Closing the Deal: Practical Insights and Legal Considerations in Emerging Market Cross-Border Transactions

Akin Gump
STRAUSS HAUER & FELD LLP

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Carolyn Campbell, Managing Director, Emerging Capital Partners
Melissa Schwartz, Partner, Akin Gump
Jeremy Schwer, Partner, Akin Gump
Dallas Woodrum, Counsel, Akin Gump

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Agenda – 5 Key Areas

1
- **Diligence, risk assessment, risk mitigation**

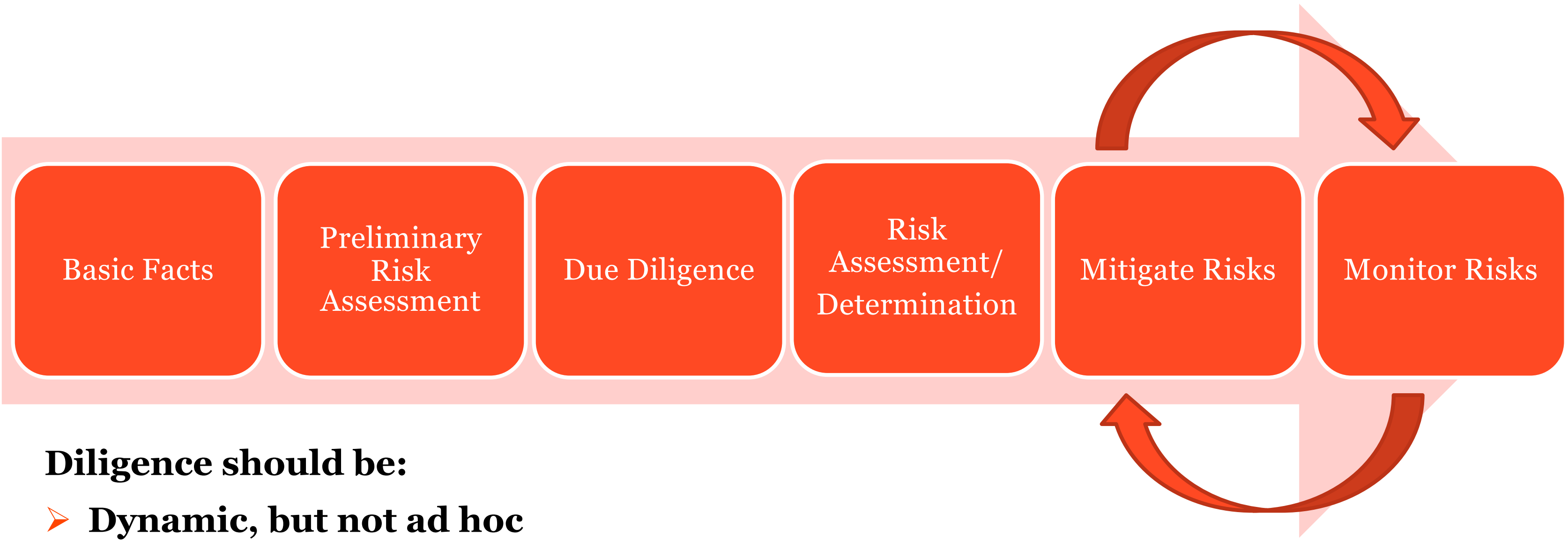
2
- **Importance of local counsel**

3
- **Roles and Contributions of each Party**

4
- **Exit Strategies and Repatriation Considerations**

5
- **Dispute Resolution**

1. Diligence, Risk Assessment, Risk Mitigation



Diligence should be:

- **Dynamic, but not ad hoc**
- **Scoped based on a risk-based determination**
- **Tailored to the specific facts, including**
  - Counter Party(ies)
  - Nature and size of transaction
  - Geography
- **Consider local customs and practices when framing and phrasing requests**
- **Time and effort required will vary in each instance**

No business is without risk!

The key is to assess if risk level is acceptable and

then to mitigate risk to the extent possible

1. Diligence, Risk Assessment, Risk Mitigation (cont'd)

Importance of Timeliness: Diligence at the outset!

- Allows for transactions to be structured in manner that mitigates risk
- Reduces the risk of delay or potential loss of transaction
- Remedying issues may require long lead times – e.g., export and sanctions-related licenses

Sufficiency of Due Diligence:

- Ask informed questions to identify "red flags"
- Do not rely exclusively on internal information or information in the public domain when potential risk warrants deeper due diligence (e.g., privately commissioned intelligence report)
- Diligence on government relations and key third parties are important in cross-border transactions

One-Size-Fits-All Diligence Doesn't Work!

- Risks vary by industry, country, nature of the transaction, contributions of each party, and historical relationship with the business partner
- One-size-fits-all risk assessments are generally ill-conceived and ineffective, with too much focus on low-risk markets and transactions to the detriment of high-risk areas

1. Diligence, Risk Assessment, Risk Mitigation (cont'd)

Diligence is critically important to cross-border transactions

- **Assess Risk of Legal Liability:** Successful due diligence should reduce the risk of legal liability
  - Even inadvertent violations can result in penalties, in both target country and in U.S.
  - Strict liability regimes in certain cases
  - Trend of increased enforcement in the anti-corruption, export controls and sanctions areas.
- **Assess and Minimize Reputational/Business Concerns:**
  - Cross-border transactions are often high-profile, particularly in target market
  - Companies may face negative business repercussions as a result of compliance issues
    - ❖ bad press
    - ❖ investor and creditor concerns
    - ❖ local government concerns
    - ❖ public disclosure requirements
    - ❖ loss of value.
- **Risk Mitigation:** Successful due diligence can inform mitigation strategies on the front end and also serve as a mitigating factor if inadvertent violations do occur

1. Diligence, Risk Assessment, Risk Mitigation: International Trade Diligence in the Cross-border Context

1. Diligence, Risk Assessment, Risk Mitigation – Trade Risk Factors

Highly Regulated Industry

Military, Aerospace, Manufacturing, High Tech, Real Estate/Construction, Transportation

High Risk Industries

Energy and Petroleum, Manufacturing, Pharma/Healthcare, Telecom, Agriculture, Military procurement

Heavy Reliance on Third Parties

Representatives, Agents, Distributors

Past Enforcement History

Voluntary disclosures are generally a good sign; subpoenas are not.

High Risk Geographies

Countries known for corruption, money laundering, export control/sanctions evasion

1. Diligence, Risk Assessment, Risk Mitigation: Sanctions

United Nations

Economic Sanctions

- Tool of foreign policy; alternative to military force
- Intended to change behavior of the target (e.g., violations of human rights and international law)
- Restrictions imposed by governments and multilateral organizations against countries, entities and individuals
- Sanctions restrict transactions and dealings (not necessarily involving items) with other countries, persons or entities based on national security or foreign policy concerns

Who enacts Sanctions?

- Multilateral organizations impose sanctions that bind their members to enforce these restrictions (e.g., European Union, United Nations)
- Individual countries impose sanctions unilaterally (e.g., United States, Canada, Japan and Australia)

After a period of heightened coordination among multilateral organizations and individual countries there has been increased divergence and unilateralism in sanctions programs

1. Diligence, Risk Assessment, Risk Mitigation: Sanctions

Key sanctions diligence questions – compliance with law:

- Is there a nexus with country or countries subject to sanctions?
- Are sanctioned parties or entities owned or controlled by sanctioned parties involved?
- Is the activity one that raises sanctions concerns?
- Are there reputational concerns, regardless of sanctions risk?
- Are there red flags?

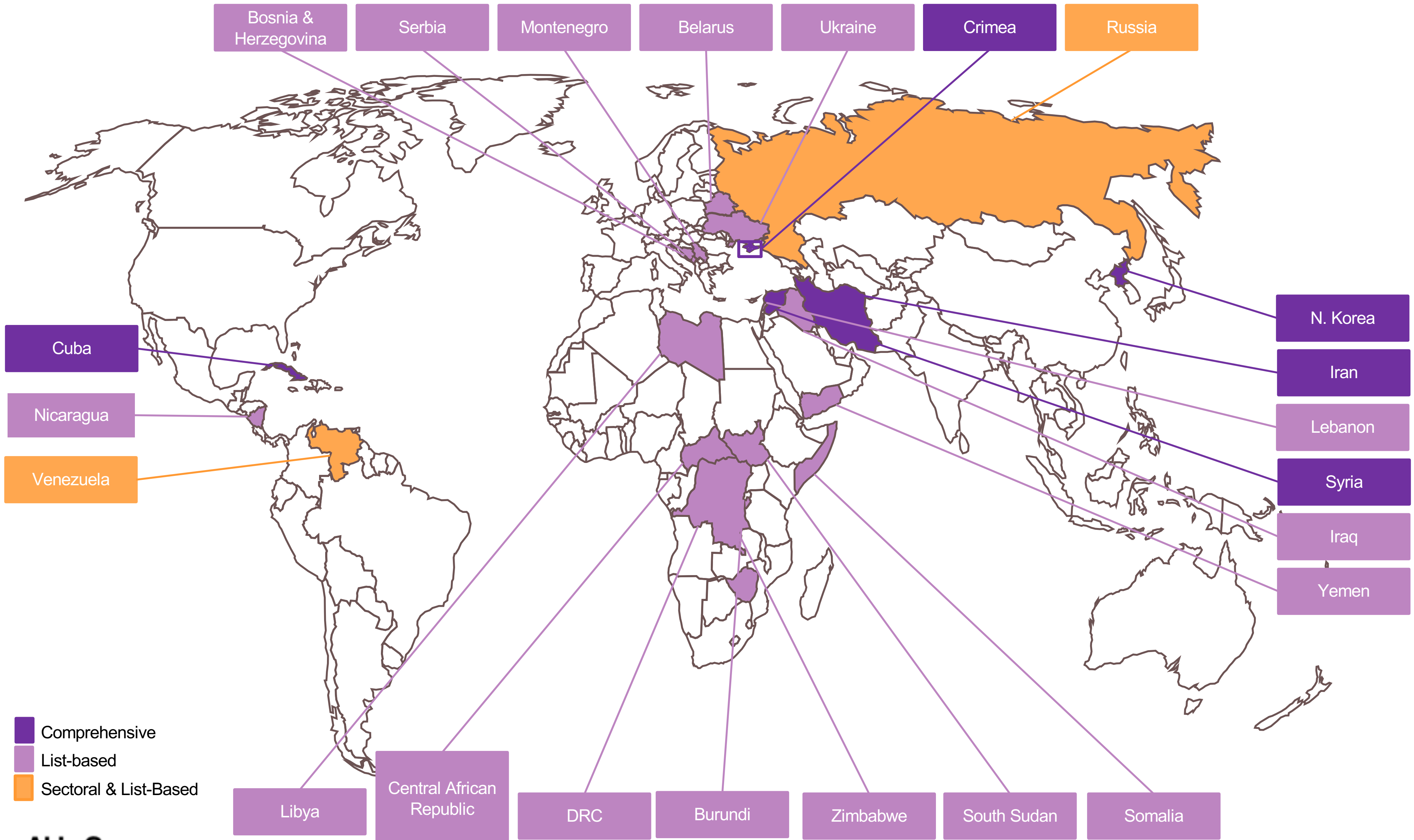
Key sanctions diligence questions – compliance with contractual arrangements:

- Confirm that transaction complies with sanctions compliance provisions in loan agreements and other contracts

Forward looking thinking

- Is there a likelihood of sanctions affecting the transaction? The counter-party? Key third parties involved in the transaction/ongoing business

1. Diligence, Risk Assessment, Risk Mitigation: Current U.S. Economic Sanctions Targets



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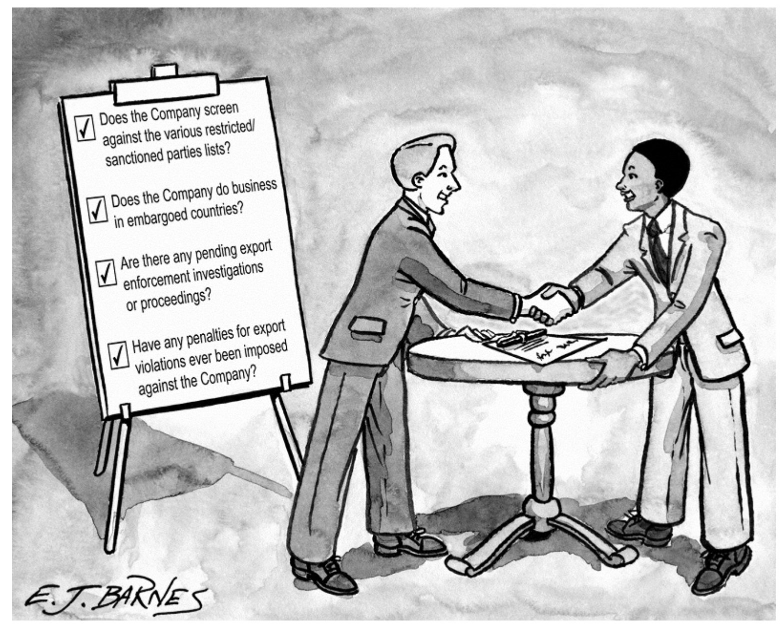
1. Diligence, Risk Assessment, Risk Mitigation: Export Controls

What are Export Controls?

- Impose controls on the movement of items (commodities, software and technology) – specifically, where they can go, who can receive them, and for what purpose
- U.S. export controls → "Follow the item"

Key export controls diligence questions

- What is being exported? (Goods? Technology? Data?)
- How is it controlled? (what is the export classification?)
- Will foreign nationals have access to controlled technical data?
- Where is it being exported?
- Who will be receiving the export(s)? (Denied/restricted parties?)
- How is the customer using it / why does the customer want it?
- Are there red flags?



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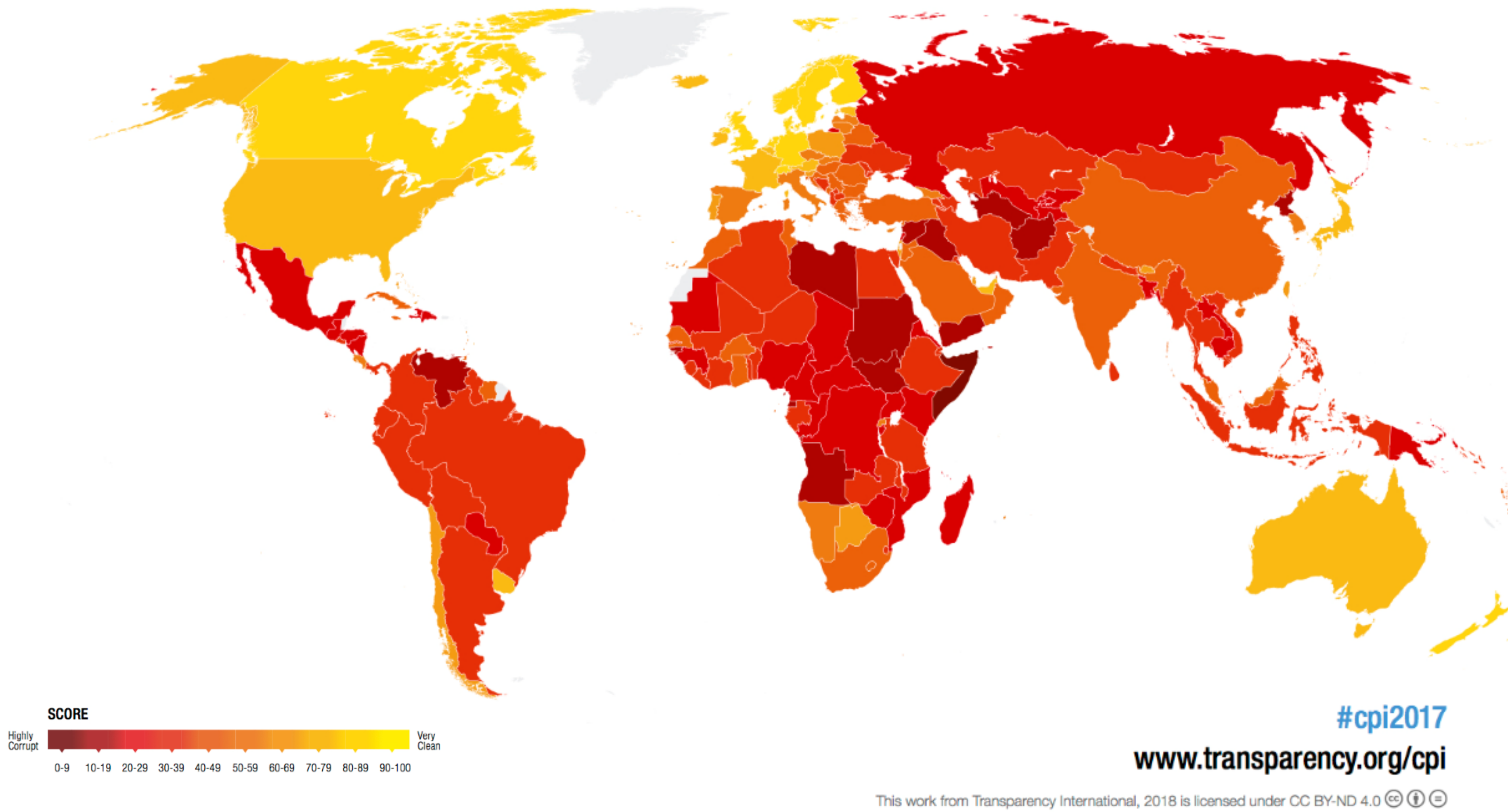
1. Diligence, Risk Assessment, Risk Mitigation: Anti-Corruption

High-Risk Geographies:



1. Diligence , Risk Assessment, Risk Mitigation: Anti-Corruption Issues (cont'd)

Key anti-corruption diligence questions – compliance with law:

- Transaction involves a country known for corruption (i.e., Transparency CPI)
- Recommended by a foreign official
- Refusal to respond to diligence questions related to anti-corruption concerns, identification of owners, partners or principals, or to provide compliance certifications, representations and warranties
- Lack of facilities, qualified staff, experience or "track record" in industry
- Vaguely-defined services to be provided
- Company formed for purposes of acting as an intermediary
- Government ownership, politically exposed persons, or other government/political ties
- Suspicious payment terms (cash, political contributions, payments to accounts in tax havens) and/or suspicious requests (entertainment or travel, nondisclosure of identities, requests for employment for friends/govt. officials)
- Inconsistent information provided by a source or across sources
- Excessive commissions / large discounts

Key question – do contractual arrangements require compliance with laws beyond those directly applicable to the company (e.g., UK Bribery Act)? If so, confirm transaction is compliant.

2. Importance of local counsel

Selection of Local Counsel is one of the Critical Decisions in a Cross-Border Transaction

- Check references and deal sheets
  - ❖Confirm experience is ***relevant*** to the transaction
  - ❖Cross-border transactions may be first-of-their-kind transactions – critical to have deep understanding of local law
- Act quickly and confirm conflicts checks
  - ❖It is often the case that only a few local firms are qualified to act on the transaction
- Has local counsel worked with global counsel previously?
  - ❖Local counsel and global counsel must work well together – a single coordinated team
- Interview! Do not rely upon recommendations alone!

Local counsel often have a seat at the table before, during and after the transaction is consummated!

2. Importance of local counsel (cont'd)

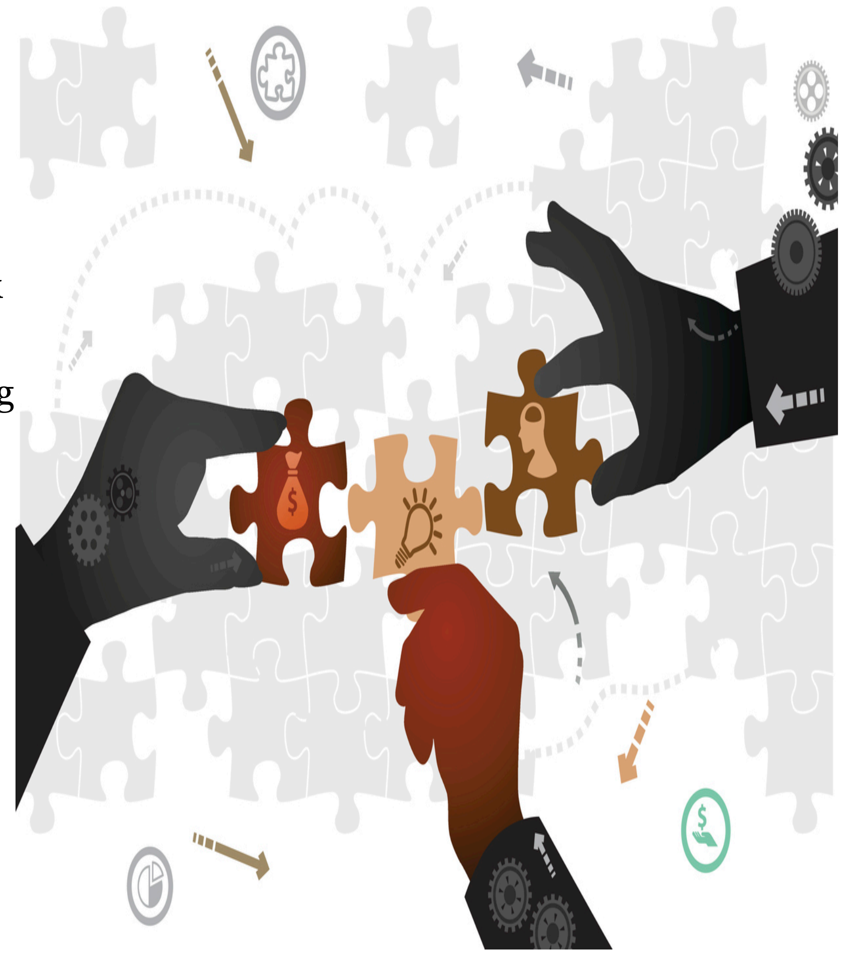
Local Counsel and Diligence

- Critical importance of local counsel's input to diligence and assessment of risks
- Key to ensure that significant local issues are spotted given target country knowledge

Local Counsel and Transactional Agreements

- Selection of governing law is critical – often English, New York or French law
  - ❖ Is local counsel accustomed to working with the governing law to be chosen?
- Is local counsel able to advise if desired provisions will be enforceable in local jurisdiction? Able to offer precedents?
  - ❖ Example: Many jurisdictions do not allow for preferences to one group of shareholders over another, yet in international transactions, this is standard
  - ❖ Example: Will implementation of a capital protection clause be lawful in a given jurisdiction?

Although a global law firm may draft clauses that the investor has used in multiple jurisdictions, clear guidance on the enforceability of the clauses in country by local counsel is critical



3. Roles and Contributions of Each Party

Typically, in cross-border transactions, each partner has a specific role, and makes specific contributions to the success of the venture.

- For each role to be played by a party, consider:
  - ❖What are the party's rights and responsibilities in this role?
  - ❖How will each party enforce such rights and responsibilities against the other party?
  - ❖What documentation is required?
- For each contribution to be made by a party, consider:
  - ❖When and how is the contribution being made?
  - ❖How is the contribution being valued between the parties?
  - ❖How is the contribution being valued to a tax authority or regulator?
  - ❖What are the consequences to a party of the contribution not being made as promised?

3. Roles and Contributions of Each Party (cont'd)

Local Partners

- Local partners will often be the "operating partner" of the venture, making day-to-day decisions on the running of the business (subject to the foreign partner's approval and consent).
- Local partners typically make in-kind contributions to the venture, such as:
- Land and buildings
  - Licenses
  - Local government and regulatory introductions
  - Local market knowledge
  - Local connections to suppliers, vendors and customers
  - Intellectual property and know-how
  - Staff/local employees

Foreign Partners

- Often will be the "financial partner" of the venture, with control of the Board of Directors of the venture and/or significant veto rights on activities that may impact the long-term success of the venture.
- Typically make cash contributions to the venture.

4. Exit Strategies and Repatriation Considerations

Exit Considerations

- Will the local partner offer a potential exit?
- Is there a market for third party sale/exit or public offering?
- Does a sale/exit require government or regulatory approval?
- Is the asset ownership structured in a way that facilitates an exit?
- Are there negative tax implications for an exit?
- Currency considerations/foreign exchange risk

Repatriation Considerations

- Is there a dividend/distribution block or tax to consider?
- Can the asset ownership be structured around the block or tax?
- What other local legal requirements and restrictions exist?
- Are there negative tax implications of a dividend/distribution?
- Currency considerations/foreign exchange risk

5. Dispute Resolution

Dispute resolution

Governing Law	Consider optimal dispute resolution clause – typically, in emerging markets, preference is for arbitration • Rules • Location • Language • Number of arbiters • Timing	Enforceability of arbitration decision in local jurisdiction

Final Thoughts – Keys to Success

- ✓Experienced deal team and advisors (bilingual a plush)
- ✓Local presence and face-to-face-meetings
- ✓Effective and consistent communication with local partners
- ✓Strong documentation
- ✓Understand the risk!
- ✓Patience
- ✓Know when to walk away
- ✓Good governance and oversight
- ✓Compliance program from Day 1

Contacts

Melissa Schwartz
Partner, Washington, D.C.
202.887.4539
mschwartz@akingump.com

Carolyn Campbell
Managing Director & Founding Partner
Emerging Capital Partners
202.280.6200
campbellc@ecpinvestments.com

Jeremy Schwer
Partner, Washington, D.C.
202.887.4471
jschwer@akingump.com

Dallas Woodrum
Counsel, Washington, D.C.
202.887.4591
dwoodrum@akingump.com