703:Successfully Conducting Business Internationally

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Faculty Biographies

A. Patricia Marcucci

A. Patricia Marcucci is senior operations counsel for BellSouth International in Atlanta. She is responsible for legal matters in Peru, Panama, Guatemala, and Nicaragua.

Before joining BellSouth International, Ms. Marcucci was vice president and associate international counsel for Equifax Inc. in Atlanta. In this position, she was responsible for Equifax's legal matters in Latin America, including Brazil, Argentina, Chile, Mexico, and Peru, as well as in Spain and Portugal. Prior to Equifax, she worked on international matters for law firms in Atlanta and Madrid.

Ms. Marcucci is a member of the State Bar of Georgia and is on the executive board of the international law section. She is also a member of the International Bar Association. At BellSouth, she is the cochair of the legal department's diversity committee and is on the pro bono committee. As such, she is extensively involved in projects and activities in the community. Ms. Marcucci is originally from Guatemala and she speaks English, Spanish, and Portuguese.

Ms. Marcucci has a BA from the University of Georgia. She graduated from the College of Law at Georgia State University and received a LLM in international law from the University of the Pacific.

Phillip A. Pesek

Phillip A. Pesek is the senior director-international for The Home Depot, Inc. in Atlanta. His responsibilities include oversight of all legal issues in Home Depot's international operations as well as Home Depot's global supply chain. He also manages the international legal department, which includes attorneys located in Canada and Mexico.

Prior to joining Home Depot, Mr. Pesek served as international counsel for Wal-Mart Stores, Inc. in Bentonville, Arkansas. While at Wal-Mart, he oversaw Wal-Mart's legal issues in Canada, Mexico, South America, Europe, and Asia as well as served as Wal-Mart's mergers and acquisitions counsel for a number of acquisitions throughout the world.

Phillip Pesek received his BS from the University of Texas and is a graduate of the University of Arkansas at Little Rock, William H. Bowen School of Law.

Michael F. Pillow

Michael F. Pillow is assistant general counsel with Siemens Westinghouse Power Corporation in Orlando, Florida, which designs, manufactures, sells, and services turbine generators and other power generation equipment. He has principal legal responsibility for the Siemens global power generation service organization, including strategic and commercial transactions, dispute resolution, and legal compliance.

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Mr. Pillow has held a variety of positions with Siemens Westinghouse and Westinghouse Electric Corporation. He has handled commercial contracts, forming and implementing subsidiaries, joint ventures and alliances, domestic and international acquisitions and divestitures, corporate governance and compliance, dispute resolution, and labor and employment matters. Prior to joining Westinghouse, he worked for two law firms in Pittsburgh.

Mr. Pillow is an authorized house counsel in Florida. He is a member of ACC and is currently president of ACC's Central Florida Chapter.

He received his BA from the University of Virginia and his JD from the University of Pittsburgh School of Law.

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Compliance -- Trish Marcucci

I. Set up a global compliance program

A. Set the tone at the top

1. Effective communication of requirements and education is extremely important in order to have a successful global compliance program, and must begin with communication from senior management to all employees worldwide, and should be continuously reinforced by senior management.

2. It is particularly important for multinationals to get the General Managers of all local operations involved in the process as early as possible to make them part of program and get their buy-in. The corporate culture in the other countries needs to be set by the local management team in line with parent company's culture.

B. Communication -- How to make it most effective.

1. Companies need to communicate the existence of and operation of the compliance program and complaint channels to all employees, including those outside the U.S.
2. Use local language
3. The CEO may read a message that is translated and broadcast to all employees
4. Forms of communication:

   i. Intranet postings
   ii. Posters
   iii. On-going dialogue
   iv. Cases
   v. E-mails
   vi. Contests

In addition to the General Manager, the company will need to get local counsel involved early. What generally works best is to develop the Code of Conduct and then send to local counsel. They can identify any local laws that conflict with anything in the Code or any other local requirements that would require changes to the Code. They should also determine any local requirements such as filings, notices or approvals with local labor ministries.

C. Establish reporting mechanisms and infrastructure for reporting. It is necessary to establish procedures for the receipt, retention and treatment of complaints.

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1. The reporting mechanisms should be confidential and anonymous.
   Note: There may be some push back originally from those outside the U.S.; however, anonymous reporting is permitted in most jurisdictions, so the company should insist on this with local tailoring as necessary.

2. Complaint channels - Hotlines or email considerations

   i. International access -- Toll free 800 numbers from other countries
   ii. Internal or outside third party to receive complaints
   iii. Language issues

3. Document procedures, review and adjust periodically and present to Audit Committee for approval.

D. Globalizing the Code of Conduct -- Cultural Issues

1. To get buy-in, make sure it does not appear like a U.S. compliance code being imposed on local employees.
2. For labor law purposes, you also want the code to be a local company document. Have your local human resources department issue the Code of Conduct.
3. Labor laws in many countries are much more protective of employees than in the U.S.
4. Language

   i. The Code of Conduct should not just be in one language. It may need to be adapted for various countries.
   ii. There may be a local requirement that a certain language be used, for example: some countries require that any sanctions that may be taken be specifically set forth in the Code of Conduct that is provided to employees. In other countries, general language regarding disciplinary actions up to termination is sufficient.

5. Concepts vs. References to U.S. Law -- Use concepts instead of U.S. law references, e.g., fair treatment; fair competition; harassment-free workplace.

E. Implementation of the Code of Conduct requires certification by all employees. Make sure certification document complies with local laws (including privacy laws).

F. Training

1. In person -- requires a lot of travel and time. Could have inconsistent messages or misinterpretation
2. On-line training -- modules can be prepared specifically for your company.
3. If on-line, training may be interactive
4. Ensure uniform messages and themes

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5. On-line training can automatically track employee participation and measure comprehension
6. Can be implemented in various languages
7. Provide focused training to certain key functional areas
   i. High priority areas: Finance, Internal Audit and Regulatory
8. Use job specific guidance and hypotheticals
9. Refresher (supplemental) web-based training can be used to drive comprehension and compliance
10. Constant interaction with and training of Legal Departments is important to ensure vigilant and uniform management of client matters
11. Consider external training to third parties: partners, consultants, vendors
12. Periodically issue additional tools for augmentation of internal and external awareness.

G. Local Partners

1. Can have a lot of influence over local operations
2. May be influential people locally; therefore, need to get their buy-in to compliance culture early in the process for two reasons:

   i. Ensure that they understand and will comply, particularly with the areas in which they may expose the company to liability for non-compliance such as FCPA and antitrust;
   ii. They also can help set the right tone from the top.

II. Monitoring - Compliance Review

A. The company should establish procedures for the periodic review of its compliance program and issues.

1. Review by the Compliance Area

   i. Set up local compliance committees -- generally include legal, human resources and Compliance representatives
   ii. Report to Compliance Director and Headquarters
   iii. Define which matters will need to be handled by Headquarters
   iv. Establish process for review by compliance area in company documents or directives provided to local management

B. Audit Committee

1. Internal audits
2. Reporting process

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3. Establish internal audit processes and procedures for follow-up to ensure corrective action is taken to address all audit findings and avoid repeat findings worldwide
4. Increase Emphasis on Internal Audit Findings

   i. Include in senior management annual reviews/bonus/push down throughout organization
   ii. Address at Senior Leadership Conferences
   iii. Monthly reporting of internal audit results to senior leadership
   iv. Headquarters management should track findings and corrective actions
   v. Consider adding Headquarters resource dedicated to this function

C. Internal Investigations

1. Who conducts investigations outside U.S.?
2. Local counsel vs. U.S. counsel
3. Attorney-Client Privilege

III. FCPA: Foreign Corrupt Practices Act/OECD/Global Anti-bribery

A. Two basic requirements:

1. Anti-bribery -- can't directly or indirectly offer or give anything of value to a foreign government official in exchange for assistance with business or to obtain an advantage.
2. Books and records -- company's books must fairly and accurately reflect the transactions of the company. Therefore, an accounting issue/irregularity may also expose the company to FCPA violations which also carry severe penalties including imprisonment.

B. Global laws now very similar in scope to FCPA. Enforcement varies greatly around the world.

Note: Much of the things discussed above regarding the Code of Conduct also apply to FCPA, such as training, reporting mechanisms, hotlines. Consider developing similar training and processes specific for the FCPA because of the level of exposure. One specific area of concern is retention and use of sales agents and business consultants.

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Local Counsel – Phil Pesek

Do:

Set up an in-country outside counsel network, including subject matter experts and local counsel.

When entering into a new country, it's easy for an international attorney to heavily rely on an international law firm or a large prestigious firm situated in the country in question. However, considering the myriad of legal issues that may come your way, using such law firms can become cost prohibitive. The better solution may be to establish a network of law firms which are used to perform different tasks.

For complex legal issues, including securities, financing and corporate work, the prestigious local law firms may be the best bet. It may also be preferential to select a local firm that is part of a larger international firm or a member of an international association of firms. That way, you can leverage the expertise of the local firm as well as their international counterparts. However, do not discount the importance of a good, established local firm. Their billing rates tend to be lower and they may be more attentive to your work. Regardless, choose the firm that will best meet your demands for legal work and is willing to follow your internal attorney guidelines and procedures.

For simpler, more "everyday" legal issues, such as employment claims and local regulatory matters, a good local firm, which is geographically located close to your factory or store may be preferable. These firms know the local municipal law and regulations as well as the local law makers and regulators. Their hourly rates tend to be significantly lower and oftentimes, a flat fee arrangement can be negotiated.

Regardless of your choice of counsel, always do the necessary due diligence on your counsel and set up a means of evaluating their performance. Due diligence can easily be conducted on outside counsel. Ask for a list of representative clients and contact the clients for an evaluation. Also, ask your international firm to investigate the firm in question and provide feed-back. Feed-back from a trusted colleague is also very valuable.

Once you have chosen counsel, set up yearly evaluations of their performance. Evaluate how each firm has met your deadlines, budgets and attorney guidelines as well as the quality of their work. Assign numerical values to the evaluation and establish the pass/fail score. However, don't forget to share this information with the counsel. If they realize that they aren't meeting your expectations, corrective measures can be taken.

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Don't:

Hire local in-house counsel and assume everything will be ok.

The best way to leverage legal expenses in a country is to hire in-house counsel for the country. However, don't just hire someone and assume everything is ok. Set up a program that will (i) educate the local in-house counsel as to the philosophies, procedures and initiatives of the company and the legal department, (ii) set personal performance goals for the in-house counsel and (iii) provide a means of monitoring the performance of the in-house counsel as well as the legal issues in the country.

Local in-house counsel should make regular trips to the "home" office. You can educate the in-house counsel within their country, but it is far better for them to see and experience your corporate culture firsthand. Also, this is an excellent way for the local in-house counsel to build relationships with other members of your legal staff. If you have in-house counsel in multiple countries, schedule some of their visits at the same time and conduct a roundtable so they can compare experiences and discuss common issues.

How many times have we said, "I can't get anything done because I'm too busy fighting fires?" The same is true for the local in-house counsel. Therefore, it is important to identify the most important legal initiatives that need to be accomplished. Review all legal initiatives with him/her and establish deadlines for completion. As will be discussed in the next paragraph, have the in-house counsel report on the progress of each initiative in each monthly report. As an alternative, have the in-house counsel develop a project plan, which details the scope of the project, presents a Gantt chart for deadlines, outlines major milestones and highlights possible barriers to completion of the project.

Monitoring the performance of the local in-house counsel and local legal issues can be as easy as the development of a monthly status report. The status report should cover, by substantive area, the major legal issues for that country. Each area legal summary should detail the business partners involved, a brief description of the issue, the legal risk involved, a summary of the legal support needed, appropriate deadlines and the current status of the issue. The monthly report is a good way to monitor how the local in-house counsel is interacting with the local management, handling the legal issue and meeting deadlines. In addition, periodic visits should be made to the country in question to meet with the local in-house counsel and his/her business partners. You should bring the monthly report with you as a guide for your meetings with the in-house attorney and their business partners.

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Advertising – Phil Pesek

Do:

Consider using local advertising agencies with U.S. templates, to avoid advertising non-compliance.

When a company, particularly a U.S. company, decides to go into another country, it is typically set in its ways on how to effectively and compliantly advertise. The company is aware that ads must contain the proper disclosures and all products and prices must be adequately described so that the consumer is not misled. Credit advertising is even more complicated. However, a company should not assume that compliant advertising in the home country will work in the new international country. As you may know, the consumer protection laws in each country vary widely. And to complicate it further, the ads will need to be translated to a different language that may have a totally different meaning if literally translated.

The easiest way to make the conversion to advertising in a new country is to find a local ad agency which is familiar with the local requirements. Your local law firm can help as well. However, there is no need to re-invent the wheel. Take the home country ad layouts and give them to the local ad agency or local law firm and have them review and change to meet the local requirements. Also, let them do the necessary translations. The same can be done for all store signage as well.

Don't:

Assume local customers can tell the difference between local ads and U.S. ads.

For U.S. companies, the natural international expansion is into Canada, Mexico, Puerto Rico, as well as the other Caribbean countries. Telecommunications capabilities have become so sophisticated today that is conceivable the customers in these new countries have already seen your company's U.S. advertising. This can create a problem especially with regard to pricing and special promotions. Due to logistics costs, the base price for identical products may vary in each country. This can create a problem when a customer walks into the international store and requests the U.S. price. If your international store refuses, they may take their complaint to the local consumer protection agency.

The best defense to this type of problem is proper disclosures. Once a company decides to go to an international location, they need to be mindful that what they do in one country could affect the other country. If the company is going to run a promotion in both countries and knows that the prices will be different, it needs to make it very clear the prices in one country are not applicable in the other country. If the promotion is only going to run in one country, then the advertising needs to make it clear that the promotion is only applicable in that country.

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International Contracting -- Michael Pillow

Do:

1. Understand the general considerations that can apply to international contracts.

a. Type and Form of Contract: Supply of goods versus services? Purchasing contract? Licensing arrangement? Technology transfer? How long will it take to perform the contract?

Often in international business the other party will neither expect nor appreciate a lengthy and detailed contract, especially at the beginning. One must also consider the use of United States-specific terms and terminology. One simple but common example concerns the use of capital letters in warranty disclaimers to ensure conspicuousness. This will often raise questions outside the U.S. and is usually unnecessary.

In International tenders or bids, the ultimate "contact" may consist of the basic bid documents, along with meeting minutes, letters, and other internal documents. The actual commitment must be understood.

b. Identity of Contracting Parties: One must first understand its own company and determine whether the contract will be in the name of the parent company, an affiliate or even split between affiliated or non-affiliated companies (a consortium). The counter party must also be known. It is more important today than ever to know one's customer. Is it a government or private entity? Does it have financial wherewithal? Who owns it?

The parties' respective identities and origins will also help determine the contract language. One should never underestimate the cost and difficulty of obtaining translations from one language to another. It is important to obtain the help of native, bi-lingual speakers to help not only with the written contract but also with oral negotiations and written communications.

c. Place(s) of Performance: The place will help determine among other things the relevant legal regimes. Does the transaction involve an export purchase or sale from the U.S. or another country or contract to be performed within a country?

d. Freedom of Contract: Commercial enterprises are generally free to contract on the terms on which they agree, and can allocate risks between them. The principle of freedom of contract between commercial entities is well established in the United States, England and other common law countries. Basically commercial parties increasingly enjoy freedom of contract throughout the world. Civil Code jurisdictions, such as in continental Europe and South America, may have more rigorous prescriptive provisions, some of which expressly indicate the kinds of contract

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provisions which companies may employ. In practice, however, those codes cannot cover the myriad situations that may occur.

There are of course exceptions and caveats to this general principle of freedom of contract. One critical constraint stems from the customer's identity. If the customer is a government-owned or heavily regulated entity, the applicable law may well restrict freedom of contract or even prescribe terms. A related caveat is founded on public policy. Contract provisions may be limited by a country's public policy. This presents particular problems in determining what comprises "public policy." Further, one may encounter this stumbling block at later stages, such as when seeking to enforce a judgment or arbitration award in a particular country.

2. Understand and pay attention to the business or commercial deal, particularly payment provisions and potential restrictions that may apply to the transaction.

a. Whether you are buying a business, starting a joint venture or merely selling a widget, you must understand the basic transaction from not only your company's perspective, but from those of other concerned parties. If the contract does not comport with the underlying intent(s), this may cause significant problems later.

b. Ensuring that you will get paid is still and always the top international issue. Understand not only the other party's financial situation, but also currency restrictions, tax issues, payment security and similar impacts. If payment will be made in local currency, ensure that the currency is convertible, or that you specify the exchange rate and have provisions to use the currency. If payment will be made in freely convertible currency (0preferably Euros or dollars), be sure that there is a correlation to the underlying cost basis for the products or services. Currency hedging should be considered by financial personnel.

Both your company's and the other party's financial condition are vital. Obtaining security via advance payments, letters of credit, bank guarantees, bonds, parent or surety guarantees or similar means may be necessary. Payment security also poses different considerations internationally. One must carefully examine the bank or other institution, and understand the mechanics of obtaining funds.

Contract price and payment terms should also be evaluated in relation to risk allocation provisions. Obviously, it may be easier to justify a limitation if the amount paid bears some relationship to the risk allocation. One may also want to accept greater risks in exchange for money. Contractual limitations may often be drafted in relation to the contract price. Further, there is a matter of leverage. When a claim arises, one may certainly assert various limitations as a defense. It may be much easier to negotiate if one has received most or all of the required payments. Favorable pricing and payment terms may also allow you to evaluate the probability of whether you are more likely to be a claimant or a defendant in proceedings, and the consequent degree of flexibility you may have for the dispute resolution provision.

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c. Familiarize yourself with the SEC's Staff Accounting Bulletins (SAB) 101 and 104 regarding revenue recognition. This could dramatically affect your company's ability to recognize the sales under the agreement you are negotiating. Also understand Incoterms 2000 and effect on costs/pricing from using different Incoterms; e.g., FCA vs. DDP; as well as interaction between Incoterms and SAB 101/104.

For companies traded in U.S. financial markets, the SEC requires strict compliance with SAB 101 and 104, which set forth the parameters for timing on revenue recognition: e.g., when a sale is complete and the revenue from such sale can be reflected in the seller's financial statements. Under SAB 101, a sale is complete, and thus, revenue can be recognized only when:

- Persuasive evidence of an arrangement exists;
- Delivery has occurred or services have been rendered;
- The price to buyer is fixed or determinable; and
- Collectibility is reasonably assured.

The third element, delivery, is based upon the written agreement between buyer and seller, in general, delivery of products has occurred once the risks of loss and damage, as well as title, passes from the seller to the buyer.

Parties to international commercial agreements often utilize Incoterms 2000, a group of standardized commercial terms (similar to UCC delivery terms) promulgated by the international Chamber of Commerce, that allocate and explain the various duties and obligations of buyers and sellers in connection with delivery of goods, under each particular term. Each of the Incoterms 2000 also identifies the point when the risks of loss and damage pass from seller to buyer.

For example, under the Incoterm **FCA** [designated international port of export], delivery is complete -- and revenue can be recognized under SAB 101 and 104 (assuming the other three revenue recognition elements are satisfied) -- provided that there are no contrary provisions in the agreement -- once the goods are delivered to the initial carrier at the agreed international port of export and seller is required only to pay for the transportation and insurance costs for delivery of the goods to the initial carrier at such agreed international port of export.

Using the Incoterm **DDP** (buyer's warehouse), delivery is complete -- and revenue can be recognized under SAB 101 and 104 (assuming the other three revenue recognition elements are satisfied) -- provided that there are no contrary provisions in the agreement -- once the goods are delivered to the buyer's warehouse. Depending upon the country where buyer's warehouse is located, the distance from seller, the route of delivery (both international and in-country), as well as other related factors, this could take days, weeks, and longer, to recognize the same sale under the FCA Incoterm above. Seller is also responsible under the DDP Incoterm (unless otherwise agreed by the parties) to pay for all insurance and transportation costs until the goods arrive at the buyer's warehouse -- including clearing the goods through customs -- another

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factor that could delay revenue recognition. In addition to the higher costs of selling the goods, this entire process must be completed for delivery to have occurred under the SAB 101 rules.

Additional important note: Watch out for VAT in DDP deals: make sure if using the DDP Incoterm, to specify in the agreement that any applicable value added tax (VAT), which could be substantial (15 - 25% or more), should be borne by the buyer. In many countries, the customs officials will not clear the goods unless the VAT on the goods is paid in full. Sellers don’t like to be surprised with this kind of tax payment.

3. **Have choice of law/jurisdiction clauses in contracts – U.S. choice of law or location may not be the best. Be prepared to accept local law if customer requires it (some may be mandatory in any case).**

Virtually all international contracts should contain a provision stating the applicable law. That law should be carefully considered. Using New York or another state law may not make sense, especially if the performance will be rendered within a country other than the United States. The counter-party (especially if a customer or otherwise having leverage) may demand that its own law be used. Some local laws (such as labor and environmental laws) may “automatically” apply in any case.

One potential compromise is to use a third country law. For example, it is possible for a commercial contract between a U.S. company and one from Brasil to be governed by the law of Switzerland. One should not take this for granted, for example because of the traditional U.S. rule that such chosen law should have some relationship to the contract or one of the parties. Using your own law or even a neutral law will usually pose a difficult negotiation point with the customer as well.

A related approach for sales of goods is to use the “law” of the United Nations Convention on Contracts for the International Sale of Goods. This convention was enacted for the purpose of harmonizing commercial law for international sales transactions. It will apply between two signatory countries for a sale of goods (but not services) unless expressly excluded. Unfortunately, it does not address the entire range of legal issues that may apply.

It should go without saying that one should appreciate the implications of whatever law is chosen. In particular cases, application of a particular country’s laws can have unforeseen consequences. You may, for example, wish to discuss Swiss law, with a Swiss lawyer prior to using it as a “neutral” compromise.

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4. Develop an arbitration or dispute resolution clause that is right for your company and enforceable in the jurisdictions in which you operate. This can be used as a standard, adjustable for particular countries or situations.

This is intertwined with the governing law issue and probably proves even more crucial. Ultimately one strives for a provision that ensures the greatest possible fairness, relatively equal inconvenience and/or facilitating amicable settlements. The first question one must address is use of courts versus alternative dispute resolution.

One will seldom encounter companies from outside the United States willing to come into the United States courts. They fear everything from the outrageous legal expenses, to juries and punitive damages. Likewise, United States companies will seek to avoid courts in other countries if at all possible. Courts in many countries may be perceived as corrupt, slow, inflexible and/or unfathomable. While courts outside the United States do not possess the vagaries imposed by jury trials, using local courts would only be advisable as a last resort. For example, some countries do not uniformly recognize international arbitration awards

International contracts will therefore typically provide for some form of international arbitration. The first and most basic point concerns the arbitration rules and/or appointing authority. Some of the more widely used international arbitration rules are those of the International Chamber of Commerce, London Court of International Arbitration and American Arbitration Association.

A second issue concerns the place where the arbitration will be held, and the language used. If the arbitration will be held in China, using Chinese arbitrators and the Mandarin language, it will be far less likely that the arbitrator(s) will base a decision on actual contract language or some contractually mandated foreign law. One must also consider such points the number and identity of the arbitrators. One may seek to have the arbitrator (or Chairman of a 3-person panel) come from a “neutral” country, and have experience in the particular industry. Specifying that one or more arbitrators be lawyers may also prove beneficial.

An additional consideration is a requirement for some form of alternative dispute resolution such as mediation prior to commencing formal proceedings. This approach has gained more support over the years, and may be consistent with some cultural tendencies to avoid disputes.

5. Develop standards for key issues such as force majeure and limitations of liability and understand local law treatment.

a. Limitations of Liability

There are probably three most common means for limiting liabilities.

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The first common limit is a monetary limit or cap on liability. Quite simply, this type of limitation permits recovery by a customer only up to a given limit. This can be stated as a monetary limitation, such as $1,000. It can also be stated as a percentage of the contract price, from as low as 10% to as high as 200%, depending on the price and other factors. A cap can be provided for liabilities for particular types of incidents, for total or aggregate liability or both. Practically speaking, one would be well served to ensure that the limitation is reasonable for the particular contract and customer.

A second type of limitation disclaims or excludes certain types of damages. The basic idea is to limit damages to those which are direct or emergent. A suggested litany would include consequential, indirect, incidental, special and punitive damages. Given the vagaries of some of these terms, specific types of damages should also be excluded, in particular lost profits. Common law lawyers will be most interested in excluding "consequential" damages. This term does not have a historical meaning in civil code and other non-common law systems. Most sophisticated companies today understand the term. Even in the United States and other common law countries, the term can vary depending especially upon the context and the dispute resolution forum.

A third method of limitation is to liquidate the damages. This would normally be applied to specific types of obligations, such as performance or schedule guarantees. Thus, if a contractor fails to achieve completion by a certain date, or for a certain agreed performance level, damages would be calculated based on the number of days late, or the degree by which the performance was missed. The maximum damages would then be capped, by reference to the contract price or some other standard. Liquidated damages should be fixed at an amount which reasonably approximates the compensatory damages, to avoid characterization as a penalty. Liquidated damages may be a creature of the common law, but they are widely accepted around the world today. They should be distinguished from penalties. Penalties (whether or not in the guise of liquidated damages) are normally not permitted under the common law.[i] Penalties are common and readily used in civil law and other jurisdictions.

Generally, limitations of liability such as those described above are enforceable globally. There are certain mandatory exceptions, which vary from country to country. The most common exception is for conduct which can be characterized as "intentional" and "wrongful." This could be termed willful misconduct, bad faith, "dolo," or recklessness. Fraud or intentional misrepresentation is also typically considered an exception. One should normally presume that a limitation of liability will not be enforceable in cases of willful misconduct.

Less commonly, a limitation may not be enforceable in cases of gross negligence. This term is not as susceptible to rigorous definition as intentional misconduct. One may "know it when I see it" but one cannot predict with certainty what actions may be deemed grossly negligent. Indeed, the cases which discuss gross negligence run the gamut. It certainly requires something more than ordinary or simple negligence. The conduct must approach intent because of a "reckless disregard."

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Negligence itself will normally not be considered a mandatory exception to a properly worded limitation of liability. The limitation should specifically refer to the term "negligence" to maximize potential enforceability.

b. Performance and Excuse/Force Majeure

The most significant consideration here is that there are far more things outside of one's control in international transactions. It is difficult to understand and follow local weather patterns, law changes and a wide variety of other items. Due diligence and local advice are clearly needed.

One solution is a well-crafted force majeure clause. Normally the preference is to list all of the specific events that constitute force majeure along with a general definition of events beyond a company's reasonable control. Special consideration should be given to the implications of the clause flowing in both directions. For example, could the clause give the other party an excuse for not making payment? All of the usual concerns should also be addressed: how invoked; delivery and cost consequences; ability to suspend or terminate; and resolution of disputes.

A key performance area internationally concerns delivery terms, title transfer and risk of loss. Title transfer should be tied to payment provisions, but should also account for the possible inadvertent establishment of a physical presence if title transfers within a country. The INCOTERMS provide a short-hand way of expressing the meaning and consequences of particular delivery terms. One should also consider how and when risk of loss passes, and tie that to responsibility for insurance.

6. Understand and anticipate government approvals.

One sure way to disrupt a negotiated contract is the government approval process. This can include:

- Approval to enter the contract (for example, joint ventures in China)
- Central Bank or Treasury approval to receive hard currency
- Registrations to do business, or open a subsidiary or branch
- Intellectual property registrations
- Export control licenses

The bottom line advice is to be completely sure that any government approvals are well understood in advance. The contract should contemplate them from both a timing and effect standpoint. If the government requires a change in the terms, the contract should identify who bears the cost and schedule burden. The termination and dispute resolution provisions may require adjustment.

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7. **Have provisions addressing confidentiality, intellectual property and know-how protections.**

   Many of the same considerations that apply to U.S. domestic contracts apply internationally. Clearly one should have confidentiality provisions to protect information and technology. The provisions must be drafted bearing in mind the subject matter of the contract and how it will be executed. The biggest question concerns enforceability. Can one use the local courts? Is it necessary to have an exception to the arbitration provision?

   One should also be aware of any local laws that may restrict one's ability to collect royalties or protect certain types of intellectual property. Tax laws pertaining to technology transfers should also be understood.

   Perhaps the biggest consideration is the potentially different perspectives of the counter-party on this whole subject. There may not be a sufficient appreciation of the value of intellectual property, or a company's right to protect it. This perspective does not seem as pervasive (or as justified) given today's globalization and electronic communications.

8. **Include provisions addressing the term, termination and consequences.**

   Normally one would expect to give contracts a definite duration. However, it may depend on the applicable law. Agency or distributor agreements may in fact be indefinite in some countries unless a particular procedure is followed and/or indemnity paid. Similarly, antitrust or competition laws may restrict the duration of some types of contracts or provisions. The bases for expiration or renewal should be specified. Your potential exit strategies and options should be carefully considered and worded.

   The causes of termination must be carefully considered besides simply material breach or default. The contractual implications of financial insolvency may vary, and may not be valid grounds for termination by the other party. Notice and cure periods should be both realistic and tailored to the specific type of contract.

   The costs and damages recoverable on termination should be determined. Applicable damages payable or other rights triggered under the applicable law must be taken into account. Special rights (such as rights of first refusal) may apply for certain types of contracts.

9. **Take into account all income, VAT and other source and local tax considerations, both in and independent of the contract.**

Don't:

1. Force-feed U.S.-based contracts into non-U.S. countries. Consider one or more international templates for standard transactions.

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2. Fail to clearly define contract procedures, including management approval process and signing authority. (Contract Procedures and Maintenance)

3. Get hung up on counterpart's spelling and grammatical mistakes, unless they create contractual ambiguity or the risk of incorrect interpretation.

4. Forget to include broad anti-corruption, Foreign Corrupt Practices clauses in your standard consulting/sales representative/distribution agreements. These clauses should not be negotiated out -- ever.

5. Ignore permanent establishment taxation rules for doing business in foreign countries to avoid incurring "deemed" corporate tax on foreign parent company's revenues. Forget to contact local counsel to explain local tax and legal risks for your local subsidiary's provision of services and issuing of invoices in foreign jurisdiction.

6. Assume burden of exporting products manufactured by your subcontractor from the place of his manufacture.

7. Ignore role of customs, import duties, payment of value added tax (VAT) at customs clearance points and in connection with retaining service providers in foreign jurisdictions. Local companies paying value added tax are usually eligible for refund from tax authority. Foreign companies usually are not.

8. Get hung up on standard terms in NDA's; including choice of law; choice of forum. Pick something that is neutral; mid-way between two parties' locations.

Hiring and Retaining Employees - Mitch Shelowitz

Do:

1. Develop a good standard employment agreement. In order to ensure consistency internationally with your company's employment terms and conditions, develop a general standard employment agreement. While you won't necessarily be able to use this standard agreement without modification in light of local rules and customs, it may save you time and resources in supporting your team in getting an agreement to the prospective employee as soon as possible by having something ready to send to your local counsel.

   This standard agreement should reflect key terms, conditions, and policy issues. Remember, as your company establishes new foreign subsidiaries, there will likely be a time lag from the point of hiring employees and developing an employment manual for that particular local presence – if any – that will reflect company policies and local rules and customs – so you won't necessary be able to rely on the company employment manual immediately. The employment agreement will be the most important initial "set of rules" for your international employees.

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Tip #1. Decide who will be the employer. Will it be your company's local in-country subsidiary? If in the EU, and you have a local subsidiary in the UK, will the employer be your UK subsidiary or will you establish another subsidiary in the country where the employee resides? Will the employer be a local representative office? Will the employer be your company? These questions should be answered early on to avoid additional costs; delays; and anxiety. Consider social benefit issues; tax issues; treatment of employee stock options in particular country (and make sure that your employment agreement and stock option plan or grant letter contains language that shifts the burden on paying taxes related to employee stock options to the employee).

Tip #2. Policies to consider referencing in this standard agreement include: insider trading policies; company ethics (doing business) policies; non-competition issues; treatment of confidential and proprietary information; anti-corruption and foreign corrupt practices act language; expense reimbursement; and travel procedures.

Tip #3. In every country there will be exceptions. In some countries, it will take more time and cost more money to use your company's standard employment agreement since the local lawyers may object to certain of your standard provisions based upon local law and customs. You'll need to look at each country on a case by case basis. If you decide that it is better from a cost and time perspective to use an agreement prepared by your local lawyers as a base – you can then insert the specific key policy provisions in this local "standard" agreement – and have local counsel check and translate, if necessary, only these specific provisions that you have added to their standard agreement. This approach can also save time and potential ambiguity resulting from translation/ interpretation issues in the event of a later employment dispute. A judge will see an agreement that looks like all the other agreements he or she has seen, with the exception of your special added provisions.

Tip #4. Note: In some countries, such as France, employment agreements must be written in the local language, so there is an issue of getting a proper translation, as well as ensuring that all of the very complicated and required social benefits and employee protections are adequately reflected in the agreements. Make sure to have an English translation to review.

2. Educate company executives about severance. The company executives in your international operations may be expatriates from the United States. In the U.S. the employment at will doctrine controls and baring any public policy prohibition (e.g. discrimination) and an employment agreement, an employer can terminate an employee with little to no notice and for no reason. In most countries outside the U.S., the concept of severance is prevalent. Local employment statutes typically dictate the probation period of employment and the minimum standards for severance if an employment relationship is terminated for no legitimate cause. Under these statutes, if an employment relationship is terminated during the probation period, no severance is owed the employee. However, once the probation period ends, an employee is owed severance, which can be calculated based upon the number of years of service. Of course, if the employee is under an employment contract, the severance obligation

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could exceed the amounts stated in the statute. In any case the severance or termination indemnities can be significant.

It is important that your company executives understand the severance statutes in the location of your international operations, especially if they are used to the employment at will doctrine. They need to understand that they can terminate the employment relationship for cause and pay no severance, however, "cause" is usually defined in the statutes and may not encompass some of the "for cause" terminations within the company's employment policies. That doesn't mean that they can't fire the employee if they are doing a bad job or have committed a bad act. It just means that the company may have to pay severance. Another important thing to remember is upon termination, severance can be negotiated with the employee and may not be equal to the statutory minimums (especially in the case where there is a question as to whether the termination was for cause or not for cause). In such cases, however, a locally recognized release is essential.

Don't:

1. Have expats manage foreign employees, using U.S. law employment standards. As mentioned above, your international company may be managed by U.S. expatriates, who are only familiar with U.S. employment law standards. This can really create a problem if your manager is not aware of the differences under the local employment laws. For example, a U.S. ex-pat in Canada may assume that if an employee is coming off a one-year leave of absence, they only need to be placed in a similar job upon their return. However, under Canadian law, the employee is entitled to the same exact job. Imagine the difficulty if that same U.S. ex-pat had already hired a replacement for the employee on the leave of absence!

   You may also need to consider having a separate, or perhaps two different, ("matrix") reporting structures. For example, you may want to have European employees formally reporting to a local manager, but operationally reporting to an expatriate.

   The best way to manage this problem is for you or your local employment counsel to sit down with your manager and go over the difference in the law. Most local employment counsel with U.S. clients have dealt with this problem before and can give the manager good examples of what not to do. A general employment law seminar for all managers, including ex-pats and local managers, is also a good idea. The seminar should be done on a yearly basis.

2. Assume English-speaking managers understand English policies.

Tip #1. Take the time to explain the key points in the policies to these managers, provide sufficient training and give them the opportunities to ask questions and follow up whenever they want.

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Tip #2. Don't assume that by delivering the policy books to them that:

(a) They'll open the book;
(b) They'll read the book;
(c) They'll understand what they read;
(d) They care about what is written there.

Tip #3. KEEP THE LANGUAGE AS SIMPLE AS POSSIBLE, BUT NOT A BIT SIMPLER (with acknowledgement to Einstein). Even if a manager is "fluent" in English, some of the concepts in your company's policies may be misunderstood. Also, it is not uncommon, when asked, for a manager to state that they understand the policy. Try to create simple tests for each policy area to assure yourself that by answering correctly, you have the assurances that they understand and comprehend the policies. Finally, never underestimate the importance of properly translated policies.

3. Underestimate the cost and time involved in the translation of policies and documents (and who does the translations).

Tip #1. Have good, reliable translation company at the ready in your home country. Get recommendations from ACCA colleagues. There are many and check prices and service levels. There is a huge value to paying a little more, in order to ensure rapid and efficient service when you need it. Emergencies happen all the time and you don't want the translator to delay your transaction – since, in any event, you will be viewed as the bottleneck. You can always deal with the costs internally later on. Make sure you get the translations done as fast as humanly possible and pressure the people you are working with. You'll likely get better service on an ongoing basis from "your" translator. In addition, you should maintain quality control on the translations; e.g., you should read the foreign language to English translations to make sure that they make sense and the correct words were used by the translator. You can discuss any conflicts with the translator and if you are correct, they will typically update the translation accordingly.

Tip #2. Immediately send foreign language documents to translator. Once you know that you'll have a translation issue for any agreement, send immediately to your translator. Translations are another element of managing an international project and you'll need to add in from 24 hours to more time in order to get things done in line with your business team. You should always be able to pay a little more for expedited service, however, if the contracts/documents are long, you'll need to get an immediate time to completion estimate from your trusted translator so you fully understand the process and how to advise your team.

Tip #3. Seek to push translation costs and responsibilities to another department. Try to push expenses for translation of certain documents out of legal budget to HR budget or to marketing and sales. For example, employment policy books; training manuals; etc. Other departments may also have in-house persons who are fluent or at least knowledgeable. This can be particularly helpful with respect to technical or business terms that may not be understood by a translator or even legal counsel.

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Tip #4. Large Project tip. For large and non-urgent translation projects, get cost and time estimates in order to shop around and compare. Break down the projects into smaller parts, if possible, and prioritize the parts. For such projects, I recommend against sending parts to different translators to speed things up, since this often results in different translators choosing different translated foreign language or English words to describe the same concepts and ultimately – internal ambiguity and inconsistency. This may lead to larger – and more expensive -- problems later on.

Tip #5. Send certain translations to local counsel for review and confirmation. You should consider sending certain English to foreign language translated documents, which you'll need to identify on a case by case basis, to your local counsel to check the translations. Legal terms and concepts, or terms and concepts with local regulatory and legal implications, should be confirmed with local counsel to ensure that the translators -- who usually are not, but sometimes are, lawyers – used the correct terms of art in the local language in their translations. You may find that the extra costs will really result in cost savings by the avoidance of re-translations and the reliance on accurately translated documents.

Tip #6. Use the term "urgent" selectively with your translator. Be extremely selective about what you identify to the translator as URGENT. As with all service providers, it pays to build a track record with non-urgent projects, so that the translator doesn't feel that everything you send – and, perhaps, nothing – is truly urgent. You want your service providers to want to help you and not feel that you are a burden that is effecting how they service their other customers.

Tip #7. Send thank you's to your translator for a job well done. Send thank you emails when you get things on time -- especially for extra effort -- and try to pay your bills on time. After all, you pushed them to serve you, don't make them wait for their money. Treat these people respectfully and with kindness. They can help you in more ways that you can believe.

Evaluating Local Partners and Structuring Business Relationships - Trish Marcucci

In order to maintain the highest level of professionalism and effective standards in conducting business in the U.S. and abroad, without going into the specific requirements of the Foreign Corrupt Practices Act ("FCPA"), it is important to note that due to the severe penalties and potential liability for payments made by partners, consultants, or other third parties with whom the company does business, dealing with any such third parties requires special sensitivity from the beginning.

It is recommended that companies establish a policy that prohibits entering into relationships with a third party who may have contacts with government officials (as defined by the FCPA), without inquiry into the third party's background and reputation.

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The due diligence investigation should determine (a) that the third party is not a "foreign official" or a company in which a foreign official has a significant interest; and (b) the third party will not engage in improper practices.

Any issues raised by the investigation should be resolved to the company's satisfaction before entering into the relationship.

There is a basic three-step process for entering into relationships with third parties: (a) due diligence review and approval; (b) execution of a written agreement; and (c) documentation of the process completed.

I. Due Diligence: Know Thy Partners and Business Associates

A. Questionnaire and Report: In order to complete the due diligence process, the company should develop a due diligence questionnaire and data sheet to be completed by the third party. Based on the information collected through this process, a background investigation may be conducted by an investigative firm, if necessary and appropriate. The company should prepare the report and recommendation and determine who will make the final decision regarding how to proceed. The Legal Department must be a part of this process.

The forms to be completed should be designed so that they can be completed quickly with little administrative burden.

The forms and supporting documentation should be forwarded to the Legal Department to preserve any privileges, including the attorney-client privilege.

All personnel involved in the process should be required to act promptly so that the due diligence will not delay any business operations.

Confirm what background checks are permitted by local law and whether consents or notices are required.
For foreign partners in particular, it is extremely important to obtain information about whether they are or have a relationship with any current or former government officials. This includes any government ministry, agency or government-owned or controlled enterprise, or political party.

If so, obtain detailed information regarding the government entity or party, official responsibilities, dates of service, nature of relationship. You may also want to obtain personal and professional references, three or more of which have no biological relationship to the applicant.

B. Obtain Information Regarding Legal Proceedings, including:

1. Any judgments, claims or lawsuits pending

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2. Whether the individual has been a party to any lawsuits or liens, criminal or civil
3. Any convictions

C. Other Pertinent Background Information

1. All business ownerships or financial interests in business

D. Previous Employers -- Ask whether they have ever been suspended or discharged from a company for any of the following:

1. Theft
2. Embezzlement
3. Conflict of interest
4. Substance abuse
5. Excessive force/violence
6. Falsifying company documents/reports
7. Bribes, gratuities, kickbacks
8. Domestic violence

If yes, obtain detailed information regarding the circumstances.

The company's policies regarding contracting with third parties must be communicated to all employees. In addition, employees who will be contracting with third parties should be familiar with applicable U.S. and foreign laws, and should be required to consult with the Legal Department when questions or potential issues arise.

If issues are identified early in the process prior to any engagement, they can be resolved consistently with applicable laws.

E. Report

Someone within the company should be required to verify all information in the Questionnaire and Data Sheet that is completed by the third party. This person should also perform all reference checks, document basis for compensation and economic terms; and demonstrate that they are reasonable and commensurate with the work and value provided by the third party.

The report should include:

1. A brief description of the proposed relationship
2. Selection process used
3. Ownership, relationship and reputation
4. All such relationships should require the review of the Legal Department and approval of the Finance Department and management.

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II. Written Agreements

All third-party relationships should be reduced to a written agreement prepared by the Legal Department that includes the appropriate language required by and in compliance with the FCPA and other laws.

This requirement helps ensure that the company does business with appropriate third parties and reduces the risk of legal and ethical violations.

III. Documentation of the Process

A. The process undertaken by the company should be documented and, if possible, the information entered into a database.

<u>Intellectual Property Protection - Phil Pesek</u>

Do:

<u>Register trademarks and patents where products are being manufactured.</u>

When dealing with international intellectual property, such as trademarks and patents, most companies are aware of and do a good job of protecting their marks and ideas in the country in which they operate. However, there may be two areas of opportunity which often get overlooked – manufacturing country registrations and domain name registrations.

Most trademarks and patent registrations occur for a company when they develop a unique name or idea. In this age of the global economy, it is not unlikely that the product the company sells is manufactured in a country other than the operating country. The company registers such names and ideas in each country in which they operate to protect against infringement of the name or idea by others. However, a company may be vulnerable in the country of manufacture. For example, if a company develops the trademark "XYZ" for a ceiling fan and successfully registers it in the United States, it can prevent other companies from selling ceiling fans with the "XYZ" trademark. However, if the company manufactures the ceiling fan in China and does not register the "XYZ" trademark in China, it is possible for a third party to register the "XYZ" trademark in China and prevent the company from manufacturing the "XYZ" ceiling fan in China even though the company has exclusive rights to the "XYZ" name in the United States. Therefore, the moral of this story is to register all patents and trademarks in the anticipated operating countries as well as all anticipated manufacturing countries. But don't wait too long in contacting them because there are plenty of trademark pirates out there.

The second area of opportunity is domain name registrations. In the old days, a company only had to worry about the ".com" domain name throughout the world. However, there has been a significant increase in the availability of domain names. A company can

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protect itself by registering for all available domain names and keeping track of the addition of new domain names. There are plenty of service companies available as well as IP law firms that can help your company with this task.

Consider local perspectives on IP and confidentiality in addition to law

Historically, many countries have not recognized, much less enforced, protection of IP and/or confidential information. In the extreme, this problem can manifest into an outright encouragement of infringement. Laws may be in place, but ignorance, a cultural bias or simply lax enforcement may render such laws weak or perhaps irrelevant. In some cases, a customer, joint venture partner or other party simply may not realize or appreciate the value or protections associated with technology or information.

In any case, one should not merely rely on contract provisions. Personnel should carefully limit their disclosures of confidential or proprietary information. Such information should also be marked or designated appropriately. Periodic audits or at least written confirmations should be sought to ensure that contracts have been followed.

Export Controls, Sanctions and Embargoes - Michael Pillow

Do:

Include compliance with not only U.S. but other countries' export control restrictions as part of an overall compliance program.

Communicate ongoing changes in regimes (e.g., Libya and Syria) within your company.

Don't:

Disregard the impact of U.S. extra-territorial laws and other export controls, sanctions and embargoes.

The starting point for U.S. companies is certainly the United States laws. These can be divided into two broad categories: general trade laws applying globally and country-specific sanctions or embargoes. Doing business internationally, one also needs to be aware of the possible impact of other countries' export control laws as well. Suffice to say, that many of the regulations in this area are detailed and complicated. Specialized advice should be obtained, both within and outside the U.S.

General export control laws determine the applicable licensing requirements for the export of products, software or technology. An "export" can occur in various ways, from actual physical movement to a disclosure made in the United States to a foreign national (deemed export). It is important to understand the classification for a particular product, software or technology to determine whether it may be freely exported, i.e., under a "general license" or requires a specific export license. If one is dealing in "high tech" or anything that could be used or converted into weapons, the beginning assumption should be that one or more specific approvals will be required prior to exportation.

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The ultimate destination must be considered for export control purposes. If a product or technology is being sent to England, for onward destination to India, the particular restrictions applicable to India must be considered. The regulations may apply differently if a product will be placed into general inventory, for shipment to an unknown destination. Likewise, one must appreciate the origin(s) of a product to be sure that any applicable legal regime's requirements have been met.

It is also important to appreciate that export control laws apply even within a corporate group. Exporting to an affiliate in another country is still an export. Similarly, employment of a foreign national within your company may also be an export.

If one can overcome the general licensing hurdles, specific countries must be considered. Those countries subject to sanctions will change over time, depending on such things as world events and politics. As of this date, the countries of most concern for U.S. companies are Cuba, Iran, North Korea and Syria. Regulations differ somewhat for each country. The simplest general advice is to assume that neither a U.S. company nor any associated U.S. person can be involved in any transaction or business in sanctioned countries without U.S. government approval. Any exception should be reviewed on an individualized basis.

Brief mention should also be made of the U.S. Israeli Anti-boycott Regulations. These regulations basically preclude U.S. companies from complying with the secondary boycott of Israel applicable in some Arab countries. If you are conducting business in the Middle East, you should assure that all contracts are properly reviewed for compliance. Certain government reporting obligations also apply even to boycott requests.

The consequences for a violation include monetary fines; imprisonment or other criminal penalties; denial of export privileges; loss of government licenses; and adverse publicity. This is an area where extreme caution should be exercised to ensure absolute compliance with the laws and regulations.

Meetings and Negotiations in Foreign Countries -- Mitch Shelowitz

Tip #1. Expect the unexpected. Always remember that unexpected things can always happen when traveling. Your job is to make sure that despite the unexpected, you are prepared. The business team does not want to wait for you to get up to speed. You need to be ready all the time. You can wait for the business team – they shouldn't have to wait for you.

Do:

1. Arrive in the morning at least one business day in advance of meetings and negotiations to the maximum extent possible, especially if the meetings are external to your company.

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Having this time before your first meetings will provide significant advantages:

- You provide a time cushion in the event of unexpected travel-related, customs, lost luggage, and other delays;

- You'll have time to land, get to your hotel; and unwind after the traveling. You'll have time to review your materials and prepare for the next day's meetings – without pressure.

- You'll have time to check your emails to see if anything new came in regarding the business you are traveling for. You'll also have time to print out and comment, if prudent, in advance of the next day's meeting. This will likely translate into time savings. You'll also be able to update your business people about any relevant changes to agreement; business terms; etc. They may not have the time to check in advance.

- You'll have some time to adjust to travel fatigue, and to get a good night's sleep in advance of your first meetings.

- The rest of your team will be able to count on the fact that if they don't make it to the meeting on time, you'll be there. You'll be able to explain the delays to your counterparts and also will be able to assist your team in the event of their delays. Your team will know they can rely on you being there.

2. Check in advance that your passport is valid and that you have a valid visa, if necessary.

   You should keep a mental note of the expiration date of your passport. In theory, you should be ready to travel internationally on a moment's notice. Don't let your passport's expiration interrupt your company's business plans.

   In addition, once you schedule your travel plans, immediately address the issue of visa requirements either with your travel agent, your local counsel, business people in your company who have traveled to this destination, or others you can trust. You may need notarized documents; visits to foreign embassies; and other steps. Since you'll be relying on the bureaucracies of other countries – which often take time – you need to make sure to make all arrangements and satisfy all conditions within your control to get the visa application process going ASAP so this doesn't create a departure problem for you.

3. Prepare information binder to bring on the plane, which includes:

(a) *Research on the company you will be meeting*. Check the company's web site; information available on the Internet; and other information from contacts within your company.

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(b) *Research on the country you will be visiting.* Printout relevant listings:

(i) CIA World Factbook -- http://www.cia.gov/cia/publications/factbook/index.html

(ii) US State Dept. travel warnings -- http://travel.state.gov/travel_warnings.html#c

(iii) US State Dept, background country notes -- http://www.state.gov/r/pa/ei/bgn/

(c) *Weather reports for local venue.* Check the international weather.com website http://www.weather.com/common/welcomepage/world.html?from=globalnav

(d) Most current draft of agreement(s);

(e) Printout of home page of your hotel (with hotel address and telephone number)

Tip #2. Know about the country you're visiting. The more you know about the country where your counterparts live, the better it will serve you – both in terms of your personal travel planning and impressing your hosts.

You want to develop a comfort level with your hosts and knowing about their country and company will go a long way to help you to understand their perspective during the negotiations. They will appreciate your investment of time to learn about their country. This research will also tip you off on any sensitive political, cultural, and religious issues.

Tip #3. Know about the company you're meeting. The more you know about the company, including sales; current events; recent corporate and personnel changes; the better prepared you will be to negotiate and discuss issues "like one of the gang" with your counterparts before, during, and after the negotiations.

The more you know about the company, the more your counterparts will think you know about the company. This will have immeasurable advantages during your discussions.

Tip #4: Before departure, speak to friends; in-house colleagues, and people in your company who have traveled to the country; negotiated with the company you are meeting; You will be able to obtain extremely useful intelligence from these people that could save you time; money; headaches; disruptions; and more.

4. Bring all key documents in your carry-on luggage.

Have drafts of all contracts, related documents—take with you on plane—not in checked luggage. Leave nothing to chance; e.g., always assume that any checked luggage will NOT make it to your final destination. For this reason, always take with you in your carry on baggage all documents that you'll need for your discussions.

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5. Pack the right Clothes with Back-Up.

   Based upon the weather report you pulled from weather.com, make sure to pack the right clothes and shoes, with back-up. You may have down time between meetings for which you want to relax. Also, remember, your trip could be extended; you may find stains on your clothes. Don't let these minor problems affect how you represent your company.

6. Check if you need special shots; pills; drugs for travel in the area.

   Depending upon where you are going, you may need immunizations or may need to take anti-malarial drugs. Check with the World Health Organization web site; a good local hospital; or the U.S. embassy in the area where you'll be traveling. Requirements change from time to time, so make sure that you are relying on the most current information.

Bonus Tip: Bring supply of your preferred pain relievers (Advil, Tylenol; etc.); heartburn pills; Imodium; and any other specific pharmaceutical or other medical supplies that you may need. You likely won't have time to go shopping while in country; and it may be difficult for you to find what you need. You also don't want to have to be away from the meetings due to your health concerns and you want to be in your best shape for the meetings.

Save yourself headaches (literally!!); time; other pain, discomfort; and frustration by bringing these things with you. Have a pocket of your bag or a container with these things ready at all times so that you won't need to worry about this when it's time to travel.

7. Contact Your Local Counsel in Advance of Departure.

Contact your local counsel in advance of trip to advise them to be on-call during your visit, not necessarily with you at meetings. Additionally, ask local counsel about getting picked up from the airport and whether it is safe to take local taxis. In some countries, local taxis are not safe. Often, in these places, local counsel have a driver on staff who can pick you up and take you to your hotel. In-country transportation safety is an extremely important issue to be aware of in advance of the trip.

Take your local counsel for dinner. This will undoubtedly prove interesting and worthwhile. They may be able to provide you with intelligence about your counterpart, the industry, and other current events in their country that may help you in the meetings.

8. Have all electronic files and emails with you. Copy all drafts of documents to the C:drive of your laptop and synchronize relevant e-mails. Copying files onto Flash Disk for additional back-up can't hurt. Bring blank 3.5 inch floppy disks in case you need to exchange files during the negotiations or print out documents in real time after negotiating and updating agreements on laptops during meetings.

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Tip #5. Don't rely on others for the Word documents; emails; disks that you might need. Bring your own.

9. Have electrical and telephone adaptors with you. Don't forget to bring electrical outlet converters and telephone jack converters (certain countries; e.g., Germany and France, need special country-specific telephone jack adaptors). Bring LAN adapter and/or wireless LAN/WIFI card for high speed connection -- many hotels now provide broadband Internet access in rooms and lobbies.

10. Have a mobile phone with you at all times. Have mobile phone that works in country you are visiting. Either arrange from your port of departure, or rent at arrival airport, or ask your local counsel, or local country business reps. to get you a mobile phone.

Tip #6. When traveling, it is essential that, except when you are in the air, you have seamless communications with your company and counterparts; local counsel; and your family. Although, as always, you should try to minimize the costs of such communications in terms of priorities, 24/7 availability must be your number 1 concern.

11. Always prepare opening statement for negotiations. Surprise your counterparts with kindness; compliment their country; and be gracious.

12. Stay in a good, convenient hotel. Make sure to find the right hotel that is close to where you'll be conducting your meetings. You don't want to travel too far in the mornings to get to your meetings. There will be traffic; car issues; etc. You need to minimize these issues.

Tip #7. Room Service. Make sure that your hotel has 24 hour room service. You may be working late into the night and early in the morning. You need to eat.

Tip #8. Business Center is Essential. Make sure that your hotel has a business center. You will likely need printing; copying; faxing; and other business services to support you during your visit. Plan ahead so that if you need such support services, the business center is prepared to help you. You can often arrange to reserve personnel for late night and through the night availability – as long as you make the arrangements in advance.

Don't:

1. Discuss issues of global politics and religion. Try to avoid these issues. You usually have little details about the backgrounds; religions and family history of the people you meet. The best advice is to listen what people have to say and comment with, "Wow, that sounds interesting." Show interest, but don't make the mistake of adding your personal; professional; or religious perspectives. All the goodwill you created with your preparation; opening statement; etc. could be torpedoed by saying the wrong thing.

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2. Get too comfortable with your counterparts. Remember, that you are there representing your company. Don't make the mistake of getting too comfortable in the level of informality of your discussions. This could get you into trouble, especially at dinners and after drinks. Always check yourself and maintain self-control.

3. Publicly criticize your team members; your counterpart's team members.

   Avoid this mistake at all costs. Such criticism will not help you. It will almost always hurt you. Always maintain a positive outlook and much enthusiasm.

4. Be inflexible; difficult to get along with; uncooperative; and give appearance of apathy toward your deal.

   Remember, when you travel to your counterpart's home territory, they have a million things they could be doing, other than your deal. You have entered into their domain and each hour that they sit with you, is an hour that they are not able to work on other matters. Think of what you would have to do in order to give someone a full day of your time – and what wouldn't get done in your office during that day. If you make it a positive experience for them, they won't resent you too much. If you give them a hard time, they may decide that despite the fact that you are visiting, they can't give you two or three or more sequential days of their time; etc. This could have seriously negative consequences on closing your deal on your visit.

   Since you won't necessarily know who gave the orders for them to participate in your deal, you don't know if from a business perspective, your business has a priority within the counterpart's company. Therefore, you need to do all you can to make sure that this person is willing to work with you while you are in town.
   No one wants to work with someone who makes their life more difficult. You should always be enthusiastic and convey the message that you will give your all to get the deal done. Obviously, you want to maximize and improve the terms of the deal for your company. Nevertheless, even the toughest issues can be worked through if you show goodwill, enthusiasm and a positive, professional attitude. If you try to help your counterpart in certain areas, they will help you where they can.

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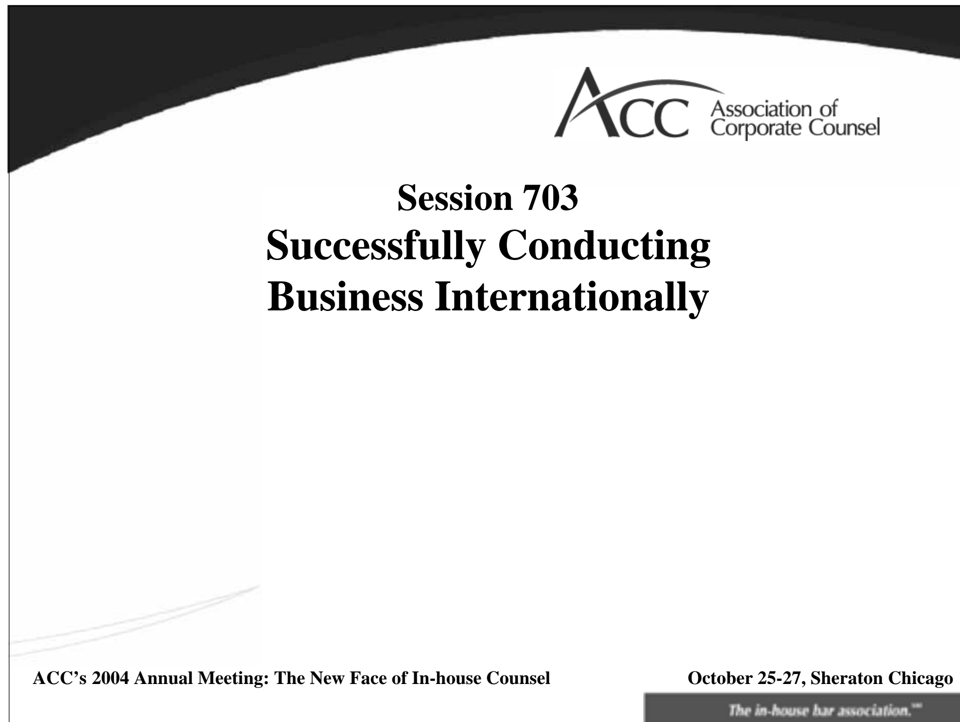

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Successfully Conducting Business Internationally

- Compliance

Do:

1. **Set up a Global Compliance Program.**
2. **Set the Tone at the Top.**
3. **Effectively communicate the Compliance Program to all employees world-wide.**
4. **Establish reporting mechanisms.**
5. **Obtain training certifications from all employees.**

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Successfully Conducting Business Internationally

- Compliance

Don't:

1. **Impose U.S. compliance code with U.S. law references on foreign employees without making necessary adjustments for language, local laws and other cultural issues.**

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Successfully Conducting Business Internationally

- Local Counsel

Do: Set up an in-country outside counsel network, including subject matter experts and local counsel.

Don't: Hire local in-house counsel and assume everything will be okay.

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Successfully Conducting Business Internationally

- Advertising

Do: Consider using local advertising agencies with U.S. templates, to avoid advertising non-compliance.

Don't: Assume local customers can tell the difference between local ads and U.S. ads.

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Successfully Conducting Business Internationally

- International Contracting

Do:

1. **Understand the general considerations that can apply to a particular international contract.**
2. **Pay attention to the commercial deal, particularly how you will get paid.**
3. **Develop appropriate standards for key contract issues.**
4. **Understand and anticipate government approvals.**

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Successfully Conducting Business Internationally

- International Contracting (cont.)

Don't:

1. **Force-feed U.S.-oriented terms and practices into non-U.S. contracts.**

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Successfully Conducting Business Internationally

- Hiring and Retaining Employees

Do:

1. **Develop a good standard employment agreement.**
2. **Educate company executives about severance.**

Don't:

1. **Have expats manage foreign employees, using U.S. law employment standards.**
2. **Assume English-speaking managers understand English policies.**
3. **Underestimate cost and time to translate policies and documents.**

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Successfully Conducting Business Internationally

- Evaluating Local Partners and Structuring Business Relationships

Do:

1. **Know thy partners and business associates.**
2. **Conduct a due diligence investigation to confirm the third party is not a "foreign official" and will not engage in improper practices.**
3. **Execute a written agreement that includes appropriate language to ensure compliance with the FCPA and other applicable laws.**
4. **Document the process.**

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Successfully Conducting Business Internationally

- Evaluating Local Partners and Structuring Business Relationships

Don't:

1. **Engage a third party if issues arise in the due diligence process without resolving the issues to the company's satisfaction prior to the engagement.**

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Successfully Conducting Business Internationally

- Intellectual Property Protection

Do:

1. **Register trademarks and patents where products are being manufactured.**
2. **Consider local perspectives on IP and confidentiality in addition to local law.**

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Successfully Conducting Business Internationally

- Export Controls, Sanctions and Embargoes

Do:

1. **Require compliance not only with U.S., but other countries' export control restrictions.**
2. **Communicate ongoing changes in laws and regulations within your company.**

Don't:

1. **Disregard the impact of U.S. extra-territorial laws and other countries' laws as well as practices.**

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Successfully Conducting Business Internationally

- Meetings and Negotiations in Foreign Countries

Do:

1. **Arrive in the morning at least one business day in advance of meetings and negotiations.**
2. **Check in advance that your passport is valid and that you have a valid visa, if necessary.**
3. **Prepare information binder to bring on the plane.**
4. **Bring all key documents in your carry-on luggage.**
5. **Pack the right clothes with back-up.**
6. **Check if you need special shots; pills; drugs for travel in the area.**

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Successfully Conducting Business Internationally

- Meetings and Negotiations … (cont.)

Do: (cont.)

7. **Contact your local counsel in advance of departure.**
8. **Have all electronic files and emails with you.**
9. **Have electrical and telephone adaptors with you.**
10. **Have a mobile phone with you at all times.**
11. **Always prepare opening statement for negotiations.**
12. **Stay in a good, convenient hotel.**

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Successfully Conducting Business Internationally

- Meetings and Negotiations in Foreign Countries

Don't:

- **Discuss issues of global politics and religion.**
- **Get too comfortable with your counterparts.**
- **Publicly criticize your team members; your counterpart's team members.**
- **Be inflexible; difficult to get along with; uncooperative; and give appearance of apathy toward your deal.**

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