AMERICAN M+A PRACTICE
SOME FACTORS FOR GERMAN LAWYERS TO KEEP IN MIND

INTRODUCTION

As the German economy grows at a healthy pace and the US economy continues to lag behind, one might expect an up-tick in German purchases of US companies. Operation in the US provides market credibility, better market access, quicker supply time and natural hedging against increased fluctuation in the Euro/Dollar exchange rate. Despite its 51 different jurisdictions, the US is still the largest unified market in the world after the EU, one generally friendly to German companies. German and American politicians and business leaders always emphasize our shared values and economic cooperation. Yet the real nuts and bolts of acquiring a company in the US differ significantly from those in Germany. This article will give an overview of many of these differences, covering acquisition agreements in general, specific aspects of M+A transactions and remedies if expectations are not met.

CONTRACT FORMATION – EARLY STAGES

Good Faith - The American view of contract formation is that the parties do not owe each other any duty until the contract is formed. Once formed, every US contract contains an implicit and vague duty of "good faith and fair dealing" – a concept which will not, however, save a businessman from the consequences of a bad deal.[1] In contrast, Germans are protected even in the pre-contractual phase by a sort of good faith obligation known by the Latin phrase "culpa in contrahendo." Americans are familiar with the concept of "fair play" but in the context of games, but less so in contract formation.

Letter of Intent - The first contractual part of a US transaction is often a letter of intent, although one is not required. A well-drafted letter of intent is broken into two parts – one which is enforceable, covering confidentiality and exclusive negotiating rights – and the other which is not enforceable, consisting of an outline of the deal negotiations to date. The American negotiator will feel free to change those non-binding deal points or walk away from the negotiations without fear of legal consequences. Changing a material part of the deal set forth in the letter of intent reduces that party's credibility but that is the only consequence. If the letter of intent is poorly drafted but *does* contain the essential deal points, it may turn out to be binding.

[1] Because US law varies from state to state, almost no general statement can be made about the law of all states. Rather than repeating this warning throughout this article, it is made once, here.

Due Diligence - Early in the process of the US deal formation, the buyer will begin its "due diligence" investigation. If the seller is well-organized, it will have gotten together 80-90% of the documents a thoughtful buyer will want to inspect and present them in an organized way – either physically in folders or in a "virtual" due diligence room on line. The buyer will use this information to formulate representations and warranties which it wants the seller to make in the contract. Inclusion of information in the due diligence materials does *not* by itself necessarily have legal consequences for the buyer. If the agreement is properly drafted, representations by the seller are enforceable even if they contradict information included in the due diligence documents. More on this topic below.

The European practice of permitting 3rd parties such as banks and 3rd party investors to rely on due diligence reports is not common in the United States. This is in part because US legal ethics prohibit a lawyer from capping his liability for malpractice. Permitting a 3rd party to rely on the report changes the nature of the investigation and the report itself – changes for which most clients will not want to pay. For example, a purchaser, particularly a strategic purchaser, will be much more aware of risks than a financial investor or bank. The lawyer would have to spell out all these risks if the financial investor were permitted to rely on the report.

The due diligence process (and its consequences) are quite different in the US than in Germany. No American lawyer makes a detailed list of the documents disclosed except so as to keep track of the procedure. The lawyer wants not overlook some important information but also not to irritate the seller by asking repeatedly for the same thing. The information disclosed in due diligence is almost irrelevant to the buyer except for purposes of crafting thorough representations. Information not contained in representations plays little or no role. German lawyers, on the other hand, make extensive, detailed descriptions of information disclosed because it can be used to defeat a post closing claim, regardless of the language of the contract.

US Contracts - Turning to the acquisition agreement itself, Americans are famous for their long contracts. There are many reasons for the great length and long articles have been written on the subject. The simplest explanation is a combination of literalism, common law and expensive dispute resolution. Americans are not at all comfortable with relying on statutory law to fill in blanks in contracts. Making this more burdensome, if a contract is clear from its language, a US judge will not try to determine what the parties really intended. He will enforce the contract as written. So American lawyers spell out the parties' agreement in great detail, covering as many contingencies as possible.

One possible exception to the American lawyer's unwillingness to rely on statutes is Rule 10b-5 of the Securities Exchange Act of 1934. It automatically applies to sales of stock and makes it unlawful for a person:

> to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

It is viewed as a sort of "catch all" representation on which a disappointed buyer may try to rely if it cannot find another representation on which to base a claim for damages. Since the rule applies only to stock, it has to be inserted especially if the acquisition is of assets, not stock. However, the buyer normally inserts it also in stock purchase agreements anyway.

CHOICE OF LAW

Most transactions involving stock or assets located in the US could nevertheless be made subject to German law. For example, a US stockholder can agree to sell his stock in a US corporation pursuant to a German contract. The transfer of stock in a US corporation or limited liability company is very simple and does not require the involvement of a "Notar" or any American equivalent. The transfer documents are not filed anywhere public. (No US state has a Handelsregister or equivalent.) Transfer of certain assets, especially real estate, *does* involve the law of the state where it is located.

STOCK VS. ASSETS

The general rule in the United States is that the seller wants to sell stock and the buyer wants to buy assets. This is because a stock buyer takes with the stock the complete history of the company, with all its old liabilities, known and unknown. The seller wants to be completely rid of these liabilities and the buyer wants to leave them with the seller. Even if the stock acquisition agreement is extremely detailed, some liabilities may not covered by the seller's representations and warranties. These could come back to haunt the buyer (and its lawyers who missed dealing with the risk). Assuming that the old liability is indemnified against by the seller, the buyer still has to find the seller, hope it has assets or insurance and that it will in fact indemnify the buyer. If the stock was purchased from multiple sellers, the buyer must find them all or hope that the agreement permits it to obtain the full damages from any one seller it finds (known as joint and several liability).

If the buyer buys assets, it may leave all the old liabilities with the seller, along with all its employees, litigation, pension obligations, etc. True, the assets must be transferred to the buyer. But this is usually either simple to do or at least not a large price to pay for the comfort of cutting off unknown liabilities. Assets requiring special transfer procedures include real estate, trademarks, patents and motor vehicles. Certain kinds of state issued licenses may also be subject to special procedures.

Even in an asset transaction, the buyer may end up with unwanted liabilities. The chances of this unhappy result increase if the buyer buys all the assets of the seller or a particular line of business and operates it unchanged and under the same name after the purchase. Then the buyer may well become liable as the successor of the seller. However such successor liability is limited to certain areas, mainly product and environmental liability. Environmental liability is also more likely if the buyer uses the land contaminated by the seller or uses the seller's plant post closing for some transition services. The buyer has a claim against the seller for the amount the buyer pays in damages, but as noted the seller may be hard to find.

In the United States if assets are purchased, the buyer is dealing with a corporate seller. If the seller is a major company selling off only part of its assets, the buyer can be certain the seller will be accessible to pay claims. But if the seller is small and selling all its assets, the shareholders may dissolve the company shortly after the closing. The extent of the liability of the seller, its board and shareholders after dissolution varies from state to state. In the best case for buyer, the seller will reserve adequate assets to cover potential liabilities and distribute only the excess amount to the shareholders. If too much has been distributed, the buyer can try to make the directors personally liable for their improper distribution and the shareholders liable for their portion of the distributed amount.

If the seller has multiple shareholders, the buyer may want to buy assets so that a minority shareholder cannot prevent the buyer from getting 100% of the target. If the assets make up only a part of the company, only the board need approve the sale, not the shareholders. If the assets purchased make up substantially all the assets, the shareholders may be able to approve or disapprove the transaction, but a minority shareholder can block the sale only if he or she has special rights by agreement with the other shareholders or by a special provision in the company by-laws or other corporate formation document. True, the purchaser of all but a small percentage of the shares (90+%) may squeeze out the minority, but this is a medium complicated procedure. US corporations are not split between the equivalents of GmbH's and AG's, so the procedure is essentially the same for all corporations. Widely held US corporations are subject to regulation by the Securities and Exchange Commission, but they are still corporations – the same sort of entity which may be used by a family to own a grocery store.

No US state gives a minority shareholder special veto rights. The holder of over 50% of the company's shares can make all decisions unless otherwise specially provided in some corporate document or shareholder agreement. So 25% ownership has no particular significance.

SPECIFIC CONTRACT PROVISIONS

Many aspects of US acquisition agreements are simply matters of what the parties agree. But others require special subject-matter attention.

<u>Employees</u> – As mentioned above, in the United States, absent a special agreement with a labor union, a seller may sell its assets and the buyer will be free to offer employment to the seller's employees or not. If not, the employees remain with the seller, which either continues to employ them or terminates them. The employees have no rights against the buyer. If the buyer does decide to hire employees, it must be careful not to violate any anti-discrimination laws in making its selection. For example it may not offer to hire only the employees under age 50.

American employees often do not have formal employment agreements. Even if they do, they cannot – as a practical matter - be forced to appear at work and none will feel obligated to appear. For example, if a contract requires the employee to give 30 days' notice of termination, the employer does not expect or even want the employee to come to work once the employee has given notice. The portion of the agreement which *are* enforceable regulate confidentiality and, to a limited degree, non-competition. But a buyer of all the stock of a company cannot force its employees to come to work, even if they have written employment agreements. If the buyer buys assets, it is not clear whether the seller can enforce the old confidentiality and non-compete provisions on the buyer's behalf. The buyer is best advised to make execution of a new agreement a condition to employing any of the seller's employees. If the buyer does not hire an employee of the seller, that old employee may well present a risk – for example that neither the new owner of the confidential information nor the old one can enforce the old confidentiality agreement.

If the buyer offers most or all of the seller's employees (or employees at a certain plant or line of business) employment, various kinds of adjustments may be necessary - such as allowances for vacation accrued but not taken and bonuses accrued but not paid. The employees often expect and get credit for their years of service with the seller.

Pensions – Retirement pensions are a benefit employers often offer. These pensions are highly regulated as part of the federal tax code, informally referred to as ERISA. ERISA compliance is a world to itself, even more complex and expensive than environmental laws (discussed below). The potential liability is enormous, especially if the plan is a defined benefits plan or a multi-employer plan. Health insurance is a similar employee benefit. The seller's historical health insurance costs may be no guide to the costs the buyer may face. These costs change frequently and the pool of employees the buyer hires may be quite different – older and sicker – than the larger pool they came from. Some large employers may self-insure and use insurance companies only to administer benefits.

Inventions – American companies often use a company-wide employment agreement with their employees. It normally requires the employee to give all his inventions to the employer for no additional compensation. This requirement is generally enforceable.

In the US, a company can own an invention or be the creator. But in Germany the inventor ('Urheber') is always a natural person who then licenses it to his employer. He might be contractually obliged to do so and have no other choice, but he will always be the 'Urheber'. The employer obtains only secondary rights (to distribute and so on, 'Nutzungsrechte', 'Vertriebsrechte').

Non-Competition – In most US states, an employee may be contractually prohibited from competing with the employer post employment for some period (usually 6 months to 3 years) without any special compensation. Some states, particularly California, are hostile to such restrictions. The seller of a company can however be restricted from competing with the company post sale. Most states do not require any special payment to permit enforcement of these restrictions.

NEW OWNER

Often the seller will assure the buyer that something has never been a problem and so the buyer does not need to investigate it or get special contractual assurance. There are several aspects where this rule does not hold true. (This observation is probably true in both the US and Germany, although German government administrators may well be more consistent in their application of laws.) For example:

- The owner is a local family, respected in the community. A new, especially a foreign, owner may not enjoy the same treatment.
- Any new owner may trigger new inspections.
- The seller may participate in a special government program for small businesses, minorities, women, etc. for which the new owner does not qualify.
- The product or intellectual property may be of special, national defense significance or otherwise subject to ownership only by US citizens.
- The purchased company taken together with the purchaser's other US companies could achieve a size which subjects it to increased regulation.

REMEDIES

Proving Authority – On rare occasions the person signing the contract on behalf of a corporation does not have the necessary authority and the corporation is not bound. No US state has a system like the German Commercial Register. Therefore, proving that the person or persons signing a contract can bind the company is more complex. This proof is usually provided by various certificates signed by other people, themselves with uncertain authority. As a practical matter, in the course of negotiating a transaction, the German negotiating team will meet enough of its US counterparts that the Germans will have a practical view of who has authority. But even that person may not have true authority. An American company will have to produce a package consisting of its formation document, certified by the secretary of state, its bylaws and board resolutions (possibly also shareholder resolutions) certified by the corporate secretary, and a list of officers with their specimen signatures, also certified by the secretary. If the transaction is large enough, counsel for the US company may reasonably be asked to produce a formal, legal opinion that the transaction is properly authorized and the officers signing are indeed officers with the needed authority. In the course of giving such an opinion, the lawyer should discover and either correct or disclose any defect which could cause the contract not to be enforceable. For example, the lawyer should note if the articles of incorporation prohibit the transaction (quite rare) or require special shareholder authorization or if the president had not been properly elected.

A US corporation does usually have a metal embosser used to create a raised, circular "seal" on paper documents. This seal has no legal significance (with certain exceptions, such as the length of the applicable statute of limitations). A notarization also has almost no legal significance. Sometimes it is required for a document to be recorded in public records, such as deed book registries. A US notary is not at all like a German Notar. Only the words are similar. If the representations in the contract are supposed to extend beyond the statute of limitations period applicable to normal commercial contracts, execution "under seal" may lengthen that period so that the validity of the representations does not end.

No Assets – Even if a corporation is legally bound by a contract, it may not have any assets to fulfill its obligations. No US state has any clear, formal requirements for minimum capital. A corporation may be formed over night with almost no money in the bank, certainly not enough to fulfill its contractual obligations. When in doubt, the other party has to take other forms of security, such as the pledge of assets, personal guarantees from third parties with real assets or a bank guaranty. A US company does not have to declare itself bankrupt.

Injunctions - A US judge starts from the assumption that a party who has breached a contract cannot be forced to undo the breach and properly perform. Instead, the judge will try to award damages sufficient to put the injured party in as much the same economic position as he would be if the breaching party had in fact performed. Only rarely will the court order the breaching party to perform or rescind the transaction. The most common exceptions to this "damages only" rule are A) if a party threatens to disclose a secret or use intellectual property of the other party or B) if a party threatens to compete with the other party in violation of its obligation. The court will then issue an injunction against the threatened breach. Extremely rarely another party will get an injunction preventing the purchase from being concluded. Also extremely rarely will a judge find the seller to have engaged in fraud and rescind the transaction.

An injunction is an equitable remedy, different from contract remedies. The most important difference is that a plaintiff with "unclean hands" will not get any equitable remedy. What constitutes "unclean hands" is very unclear, but it means that the defendant has reason to claim the plaintiff has not behaved fairly. Once the plaintiff has been found not to have clean hands, the court does not compare the damages suffered by each or the seriousness of their improper actions. An equitable remedy will not be granted.

Damages - The measures of damages available to the injured party - and particularly the legal terms used to describe the damages - vary from state to state. Generally recognized terms are "direct, indirect, consequential and punitive damages." In a nutshell, direct damages are damages every businessman would expect to result from breach of that type of contract. Consequential damages are those which are foreseeable only because the breaching party is familiar with the expectations of the non-breaching party, i.e. the damages are foreseeable but only because of familiarity with the particular case. A buyer may not want the seller to know buyer's plans for the target because that knowledge could cause seller to raise the price. But this secrecy will allow the seller to deny that it could have foreseen the special consequences of its breach and so prevent the injured buyer from collecting more than direct damages. Incidental damages are the (usually minor) costs of substitution, storage, brokerage, etc. Punitive damages are those which may be only vaguely related to the amount of injury suffered and are intended to deter similar behavior by others or repeated behavior by the particular breaching party. Note that damages in contract and tort situations are quite different. Damages in a tort setting need not be foreseeable at all in order to be recoverable. Contract damages must be foreseeable. So contract damages are already limited. Damages that are a direct result of a contract breach are not recoverable unless they are foreseeable. No court will award damages which are merely speculative or not caused by the default. The plaintiff has the burden of proving the damages and experts are often brought in to testify on this subject.

A typical provision inserted in acquisition agreements by the seller requires the buyer to waive a long list of types of damages. This is a tradition based on the ignorance of most commercial lawyers of the meaning of the terms. If the seller's lawyer refuses to be educated, the buyer can ask just what SHOULD be the proper measure of damages if the seller breaches. Often the only meaningful types of damages (such as lost profits) are ones the seller wants the buyer to waive. For example, seller often wants buyer to waive lost profits. But the price of the item being purchased may have been fixed precisely based on the profits it would likely generate. Similarly, the price may be 8 (or 10 or 12) times projected earnings but the seller may want buyer to waive claims for such multiples. The proper question is whether the breach affects the stream of income long term or not. If yes, then applying the multiple is appropriate. If no (for example when the defect can easily and quickly be cured), then no multiple should be applied. A blanket waiver of the multiple cannot be justified by logic.

Just because a contract has a long list of remedies does not mean that these are the only remedies unless the parties so agree. Furthermore, remedies are divided into contractual and tort remedies. Certain tort remedies cannot be waived, such as fraud in the inducement, i.e. material, misleading statements which are not part of the contract but which are the basis for the injured party's decision to enter into the contract.

Penalties - German lawyers often write contracts which impose financial penalties on the breaching party. These penalties are simply not enforceable under US law. At best, the parties can agree that a true measure of damages is difficult to determine and the parties have agreed on a particular amount as "liquidated damages." Whether these damages can be addition to other damages for the same breach requires research of the particular state's law. The amount cannot be unreasonably high.

Scope of Indemnity – US contracts normally contain limits on the dollar amount of the buyer's claims. The contracts also have minimum amounts (often meaningless because the cost of litigation is so high, that claims for small amounts are not worth bringing). The high and low limits may apply differently for different sorts of claims, such as product liability and environmental. The limits may (by their terms) not apply to intentional or known misstatements. Once the minimum amount of claim has been exceeded, can the claim cover the full claim or only the excess? The problems with claiming the full amount are: a) the buyer can usually get broader representations from the seller if the seller knows it will not be charged with every little error; charging from dollar one is inconsistent with that arrangement; the two parties do not really share the risk; and b) the buyer is more likely to make every little claim, not knowing whether the claims will accumulate to exceed the minimum, thereby straining the relationship between buyer and seller. This is particularly important if seller's principals continue to play a role in the company (usually as managers) post closing.

Timing of Claims – Besides the survival of claims generally, buyer may or may not be obligated to make claims quickly upon discovery. If the claim is based on a 3rd party claim, then of course seller has to be informed so seller can take over the defense. But if the claim is simply against the seller because of a misrepresentation, then requiring that the claim be made quickly upon discovery can cause unnecessary irritation. Buyer may not know initially whether the breach will create serious damages. To the extent seller is prejudiced by buyer's delay in making the claim, the claim should, of course, be reduced. If a claim is made prior to the expiration of the representation, can it be augmented post expiration – either because the damages increase or similar breaches of the representation occur?

Bankruptcy - American contracts almost always include a clause which says that a party in bankruptcy (or other economic distress) is, by reason thereof, in breach and the contract ends. This provision (known as an "ipso facto" clause) is also simply not enforceable. Bankruptcy and its effect on US contracts is a topic for its own article. Very simply stated, the party in bankruptcy has the option of enforcing or walking away from its on-going contracts. The non-bankrupt party does not have this choice. Very often the same people who ran the company before bankruptcy keep control of the company while in bankruptcy and after it has been reorganized.

If the seller files for bankruptcy, the buyer's rights of indemnification are worth little or nothing. If a creditor is paid by the bankrupt for an old debt within a short period prior to the bankruptcy, the amount is called a "preference" and the creditor must repay that amount to the trustee in bankruptcy. The funds are then spread out equitably among all the creditors. However the creditor may never be asked for the funds and it is always better to have the payment than not.

Sandbagging - Many states permit a buyer to rely on the seller's representations even if the buyer suspects or even knows that they are not correct. This rule comes as a shock to German lawyers not very familiar with US law. It permits the buyer to make a post closing claim for damages resulting from a breached representation even if the seller has disclosed the information constituting the breach prior to the closing, but not as a formal exception to a contract representation. It also applies if the buyer knows of the problem but the seller does not. This procedure is sometimes called "close and sue." The buyer is permitted to rely solely on the language of the contract and the disclosure schedules attached. To do this, the contract must contain a provision permitting such reliance. Being able to ignore information informally disclosed (such as in a due diligence room) changes the whole nature of the due diligence procedure and lowers the burden on the buyer and its legal and accounting team. Making a detailed catalogue of the documents presented and reviewed is not necessary in the United States and reduces the cost of the process.

Survival - If the contract is silent on the survival point, the seller's representations and warranties expire at the closing. So the buyer is left without a post closing remedy if he gets less than what was represented. Therefore the contract states that the reps and warranties specifically survive the closing. For how long they survive is usually a matter of intense negotiations. For some risks, the buyer will want the risk to stay with the seller permanently. To accomplish this, buyer's claim cannot be based on a representation. It has to be based on the fact that the seller affirmatively kept the liability. Another helpful contractual mechanism would be to obtain seller's covenant (promise) – such as to hold buyer harmless from certain risks or claims - which is not breached until after the closing.

State laws on applicable statutes of limitations vary. Generally speaking, the length of the applicable period for bringing a claim can be shortened by agreement but not lengthened. The fact that the injured party did not know about the breach does not extend the time period unless the other party actively hid the breach. Making matters more complex, the state where a claim is brought (not the state whose law applies to the agreement) determines the length of the applicable statutory period. As a result, even though the agreement may state that buyer has 6 years to bring a claim, if the suit can be properly brought in a state where the statutory period is 3 years, the seller may have a good defense.

Litigation - Litigation over a commercial contract is always expensive and painful. It distracts from the purpose of the company. However it is much more so in the United States than in Europe. (Largely this is due to extensive pre-trial discovery and deposition taking, important parts of US litigation.) In discovery, each party may force the other to search for and disclose all sorts of its documents which could bear on the dispute.[2] Making matters worse, the winner of the dispute has to pay its own legal fees and the loser has no disincentive to claiming large damages from the other party, even without a serious basis for the claim. Thus, the range of possible awards can be very large. These factors mean that Americans put more emphasis on clear contracts or financial and contractual arrangements which make resorting to litigation less likely. Arbitration is viewed as not being significantly different. Most American companies do not like the idea of being before a jury and so will be willing to waive trial by jury. The Americans do not know that Germans are even more fearful of juries and that the threat of a jury trial could be used to force a settlement disadvantageous to the Germans.

Germans, particularly large German companies, may try to create US contracts which follow a standard company policy. US law can be quite flexible and generally honors the freedom of the parties to contract. However, if a judge has to interpret a contract provision which, although standard in Germany, is unusual here, the outcome is much less certain than if the contract contains more standard US provisions.

[2] Another instance of forced disclosure is so-called Hart Scott Rodino "4c" documents. If an acquisition involves more than about $70 million, a filing has to be made with the Justice Department or Federal Trade Commission. The filing includes all documents in which the parties address the possible market effects of the acquisition. Often these documents suggest that the purchaser can raise prices or otherwise control the "market" post purchase. If so, they can be used by the government to block the transaction.

MISC.

Vague Words - While US lawyers write long, detailed contracts, they are often filled with terms which seem precise but are not. Sometimes this is because the lawyer is lazy or sloppy, but sometimes it is because American lawyers have come to the conclusion that it is very difficult to be more precise. These terms include reasonable, commercially reasonable, best efforts, best reasonable efforts, best commercial efforts, best commercially reasonable efforts, material, and good faith. A bit less vague are the terms knowledge, best knowledge, and best knowledge after due investigation. Gross negligence is also often used and means as a practical matter that a judge or jury suspects but cannot prove that the actor intended the action and its consequences. As to knowledge, a standard US technique is to name particular employees who are charged with making an investigation. This protects the seller from having to ask low level employees about what they know. On the other side, buyer wants to be sure that "knowledge" includes the knowledge of line operators, not just executives who may never have visited the plant floor.

Corporate Housekeeping, Details – American corporations vary greatly in their attention to formalities and documentation. Publicly held companies have to comply with extensive federal regulations and will be scrutinized closely (and possibly sued) by their shareholders. Decisions and relationships have to meet minimum standards of formality and records are carefully kept. In contrast, however, family owned companies do not need to worry about shareholders suits and often view legal formalities as a waste of money. Therefore, dealing with a family owned corporation will present very different problems and may require substantial "corporate housekeeping" – meaning locating long misplaced documents or creating them years after they should normally have existed.

Buying a small piece of a large, publicly held corporation will present the problem that the target assets were not important enough to warrant much attention. For example, the sales and expenses of that line of business may be too small to show up in the corporate balance sheet. If the seller is a private equity fund, the managers may not have much familiarity with the company's business.

CLOSING SUMMARY

Although German and US business people think they speak the same language, deal with similar balance sheets, and produce similar products and services, the two legal systems introduce concepts which are quite different, even if they use similar terms. Germans buying companies in the US can certainly apply German standards of care and collective decision making. But if they apply German procedures for doing due diligence, they drive up the price of the process without any resulting benefit. On the other hand, they may need to apply the funds saved in that process to drafting precise, thorough representations and reviewing schedules attached to the contract. [3]

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[3] In the interest of brevity, comments have been deleted about many topics, including one and two-step transactions, special assets such as real estate, environmental law, tax, including the special tax characteristics of the target, visas, wiring funds and the role of bank guarantees in the US.

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