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Hedging against Non-performance in M&A – Escrows, Legal Opinion etc.

ALEXANDER LOOS

5.1 Protective purposes

After the closing of an M&A transaction the contracting parties will need protection against the counterpartys' non-performance, be it in case of deferred payment of the consideration payable by the buyer or in case of any warranty claims payable by the seller. Lenders who are expected to finance post-closing capital increases or subsequent instalments for the purchase price or any earn-out will seek confirmation that the target, its business standing and the buyer's ownership title are still intact before releasing any payments or before waiving certain pledges.

There are two different kinds of protective means for hedging against such risks of non-performance, i.e. informative guarantees[314] and financial securities[315].

Informative guarantees are primarily important to the buyer and its lenders. In the run-up to a transaction and until closing, their access to information about the target may be limited. The seller may refuse to render information to the buyer's due diligence about pending patents and especially, about know-how. The time to prepare the deal may be too short for a comprehensive due diligence exercise. The lender may find the results of a due diligence report unsatisfactory and so the buyer's side may have to rely on confirmatory due diligence after the closing or, even more difficult, may have to rely on the factual experience made with the target and its business in the months after the takeover. Therefore, information gathered by either a confirmatory due diligence or by factual experience while managing the newly acquired target may need to be ascertained by experts confirming their findings to the buyer's lenders or to the acquiring entity itself, before the buyer is willing to assume full financial responsibility or finance new investments for the target. If the contracting parties agreed to an earn-out, its calculation may require confirmed information or a qualified analysis providing reliable protection to the acquiring party and its lenders. A post-closing adjustment of the purchase price may similarly require confirmed information.

Financial securities serve the interest of the seller to cover his counterparty risk for any unpaid instalments of the purchase price, for payment of an earn-out or for getting released from old

314 Meaning a guarantee for the existence or absence of certain facts/risks, see below 5.2.

315 See below 5.3.

bank debt of the target taken over. Such need for protection will make the seller highly interested in immediate access to liquid funds, which have either been deposited in an escrow account or will be made available by financial institutions with impeccable financial standing. In certain cases, the acquiring party may even find financial security attractive in order to ensure that any subsequent warranty claims may get fulfilled by the seller. Especially if the seller was close to insolvency or suffered a financial crisis when signing the deal, or if reductions of the purchase price (quasi the opposite of an earn-out) were agreed, but still needed to be determined; in such case financial security may provide the best protection. Consequently, the buyer may wish that the seller provide bank guarantees or sureties from either financial institutions or from the parent company with better financial standing. Due to the reporting standards which force parent companies to disclose outstanding sureties, the parent company may prefer to issue a binding comfort letter (*Patronatserklärung*) to the buyer.

Sometimes either party may consider its position as sufficiently protected if it receives a bank's comfort letter for the buyer's purchasing vehicle or for the seller.

5.2 Informative guarantees

Informative guarantees may be typically contained either in a due diligence report or in opinion letters, regardless of whether they were issued by the seller's or by the buyer's counsel.

(a) Due diligence reports

Where the sale of a target is transacted under time constraints, especially if a series of due diligences carried out by different interested parties is considered as too time consuming, the seller may elect to prepare the sale of the target on the basis of a vendor's due diligence report. Usually, German sellers have such a report prepared by a reputable auditor's firm for the commercial and tax aspects and by a reputable law firm for the legal aspects. The seller would make such reports available to all preferred bidders in its auction for the sale of a target and thereby would save the bidders the effort of performing their own individual due diligence.

For the buyer this means that it can rely on all factual findings of these reports and expect the auditors and law firms, which issue the vendor's due diligence report, to guarantee their findings and statements. This raises the question of whether auditors and lawyers as instructed by the seller may grant to the buyer any such guarantees as if they were hired by the buyer. Furthermore, the buyer needs to decide whether it relies on such findings and even more so on the absence of any alarming results reflected in the report provided by the seller. Such reliance may be based on an implied guarantee or even on the basis of an explicit mandate agreed between the acquiring party and the seller's consultants or lawyers.[316]

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316 See below 5.2 (d).

If a law firm has been instructed by the seller to prepare a due diligence report the members of such law firm may not act as advisors to the buyer according to German law.[317] German lawyers are not permitted to act for conflicting interests as between the seller and buyer in the same matter. The individual loyalty of a lawyer is based on compulsory German law, including protective aspects under constitutional and criminal law, and therefore cannot validly be waived by contract or by client instructions. However, under special circumstances different teams or individuals of the same law firm may act for diverging, competing or even conflicting interests as between the buyer and seller.[318] Such exceptions require that the seller and buyer provide written waivers, based on full information about the conflicting instructions. However, such waivers enable the law firm to accept conflicting instructions only, if the resulting legal services do not "jeopardise mandatory principles of German statute" (*"entgegenstehende Belange der Rechtspflege"*).

"Such mandatory principles of German statutory law include the independent, confidential and straightforward protection of the client's interest" by the lawyer. These principles may be deemed jeopardised if different lawyers of the same law firm are acting for competing or conflicting interests of different parties at the same time and for the same project. According to German case law, the fact that one firm acts for both the seller and the buyer at the same time by guaranteeing the correctness of a vendor's due diligence report will at least require that within such law firm different individuals act for each party and that they do not have access to the same documents. For the latter, the law firm must try to establish so-called "Chinese Walls". However, Chinese Walls are not yet recognised by German case law as an instrument to ensure respective confidentiality.

Consequently, a law firm may not at the same time issue a due diligence report on behalf of the seller and then guarantee the correctness of such report to the buyer. It is, however, possible to guarantee the results of the seller's report if such guarantee is issued to the buyer by a different team of lawyers of the same law firm, e.g. by way of an opinion letter.

(b) Opinion letter

In opinion letters law firms typically are expected to guarantee towards the addressee and sometimes even for the benefit of other parties that certain facts described in such letter lead to specified consequences under the applicable law. Due to the law firm's risk exposure associated with such guarantees, law firms tend to water-down the contents by enumerating assumptions on which they rely, i.e. for which they do not take responsibility. Further, the issuers of opinion letters make all kinds of reservations regarding their legal statements and their liability.

The subject of such opinion letters may vary considerably. Most frequently the buyer's lender has a dominant interest in obtaining reliable confirmation about the buyer's clean title to

317 Sec 43 para 4 BRAO.

318 Sec 3 para 2 sentence 2 BORA.

the target shares, about the validity of any pledges or liens granted by the buyer to the lender or about the binding and enforceable effect of certain parts of the contract documentation.

The buyer's interest to hedge his business position following the M&A transaction, widely depends on the potential liability which the law firm issuing the opinion letter is willing to accept and on the extent of liability such law firm is able to satisfy. Therefore, the wording of opinion letters is of utmost importance. The wording is decisive as to whether the opinion letter is subject to excusable error or whether it represents an abstract guarantee, regardless of the issuer's chances to avoid liability.

In principle, the wording of an opinion letter may be equivalent to an abstract guarantee. Under German law this requires that the opinion letter contains the explicit wording that the issuer assumes responsibility for his statements regardless of any intentional or negligent mistake.[319] As a result of the far reaching liability consequences for the issuer, the opinion letter may only be considered to be an abstract guarantee if it contains clear language that the issuer assumes such additional responsibility.[320]

However, the issuer of an opinion letter may restrict his liability in a very flexible way.[321] Even if such limitations of the issuer's liability in the wording of the opinion letter were contrary to the instructions received from his client and/or from the beneficiary of the opinion letter, the only source of the issuer's liability will be the opinion letter as such. Consequently, opinion letters containing an unexpected limitation of liability do not represent full contractual performance by the issuer. The restrictions for his potential liability, however, will be regarded as valid.

Reliability of an opinion letter is as good as the issuer's ability to remedy any damage caused. Consequently, the value of an opinion letter greatly depends on the amount and extent of the insurance cover taken out by the law firm which provides the opinion letter. According to statutory standards, German lawyers are obliged to provide insurance cover for each singular case and mandate of at least EUR 250,000. Major law firms usually maintain insurance cover up to the maximum available in the insurance market, i.e. an aggregate annual maximum in the range of EUR 400 million. Auditors' firms tend to annex to their legal opinions, if they issue any at all, their general terms and conditions for auditing services. Typically such liability caps amount to less than EUR 5 million.

Although opinion letters have been widely accepted in German M&A transactions as a protective means for the respective beneficiary for more than 20 years now, there is not a single case in published case law in which a German law firm has been successfully held liable on the basis of an opinion letter issued. This may be due to the fact that most of the beneficiaries neglect to carefully analyse the limitations of liability contained therein.

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319 BGH, 29 November 2006 – VIII ZR 92/06, NJW 2007, 1346 (1348); Staudinger, Kommentar zum Bürgerlichen Gesetzbuch, 2004, sec 276 no 143; Schulze/Dörner/Ebert, Bürgerliches Gesetzbuch, 5th ed 2006, sec 276 no 23.

320 BGH, 29 November 2006 – VIII ZR 92/06, NJW 2007, 1346 (1349).

321 Sec 242 and sec 238 BGB.

(c) The due diligence report as hedging security for lenders

The due diligence report as produced by buyer's consultants does not provide a direct protection for the lenders. Instead it is a document regularly designed for the buyer only and exclusively meant for the buyer's preparations of the transaction, especially for assessing risks and calculating an appropriate purchase price.

Despite the fact that the due diligence report is designed for the protection of the buyer, the due diligence report under German law also has some protective meaning for the banks financing the transaction. Such lenders' need for information may be satisfied by the report which was prepared by the buyer. In case it was obtained by the buyer from its advisors with the intention to inform inter alia the lenders, then such report may also impliedly function to protect financing third parties. The same applies to any vendor's due diligence report presented to the buyer and, as all parties of the transaction are aware, to the buyer's lenders. The same implied protective effects may be attributable to a respective opinion letter, regardless of whether it was provided by the seller's counsel to the buyer for confirmation of a vendor's due diligence report or made available and issued by the buyer's counsel upon instruction of the buyer and with a view to potential lenders of the acquiring party.

(d) Third party protection of due diligence reports and opinion letters

Under certain conditions a due diligence report or an opinion letter may have protective effects also for third parties. According to German judicial practice a third party is deemed to be impliedly protected, if

- the party ordering the issuance of the report or opinion letter has a special interest to use it for the protection of such third party,

- the contents and the purpose of the opinion letter or due diligence report make it apparent that such interest of the ordering party to protect third parties was thereby duly reflected, and

- the instructions given by the parties to issue the due diligence report or the opinion letter were based on the mutual intention to have the third party protected as well.[322]

However, according to German case law the number of third parties which are impliedly protected must be seen as limited and needs to be interpreted in a restrictive manner.[323]

A third party may only be counted among those few parties protected by a due diligence report or by a legal opinion, if the issuer (i.e. regularly the law firm instructed) was sufficiently

322 BGH, 20 April 2004 – X ZR 250/02, NJW 2004, 3035; BGH, 2 April 1998 – III ZR 245/96, NJW 1998, 1948 (1949).

323 BGH, 30 October 2008 – III ZR 307/07, NJW 2009, 512 et seq; BGH, 20 April 2004 – X ZR 250/02, NJW 2004, 3035; BGH, 2 April 1998 – III ZR 245/96, NJW 1998, 1948 (1949); BGH, 26. November 1986 – IVa ZR 86/85, NJW 1987, 1758 (1759).

informed that according to the (implied) contents of its instructions, the report/opinion letter was intended to be used vis-à-vis such third party and, if so, could be expected to be decisive for such third party's business decision on the intended transaction. If for example the due diligence report contains recommendations for the transactional approach of lenders, then the report is to be deemed as being protective for such lenders.[324]

For a vendor's due diligence report such protective effect for the benefit of third parties including at least the acquiring party, is inherent, because the report was meant to abbreviate, facilitate or even to make redundant the due diligence exercise of the buyer. As far as third parties are to be included in the protective range of a due diligence report or opinion letter, the issuer is inevitably interested in limiting its liability to the extent possible.

(i) Validity issues under German law on general terms and conditions

An exclusion of liability based upon general terms and conditions in the contractual relationship between the instructing transactional party on the one hand and its law firm on the other is invalid under German law because such exclusion is contrary to the basic allocation of risks under the statutory standards.[325] A one-sided exclusion of such liability in any general terms and conditions attached to a due diligence report or attached to an opinion letter would not be binding because it lacks the necessary declaration of acceptance by the other party.

(ii) Limitations of liability

The issuer of an opinion letter or a due diligence report can avoid liability vis-à-vis third parties by agreeing with the client that any such shall be limited by listing the third party beneficiaries and excluding any others. Even without listing the third party beneficiaries, it is possible for the issuer to limit respective liability by agreeing explicitly on the purposes and how to use the opinion letter or the report. Such explicit limitation of liability by focusing on specified and explicitly agreed purposes for the subsequent use of the opinion letter, validly excludes that any liability may arise vis-à-vis other parties by using the report or opinion letter for other than the agreed purposes.[326] In addition, it is advisable for the issuer of the opinion letter or the due diligence report to enter into an agreement to limit the issuers' liability by agreeing with the client that the opinion letter or report may not be used vis-à-vis third parties, except where the issuer has entered into a respective agreement with such other third party; such agreement between the issuer and the third party then may validly contain limitations of liability covering the degree of negligence giving rise to liability, the kind of damage excluded from such liability and a limitation by amount.

324 Sassenbach, Anwaltsblatt 2004, 651 (652); Zugehör, NJW 2000, 1601 (1604).

325 Sec 307 para 2 no 1 and sec 310 para 1 sentence 2 BGB.

326 BGH, 8 June 2004 – X ZR 283/02, BB 2004, 2180 (2181).

5.3 Financial securities

In order to secure one transactional party's future claims for payment of an earn-out or of a further instalment of the purchase price or, alternatively, for a partial refund of the purchase price, informative guarantees[1)] will not be sufficient. Claims for payment are generally secured by payment guarantees or by sureties *(Bürgschaften)* issued either by banks or by parent companies of good standing. Such sureties differ from guarantees insofar as the beneficiary can only sue for payment under a surety if the primary payment claim – as secured by the surety – was established as being fully justified regarding its cause of action and its amount. In some cases even the beneficiary of a surety is obliged to make a first claim against the primary debtor *(Vorausklage)* and only thereafter against the issuer of the surety.

In very rare cases, the seller requests that before execution of the transaction an interested buyer should provide proof that the purchase price can be paid. Typically this is done by a letter of comfort issued by the buyer's bank. In German law there is no statutory basis for a letter of comfort. Hence there is a broad variety of wordings used for this purpose and the wording as such is decisive for any such letter of comfort either being not more than a simple, non-binding opinion of the issuer "that the buyer will be able to pay the purchase price" or a binding and fully enforceable confirmation that the bank accepts liability for the buyer's future (mostly limited in time) ability to pay an amount specified by a certain maximum.

Usually the buyer and the seller are fully protected if performance by either side becomes synchronised in the closing. Consequently, each party is in a position to make its own performance conditional on the counter performance of the other party. This protection, however, is lacking, if the parties agreed to defer part of the performance until a later point in time or if it is impossible for the parties to determine the amounts or the specific performance when contracting; typically this is the case where an earn-out has been agreed or where the buyer may subtract certain amounts yet to be verified from a subsequent instalment of the purchase price, e.g. a loss suffered by the target from litigation, which was still pending at the time of the execution of the M&A contract, but that will become res judicata thereafter. Wherever payment claims of either party are determined only after the closing or shall be payable after the closing though the amount has already been determined, the respective creditor will request financial security to protect its claims.

(a) Escrow accounts

If the maximum amount of a deferred payment can already be specified while the payment date yet remains uncertain at the time of signing of the M&A contract, such amount will typically be deposited into an escrow. In principle there are three different types of escrows, commonly used in German M&A:

- appointment of a notary public as trustee and as the only party to dispose of the deposit,
- appointment of a neutral third party as trustee and sole account holder,

– a joint account of all parties concerned (debtor and creditor(s)) with a bank.

(i) Notarial escrow accounts

Under German law, the notary public is defined as the "independent holder of a public office" and thus is deemed "neutral" towards the parties contracting before him. It is one of his typical professional duties to receive and allocate funds on behalf of contracting parties. Cases where notaries did not administer their functions as trustees properly are extremely rare. Hence, there is almost no case law. Since notaries typically function as neutral trustees, their professional liability insurance covers any deficient administration of an escrow account and even in (generally not insurable) cases of wilful intent, the (compulsory) association of notaries *(Landesnotarkammer)* provides insurance cover in order to make good the inflicted damage, if any.[327] The compulsory minimum insurance cover for a notary amounts to EUR 500,000, for intentional misconduct EUR 250,000. Every notary is free to increase insurance cover in general or for individual transactions. Respective additional premiums vary between 0.6 and 1.2 % of the amount covered. A notary public in Germany is also entitled to levy a special "collecting fee" *(Hebegebühr)* which accrues upon receipt of the funds entrusted to him. If, for example, such funds amount to EUR 50 million, the notary's collecting fee totals EUR 125,037.50. For funds of EUR 60 million, which is the maximum for calculating the capped collecting fee, EUR 150,037.50 will accrue. Most of the parties to an M&A transaction may find this too expensive, although it should be considered that such fee represents less than 0.3 % and any mishap with an escrow deposit – be it an incorrect allocation of funds or delayed disbursement thereof – may easily cause higher damage.

(ii) A mutual third party trustee

In many cases the parties agree to appoint an entire law firm as trustee for the subsequent allocation of funds deposited in an account solely handled by the trustee.

Such arrangement is based on the assumed neutrality of the trustee and on parallel trusteeship agreements with the trustee on the one hand and creditor and debtor on the other hand. Unless the trustee is a law firm or an auditor of good financial standing with sufficient professional liability insurance, the choice of a trustee should be made very diligently. Unless the trustee has a "deep pocket", the parties who entrusted the amounts to the trustee may end up in financial disappointment once it comes to the enforcement of substantial damage claims.

A party looking for a transactional trustee may request (and this is customary) the respective law firm or auditor to obtain a written confirmation by their insurer confirming the amount up to which the deficient handling of escrow accounts will be covered.

Professional trustees like law firms or auditors are entitled to an "adequate remuneration". German statute does not clearly define adequate remuneration, however a wide range of case law roughly defines such adequacy in relation to the administered amounts. Wherever the trustee is required to scrutinise complex documentation or to safeguard the interests of parties in

327 Sec 67 para 3 no 3 sentence 1 BNotO.

a controversial situation, adequate remuneration may very well exceed the amount of the notary's collecting fees.[328]

(iii) Joint accounts

The least expensive and one of the most reliable and directly controllable solutions is a joint account held by creditor and debtor with signing powers for the allocation of funds requiring either side to co-sign for any payment. Typically such joint accounts will be arranged on the basis of a special contract with the bank defining the account as a "trust account" *(Anderkonto)* so that the bank itself or any cooperating bank may not seize the deposit for satisfaction of its own claims. Any violation of this special arrangement or any other improper handling by the bank will trigger respective damage claims for both parties. A joint escrow account compared to the accounts administered by a notary or a neutral trustee enables either side to block payments from the escrow, without the necessity of any arbitral or court decision, or other means to convince the trustee that he should not release payment. Once the deposit has been blocked in such manner, the other party seeking payment would have to sue the refusing party for its consent. Although a notary acting as trustee or a neutral trustee can be expected to wait for a court decision before appropriating the deposit in the controversial constellation, the joint escrow account is the only model that enables the refusing party at any time to flexibly modify, restrict or withdraw its refusal to release payments.

Thus, the joint escrow account is the most accepted form of organising an escrow in Germany.

(b) The risk exposure of an escrow in insolvency proceedings of either party

In case one of the parties potentially entitled to the escrow becomes insolvent, the receiver may seek to control the deposit and have it cashed out to the insolvent estate.

Where the trustee holds the escrow account as a neutral third party, the contractual basis of the trusteeship would be deemed void upon commencement of the insolvency proceedings and the insolvency receiver for the bankrupt trustee would have unlimited access to the escrow deposit.[329] The same applies in principle for a jointly held escrow account. In these cases, however, the material difference is that the insolvency receiver is obliged

- to account for the escrow amount as a separate class of assets, and
- to satisfy any claims of the joint account holder with priority over any other creditors.[330]

328 See above 5.3 (a) (i).
329 Lange, NJW 2007, 2513 (2514).
330 Münchener Kommentar zur Insolvenzordnung, sec 1 to 102, 2nd edition 2007, sec 47 no 389.

The third party whose interests are to be protected by the escrow is entitled to receive payment at equal rank with post-insolvency creditors and therefore will receive full payment rather than merely an insolvency dividend.

Consequently, a joint escrow account can be considered to be well protected even under insolvency proceedings of any of the involved parties.

(c) Payment guarantees and sureties

Payment guarantees and sureties represent a commercial burden for the parties who arrange for their issuance: On the one hand for such parties' credit lines or respective cash deposit to be maintained as collateral and on the other hand because of the accruing bank fees. The surety[331] differs from the payment guarantee insofar as it depends on the course of action and the amounts of the primary obligation for which the surety was issued as collateral. The payment guarantee is independent from the underlying primary debt and thus may be effectively cashed-in by the beneficiary even when not entitled to payment. Consequently, the party arranging for the issuance of such security would have better chances to protect a surety against misuse rather than a payment guarantee. Non-German parties, however, should note that the distinction between a surety on the one hand and a payment guarantee on the other hand cannot be inferred from its denomination as such, but only from a thorough evaluation of its wording: The payment guarantee which provides the beneficiary with a much better payment claim in German terminology is "*abstrakt*", meaning that it is not "related" to the underlying debt and therefore cannot be argued against because the underlying debt allegedly does not exist.

But even a payment guarantee with stronger protection for the beneficiary can be blocked by injunctional relief if the debtor is capable of proving that the beneficiary's claim under the guarantee appears to be manifestly unjustified in view of the parties' M&A contract.[332] Such injunctional relief would have to be filed against the beneficiary and not against the guaranteeing bank.[333]

If the party arranging for the payment guarantee or for the surety is not domiciled in Germany, the beneficiary should see to it that the payment guarantee or surety will be issued by a bank having an affiliated branch office in Germany, or at least in the European Union. Otherwise, the beneficiary may encounter entirely different and unforeseen problems when collecting the guaranteed amount and especially the respective local jurisdiction may cause severe problems with regard to the enforceability of German court decisions. In those cases, it is advisable to minimally have any bank guarantee or surety confirmed by a corresponding German bank.

331 Sec 765 BGB.
332 BGH, 10 February 2000 – IX ZR 397/98, NJW 2000, 1563 (1564).
333 OLG Frankfurt, 27 April 1987 – 4 W 17/87, NJW-RR 1987, 1264 et seq.

(d) "Patronatserklärungen" – guarantees for the financial standing of an affiliate

A special means of financial protective security is the so-called German *Patronatserklärung*, which can be translated as a guarantee by a parent company to preserve and protect the financial standing of its affiliate in a way that such affiliate will, during a specified time and for a specified maximum amount, be able to perform under a special contract. This special type of guarantee is not regulated as such by German statute, but can be regarded as a surety for the equity position of an affiliate and therefore is quite similar to a surety requiring that the primary debtor shall get forced to pay first and only thereafter the issuer of the *Patronatserklärung* can be held responsible.[334] In absence of a statutory regulation directly applicable to it, such *Patronatserklärungen* vary considerably and may be issued in differently, strong and even non-binding versions so that a careful analysis of their enforceability is always recommendable. *Patronatserklärungen* that bind the issuer in an unequivocal and enforceable manner "to equip the affiliate financially sufficient to satisfy any claim the beneficiary may have against such affiliate" are denominated as "hard commitments" *(harte Patronatserklärung)* as opposed to non-enforceable or doubtful wordings denominated as "soft commitments" *(weiche Patronatserklärungen)*.

5.4 Summary

As a financially effective security for protecting payment claims after the closing of an M&A transaction, escrow accounts are widely accepted. They are mostly organised as jointly held accounts with reputable banks, sometimes as trusteeship accounts administered by notaries or by any other professional trustee, who appears sufficiently insured. Further financial protective security can be provided by payment guarantees, which are independent from the underlying primary debt secured, or by sureties, which, according to their wording, depend on the cause of action and the amount of the underlying primary debt. Both the payment guarantee and the surety can get blocked by freezing injunctions in cases of proven misuse. Although this is less likely with a payment guarantee, due to its independence from the underlying contract, German law still provides the debtor with interim protection against manifestly abusive collection of such payments. Letters of comfort and *Patronatserklärungen* represent further protective securities if their wording makes them equivalent to a surety; however, both require that the underlying debt needs to be enforced first against the primary debtor and only after and to the extent payment cannot be obtained, the beneficiary may successfully sue the issuer of the letter of comfort or *Patronatserklärung*.

As regards the reliability of information and legal whereabouts of the target and its assets, informative protection can be provided by due diligence reports, either from the seller's or from the buyer's side as well as by opinion letters issued by qualified auditors or law firms. Opinion letters and due diligence reports principally are meant to protect the instructing client exclusively unless there is circumstantial evidence that they were intended to serve protective purposes for third parties also. If a due diligence report or a legal opinion contains any statement

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334 Sec 771 BGB.

explicitly addressed to third parties such as lenders, their protective effects for such lenders will be implied. Vendor's due diligence reports can only be used as protection for a third party such as an interested buyer, if so agreed in the underlying mandate as the intended purpose or by way of a legal opinion issued by lawyers other than those who prepared the vendor's due diligence report.