

Top Ten Pitfalls in Managing Global Matters That In-House Counsel Should Avoid

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Managing the Due Diligence Process in a Cross-Border Matter

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- Cross-border DD challenges include timing, risk assessment, communication, and logistics
- Different languages, cultures and legal systems
- Access to documents, harmonization of findings, and dealing with multiple advisors
- Define scope of work and establish priorities
- Clear and timely reporting and project organization

Structuring Cross-Border M&A Transactions

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- Asset purchase may be more advantageous in the US
- Asset vs. stock purchase is typical consideration
- This may not be the case in many foreign jurisdictions
- Target's liabilities may still follow the assets
- Formalities for transfer of assets may be more complicated
- Tax, labor and environmental consequences may also be different, among others

Corporate Maintenance of Foreign Subsidiaries

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- Not having the “house in order” can delay implementation of global restructuring plans, signing important documents or M&A transactions
- May also raise compliance and BOD liability issues
- Requirements may be very different and changes difficult to implement quickly
- Timing of filings, shareholder registration, number of directors, residency, etc.
- Should maintain direct oversight and regularly update info
- Don't ignore and be proactive about dormant and legacy entities

Formalities in Cross-Border Transactions

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- Originals may be required to enforce a contract
- Notarization and legalization may often be needed too
- Evidence of actual authority (POA) may also be required
- Notices may require delivery through a notary or express acknowledgment for evidentiary reasons

Overlooking the UN International Sale of Goods Convention and INCOTERMS

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- UNISGC automatic application
- May be contractually excluded – exclusion typical in standard choice of law language
- Generally pro-buyer but parties should consider advantages
- INCOTERMS define delivery of goods obligations
- Should be used when possible - current version is 2010
- They do not say anything about transfer of title – separate language needed for that

Hiring Personnel Abroad Without the Proper Structure

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- Potential application of more protective local labor laws
- Risk of deemed employment relationship even when intending to hire an independent contractor
- Social security registration implications
- Tax and “doing business” implications
- Special issues for expatriates

Choosing the Right Dispute Resolution Mechanism and Venue

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- Pros and cons of arbitration may be different in the international context
- International arbitration is easier to enforce in many jurisdictions
- Consider use for defensive purposes
- Recent trend in favor of arbitration – foreign courts more likely to recognize arbitration agreements
- Local laws in the country which is the site of an arbitration proceeding may impact the arbitration

Documenting the File in Anticipation of Foreign Litigation

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- Advisable given limited scope of discovery in foreign jurisdictions
- Many jurisdictions do not allow supplemental filings
- Short windows for responsive pleadings/motions
- Originals generally required
- Written evidence preferable over oral testimony

Remedies Available in Enforcing Rights Abroad

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- Injunctive relief is unavailable in many foreign jurisdictions
- Even where available it may be difficult to obtain
- Extra-judicial (self-help) remedies rarely available
- Damages are often difficult to prove and more limited
- Many countries will only recognize actual damages
- Proceedings can be lengthy and discovery is limited
- Posting a bond may be required for an injunction – which may be expensive/time consuming/require local collateral

Multi-jurisdictional Internal Investigations

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- Protecting the attorney-client privilege
- Different obligations and consequences regarding disclosure
- Consider the local law issues
- Cross-border data transfer issues
- Local labor laws considerations

Questions?

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