration of will only takes effect in favour of and against the undisclosed agent itself. The principal is only bound by the agent's declaration of will if such declaration is covered by his authority. Such authority may be conferred on the agent by statute or may be granted by the principal.

Sicherungsübereignung security by transfer of ownership. Unlike an ordinary transfer of title the *Sicherungsübereignung* is a transfer of title as security whereby the parties agree that enforcement of the relevant object is only possible in case of non-fulfilment of the secured claim. The *Sicherungsübereignung* requires that the parties agree on the transfer of title and instead of delivery in addition and as substitute for the delivery on a *Besitzkonstitut* (constructive possession of chattels based on an agreement). The object to be transferred has to be determined with the necessary degree of certainty.

Wegfall der Geschäftsgrundlage frustration. The principle of frustration which is now codified in section 313 of the *Bürgerliches Gesetzbuch* (German Civil Code) comprises legal consequences with regard to frustration of the inherent purpose of a contract. The *Wegfall der Geschäftsgrundlage* applies to cases in which the circumstances forming the basis of a contract have changed fundamentally after conclusion of the contract. If adaptation of the contract proves to be impossible or if it would constitute an undue hardship for one of the parties that party is entitled to rescind the contract.

Zahlungsunfähigkeit (Insolvenz) illiquidity. The general reason to open insolvency proceedings is the illiquidity of a debtor. This provides that the debtor is unable to meet his payment obligations when due. Basically, Illiquidity is presumed if the debtor has stopped to fulfil his payment obligations. In case of the debtor's request for the opening of insolvency proceedings imminent illiquidity is a further reason to open insolvency proceedings. It is deemed to be given if the debtor is likely to be unable to meet his obligations to pay on the respective maturity dates.

Zurückbehaltungsrecht right of retention. Sec 273 I of the *Bürgerliches Gesetzbuch* (German Civil Code) provides that if an obligor has a claim which is due against the obligee under the same legal relationship as that on which the obligation is based, he may refuse the performance owed by him, until the performance owed to him is rendered (*Zurückbehaltungsrecht)*. Under civil law a crucial precondition for a *Zurückbehaltungsrecht* is *Konnexität* (connectivity), *i.e.* that the claim of an obligor and his obligation vis-à-vis the obligee emanate from the same legal relationship. *Konnexität* is given if the mutual claims are based on a natural and economic connection and a consistent activity of the parties. See *Kaufmännisches Zurückbehaltungsrecht*. See *Zurückbehaltungsrecht (Insolvenz).*