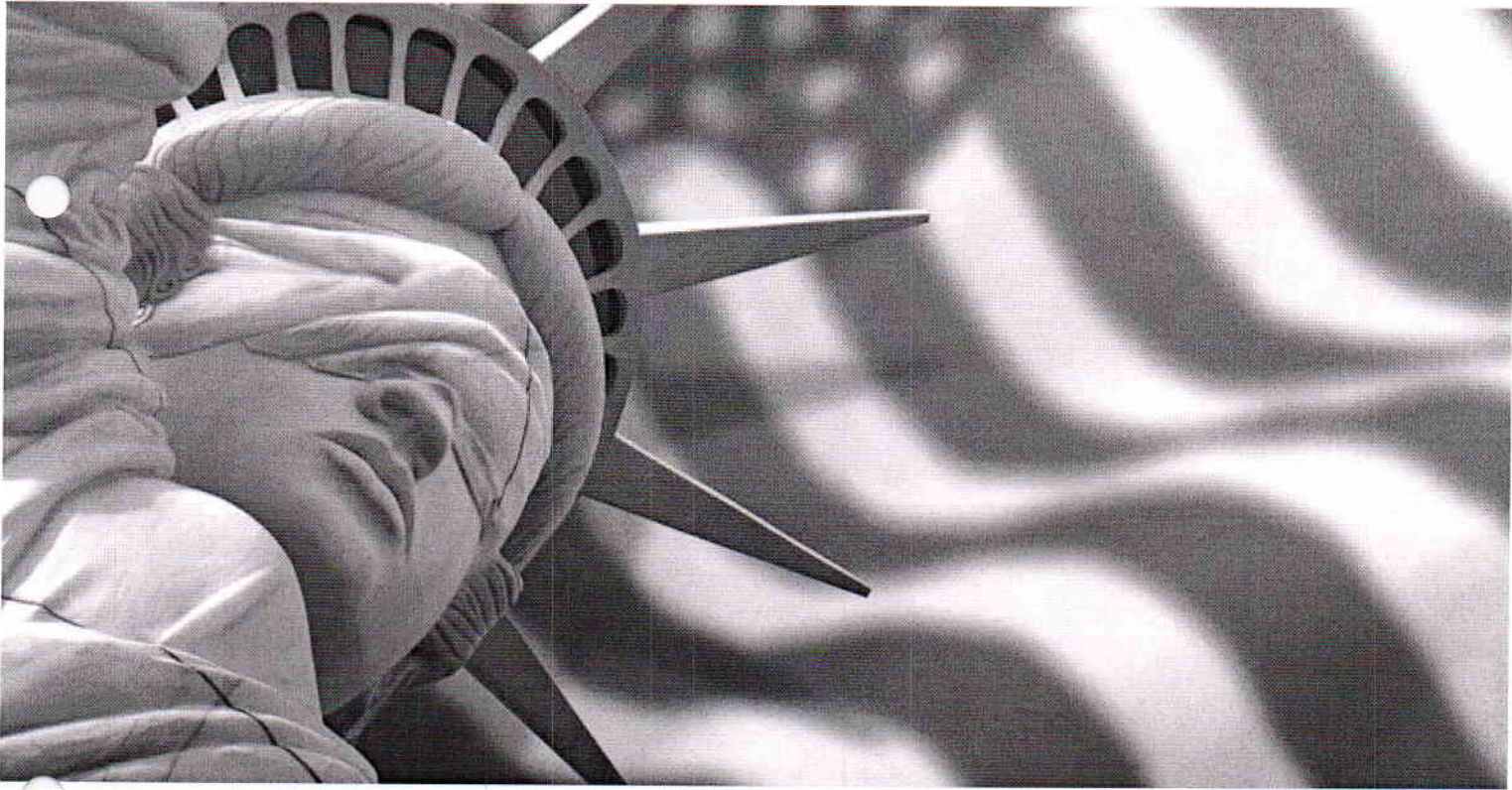


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The German Chamber Network 



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M&A' Red Flags for the United States

Red Flag 1:

Management may find the current environment tempting to purchase companies out of bankruptcy. Thus, we like to draw the reader's attention to the case MPI Acquisition, LLC v. Northcutt, where the U.S. court held that federal bankruptcy law preempts state law successor liability theories, so as to bar a plaintiff from bringing a successor liability suit against a company that had purchased assets pursuant to a bankruptcy court order declaring the assets free and clear of liabilities. But be aware that bankruptcy court orders do not in all cases assure immunity from successor liability claims under state law, and that the language in the bankruptcy court order is very important in protecting the buyer against such claims. To be on the safe side, we strongly recommend to seek additional protection against successor liability claims by including in the order approving the sale a reservation by the bankruptcy court of jurisdiction over any such claims.

Red Flag 2:

Agreements for the acquisition of a business commonly contain "material adverse change" provisions, which operate to allow the buyer to "walk away" from the transaction if there is a "material adverse change" in the business being acquired. But be aware that U.S. courts will not always construe commonly used legal terminology in a manner consistent with the expectations of the parties. Thus, do not just rely on generic "boilerplate" wording, take the time to draft specific language tailored to address the particular concerns of the parties.

Red Flag 3:

The U.S. court decision Cincom Systems, Inc. v. Novelis Corp. serves as a good reminder that an important step in structuring a transaction is analyzing whether the transaction will trigger the need to obtain the consent of third parties that have contracts with the target company. Where patent or copyright licenses constitute material assets of the target company, that analysis should take into consideration not only the language of the license agreements, but also the federal law presumption against assignability of patent or copyright licenses.

Red Flag 4:

In times of increasingly harsh measures taken by the U.S. Department of Justice or the SEC (see the recent settlement re Daimler AG – the complaint can be retrieved at the US-blog www.usa-recht.de), against violations of the Foreign Corrupt Practices Act



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(FCPA), it is a must in a purchaser's pre-acquisition due diligence that questions get asked such as "Does the target have an FCPA policy, and can it produce evidence of that policy being enforced, with FCPA training?" or "How robust are the target's accounting and compliance systems?" or "How frequently must the target interact with foreign regulators to obtain licenser, or obtain governmental inspections?"

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