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## Cross-Border Restructurings in the USA

With GDP rising 2.4% in 2014, the US-economy is showing strong signs of a full recovery after the financial crisis. This positive development is mainly driven by a steep rise in consumer spending (about 4.3%) and at the same time an unemployment rate at a record low (for the last decade) of 5.6%. However, with a lifting of the interest rates looming on the horizon and the appreciation of the US-Dollar weighing heavy on the export oriented industry, the need for restructuring and new chances for distressed M&A-transactions might wait just around the corner. Our experts Dr. Christoph Lange (Baker Hostetler) and Dr. Ruediger Theiselmann (WELLENSIEK) will give insight on what you need to know about restructuring projects under US-law.

*Are there any signs in the market that German companies might initiate restructuring proceedings relating to their US businesses?*

**Theiselmann:** The recovery story that the US-market wrote in 2014 was very impressive indeed. However, it seems that currently entrepreneurs are eying the market with mixed feelings. Sales in the retail industry, for example, were in decline for the third month in a row in February – always keeping in mind that the private consumer market makes up 2/3 of the American GDP. If the FED really lifts the interest rates in June and the oil price keeps falling, the effects for the overall market environment are not yet foreseeable.

*Do you have distressed clients in the US at the moment?*

**Theiselmann:** We have just recently advised a German holding company in its financial restructuring negotiations with its creditors. The banks were insisting on a legal opinion, to be included in the restructuring plan, about the need for the American subsidiary to file for bankruptcy. Our part was to coordinate the information exchange between the holding and its advisers setting

up the re-structuring plan and the local lawyers and accountants assessing a potential insolvency situation for the subsidiary.

*Can you name some particular characteristics of US-insolvency law from a German perspective?*

**Lange:** Most striking is the fact that in the US you have no official insolvency reasons, i.e. there is no specific rule requiring filing for bankruptcy protection. Typically the management of an American company will file for bankruptcy protection in case of excessive indebtedness but this is not a statutory obligation. Companies and its advisers often make use of insolvency proceedings as a strategic means, e.g. to try and force a debt restructuring on its creditors or to terminate rental contracts or collective bargaining agreements.

*Mr. Lange, could you name potential threats for the local management to be aware of?*

**Lange:** The fact that insolvency reasons do not exist under US-law does not mean there are no liability risks for a company's directors. At the latest when a company en-

ters the „zone of insolvency“, directors are subject to fiduciary duties. For example, a director may become liable creditors if they suffer damages because of a late filing for bankruptcy.

*How can the management avoid such risks?*

**Lange:** Management can comply with its fiduciary duties by looking for alternatives to the filing of bankruptcy proceedings. In a liquidity crisis a timely restructuring of the company's financing basis might lead the way out of the distressed situation. This might be combined with resolving operational problems as well. In the end, out-of-court restructurings are normally more likely to create new value for the stakeholders than forced restructurings in a bankruptcy context.

*Do you see special opportunities for German companies in the US M&A market?*

**Theiselmann:** Yes, especially the oil and gas industry and related suppliers could become interesting targets. If the oil price keeps its low level a lot of small and medium sized players, in particular from the shale industry, will feel rising pressure. Such situations create consolidation potentials and the US distressed M&A market traditionally holds huge opportunities.

*What do foreign investors have to look out for when acquiring a company in a distressed situation?*

**Lange:** A thorough due diligence is key to an orderly M&A process; insofar the most important aspects are: what contracts and what liabilities and/or hidden liabilities exist? Often an acquisition after the official opening of insolvency proceedings is preferable to an out-of-court acquisition.

*Why is that?*

**Lange:** Because only a bankruptcy court can guarantee an acquisition free from encumbrances („free and clear“). That is why, normally, the target will file for bankruptcy first and then the actual acquisition will be carried out within the insolvency proceeding. Typically, the bankruptcy court will determine special rules for the acquisition process, e.g. a public auction. The investor will have to choose between becoming the „stalking horse“, i.e. the main bidder, determining the ground rules or keeping in the background as a „normal“ bidder.

Dr. Christoph Lange is Attorney-at-Law and partner at BakerHostetler in New York. He focuses on cross-border M&A-



transactions, with a special focus on German clients. He also advises German subsidiaries on all business law matters under US-law.

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LENSIEK in Frankfurt am Main. He heads the cross-border team and has advised in and coordinated international restructuring projects in terms of both legal and financial aspects. He focuses on advising management, supervisory board members, creditors and investors in corporate and insolvency law related transactions.