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Preparing for Your Cross-Border Deal: Practice Tips for In-house Counsel

Commercial and Contracts

CHEAT SHEET

- ***First and foremost.*** The first step in a global acquisition is to assemble a strong cross-disciplinary team staffed with players from key departments beyond legal. Meet with the team once or twice a week to stay on task.
- ***Search and inspect.*** It's essential to perform comprehensive commercial, financial, and legal due diligence to uncover risks and ensure a proper deal valuation. Flag issues that can lead to action items, or issues to change post closing.
- ***Evaluating antitrust.*** Every cross-border merger or acquisition can be scrutinized for potential antitrust violations. Failure to follow mandated procedures in all relevant jurisdictions may result in significant fines or a demand to alter and undo the deal.
- ***Post closing.*** Even after closing, your team will have to work to wrap up the loose ends. Consider hiring extra staff to help assemble necessary filings and handle follow-up requests from government or regulatory agencies.

Your CEO just announced that the company wants to acquire a business with global operations. As in-house counsel, you will play a key role in this transaction by ensuring the deal runs smoothly.

It’s a tremendous growth opportunity for you. In addition to the exposure it will provide for your senior team, you will gain critical legal experience, develop an intimate knowledge of your company’s operations, and build relationships with your company’s key stakeholders — all of which will make you more valuable to your company. In this piece, we will describe some critical steps to make your global transaction a success.

Deal team

The first — and perhaps most important — step is to assemble a strong cross-disciplinary team staffed with players from key departments beyond legal. These include finance, tax, compliance, human resources, IT, facilities, and general management. Typically, this deal team should meet between once a day and once a week to stay on task and to provide reports and updates as necessary.

Documentation, filing, and signatory requirements for global deals are voluminous, so stay ahead of the curve by keeping a schedule and developing a game plan to tackle the mechanics throughout each stage of the deal. Keep team meetings efficient with detailed lists involving specific deliverables and due dates, and review the progress at each meeting. This discipline and rigor will keep you organized and prepared throughout the deal process.

In addition to your internal cross-disciplinary team, also establish your external team of lawyers and paralegals to manage the legal responsibilities. Designate a lead outside counsel as well as a local counsel for specific jurisdictions. Select a lead counsel who has experience working on deals and who will be able to provide project management insight in addition to legal expertise. Ideally, you will consult and collaborate with local legal and tax counsel as early as possible to determine the deal structure and address other preliminary matters. If you are unfamiliar with a particular jurisdiction, a lead counsel experienced with cross-border transactions should be able to introduce you to a vetted local counsel. In engaging and budgeting for outside counsel, remember to account for unexpected work that may fall outside the scope of work agreed upon, as such costs are common and almost inevitable.

Because each country has its own legal, financial, and regulatory regimes, local counsel can provide useful knowledge and insight on local customs and procedures, and can minimize issues that may otherwise lead to delays or costly missteps. For example, native Chinese lawyers who have experience with cross-border deals and are fluent in Mandarin can help steer discussions between your company and the various government entities that review China-related transactions, including local tax authorities, local labor bureaus, or agencies that approve international deals in China, such as the National Development and Reform Commission, the Ministry of Commerce, and the State Administration of Foreign Exchange.

Certain Chinese deals, including those relating to sensitive industrial sectors such as media and telecommunications, are subject to even further governmental examination and approval before they can proceed. In such cases where the local approval process is extensive, local counsel can help ensure smooth communications with the local government throughout the deal process. Local counsel expertise would be particularly relevant in places where foreign investment is relatively new. For example, if your company is doing a deal in Guizhou, China, you may consider working with local counsel in Guizhou through a local and bilingual counsel in Beijing.

Local counsel can help your integration team keep abreast of local guidelines on document creation and approval. Depending on the jurisdiction, these can be strict and time-consuming. For example, some EU notaries insist that deal documents be read aloud in person before they will approve them. In China, official company chops, or company seals, are required to legally authorize documents. As such, use of company seals will be important in any deal involving Chinese companies as signing or closing approaches.

Engaging local tax advisors early is crucial in cross-border mergers and acquisitions, where tax considerations often become a key driver in deal structure. For example, as a general matter, sellers tend to prefer stock sales, which may produce a lower tax burden on any gain; whereas buyers often prefer asset purchases, which increase their post-acquisition depreciation deductions — often at the expense of more favorable pre-acquisition tax attributes of the target.

Because methods used to assess valuation and calculate tax liability may differ depending on the relevant regulatory guidelines and standards, you will need to consider the potentially different tax treatments in each applicable jurisdiction. Some jurisdictions do not recognize certain types of entities, while others apply very different tax treatments to entities that appear to be similar. In many countries, a “limited liability company” is a form of taxable corporation, rather than a pass-through analogue to a tax partnership, as it is in the United States. Additionally, as cross-border deals continue to grow in size and volume, the search beyond an acquirer’s borders for targets and capital increases the need for knowledge and understanding of the differences and similarities between the US Generally Accepted Accounting Principles (GAAP) and the International Financial Reporting Standards (IFRS). Although the relevant standard-setting boards have made, and continue to make, efforts to bring about convergence between the two regimes in the context of business combinations, significant differences remain. Examples include the foundational definition of “control,” the treatment of contingent consideration, and the availability of “pushdown” accounting. Failure to appreciate and deal with those differences may jeopardize the timing, and indeed the value, of a proposed transaction. Determining a deal structure and approach that achieves the parties’ tax objectives upfront will avoid the time and expense of having to restructure the transaction.

Once your team is assembled, you are ready to move to the next phase of the deal process.

Due diligence

Comprehensive commercial, financial, and legal due diligence can help uncover risks and ensure a proper deal valuation. Issues will vary depending on the industry, and you will need to assess each problem for its magnitude and likelihood of risk, as well as for ways to mitigate or eliminate that risk. Some may be tolerable, and others may be deal-killers

For example, you may discover that the target company’s contracts have granted most favored nation pricing provisions to its customers, and terminating or repapering those contracts would unduly disrupt the business. Alternatively, the target company may be bound by non-competition and non-solicitation agreements that extend to the company’s affiliates, so they would apply to your company if the deal is consummated. If the non-competition and non-solicitation terms are limited in geography and duration or apply only to one contained entity or business, they may be tolerable.

Other typical issues covered in due diligence include the termination and assignment provisions in critical customer and supplier contracts, litigation, and other claims from government agencies and third parties, and employment issues such as pension liability, change in control costs, unfavorable joint ventures and partnerships, and unprofitable operations and jurisdictions.

You will also want to flag issues that can lead to action items, or changes to make post-closing. For example, identifying duplicative departments during the due diligence process should prompt the parties to streamline the departments. Examining the corporate structure could result in a restructuring of the company post-closing to maximize tax benefits or minimize costs, such as by dissolving entities in certain jurisdictions or combining duplicative entities.

Partner with your compliance team to review the target's compliance programs and practices, including past practices, to identify any gaps and issues that you will want to address immediately after closing.

You and your compliance team may advise that the target company undertake additional procedures pre-closing or may determine self-reporting or disclosure to the applicable agency is required or advisable. Where appropriate, tailor compliance programs to meet local jurisdictional requirements. Because compliance practices, customs, and requirements vary by country, it will be important to work with local counsel. For example, data security and privacy restrictions are more stringent in Europe than in the United States. A non-European acquirer's data security and privacy policies and procedures may need to be updated to comply with more restrictive standards. Your IT team's participation will also be crucial here to help identify data center locations, data storage facilities, and the flow of how data is transferred within the company — factors that will help shape and determine the compliance plan for data privacy.

Once you have completed due diligence, assessed the risks, and identified areas that either the buyer or the acquired business will need to change once the deal closes, you need to make sure your transaction documents appropriately address and allocate deal risks between the buyer and the seller. You can do this through:

- Robust representations and warranties (e.g., intellectual property);
- Indemnities for specific identified matters (e.g., pending litigation);
- Covenants pre-closing (e.g., operating the business in the ordinary course);
- Covenants post-closing (e.g., access to information, nonsolicitation of employees); and,
- Conditions to closing (e.g., acceptance of employment by minimum number of employees, required third party and governmental approvals).

Deal terms will also vary depending on the governing law and what is acceptable and customary in the relevant jurisdiction. For example, mergers and acquisitions in the United Kingdom often contain less extensive representations and warranties, and carry fewer closing conditions than deals in the United States. As a result, once a deal is announced in the United Kingdom, parties are expected to close barring any extraordinary circumstances. In contrast, deals in China will often include a contingency clause stating that terms of the agreement will only become effective upon relevant government approval.

Third party and governmental approvals

Obtaining third party approvals is usually a part of any deal. It may play an even larger role in cross-border deals if international third parties, including customers and suppliers, have more leverage than smaller, local third parties. Your legal team should help conduct due diligence to identify the key customers and suppliers whose consent is needed for the proposed deal. In certain cases, even if consent is not contractually required, it may still be a smart strategic move to meet with select third parties to share an overview of the proposed deal and address any concerns they may have. This effort can help minimize deal risk because it can address customer and supplier concerns and ensure third-party satisfaction as the deal moves forward.

Third parties may sometimes be uncooperative and oppose the proposed deal. For example, a third party may object if it feels that the buyer is a competitor. Or it may use the opportunity to renegotiate more favorable terms in its own agreement with the target company. In such a case, you and your team must assess the cost of losing a third party and determine whether to implement a purchase price adjustment or a walkaway right in the transaction document.

Government and regulatory consents are another critical piece of cross-border deals. Government and regulatory agencies operate on their own timeline and may raise issues, ask questions, or require additional information unanticipated by your team. Your team should budget extra time to accommodate these requests and respond to these agencies.

In one situation, a government official new to an agency requested comprehensive information that had not previously been requested under similar circumstances. Gathering this material added several weeks to the approval process and delayed closing. But even in the face of short-term frustrations, it is important to maintain a good working relationship with government and regulatory agencies in the jurisdiction where the business will operate post-closing.

One strategy for preventing delays and fostering a positive relationship with the relevant agencies is to preview the proposed transaction with them. Government and regulatory agencies usually appreciate advance warning and, as a result, may be more receptive if you reach out to them early in deal discussions. These discussions can also help flesh out any issues or questions that you need to address when you have the time and bandwidth to do so.

Labor law

Different jurisdictions each have complex labor and employment laws, customs, and regulations. For example, Chinese buyers of US businesses with a unionized workforce will need to understand the applicable collective bargaining agreement that governs that workforce and the requirements imposed under the agreement. Such approval includes whether the seller has previously agreed to require a buyer to assume the collective bargaining agreement, and whether unions must be notified of some transactions in advance so they may bargain as to the “effects” of that transaction. Foreign companies will also need to comply with the labor laws of the applicable states within the United States. Each state’s labor laws vary, such as one state imposing a higher minimum wage than another state. Also, certain states in the United States may limit or even prohibit employers from imposing non-competition provisions on employees.

In addition, labor unions, or works councils, are more prevalent in European countries compared to other countries. Those in the European Union may have more power than in the United States to influence or shape transactions. For example, overseas unions may have approval rights over transactions or may give their employees rights such as advance notice of information and consultation regarding an upcoming transaction.

Certain labor laws apply specifically to employee rights in the context of mergers and acquisitions. In the United States, an asset acquisition can be a fresh start for compensation and benefits, but European countries may require the surviving entity to continue the workers’ employment under identical terms and compensation. In Germany, an employer that is an acquisition target may be required to provide extensive information and co-determination rights to its works council — giving workers a voice in a merger or acquisition.

Asset purchases may, in some countries, trigger a “transfer of undertaking,” which restricts the employer’s right to make employees redundant. When an entity in the United Kingdom is acquired, its employees are entitled to notice from the employer and, often, consultation as well. That’s likely the case when the employer plans changes that affect its employees, such as changes relating to employee policy, working conditions, reporting lines, or location.

While there is no stated minimum notice period, it is advisable to provide at least two weeks of notice before the effective date of the acquisition. Penalties for insufficient notice and consultation can be as much as 13 weeks of pay per transferred employee. Entering into a deal overseas with the expectation of significant synergies and cost-cutting can lead to disappointment if labor laws are not carefully reviewed.

Antitrust considerations

Every cross-border merger or acquisition may be scrutinized by the government for potential antitrust violations. The review may extend beyond the countries where the two businesses are primarily based. For example, a deal involving a US company and a German company may require additional filings in Brazil if both companies sell products in Brazil and have Brazilian revenues above certain thresholds. The substantive standards for the antitrust review of a merger or acquisition are similar in most countries around the world. By and large, antitrust agencies will ask whether the transaction substantially lessens competition in any relevant market. There are, however, significant procedural differences. For example, in the United States, most transactions reportable under the Hart-Scott-Rodino (HSR) Act are filed without prior engagement with the antitrust enforcement agencies. If the agencies have questions, they are often addressed after the filing has been submitted and the HSR waiting periods have started to run. There are exceptions, especially in complex matters, but that is the general approach in the majority of cases. In the European Union and many other jurisdictions, by contrast, it is customary to engage in pre-notification discussions with the local antitrust agency, a process that can take weeks or months depending on the complexity of the transaction. These procedural differences can have a significant impact on the timing of closing and require careful planning — especially in large cross-border deals.

Failure to follow mandated procedures in all relevant jurisdictions — even if the jurisdiction has only a tangential relationship to the parties in the deal — may result in significant fines and possibly a demand to alter or undo the deal. Anticipate and prevent potential snags by conducting a filing review and a competitive landscape market check to understand all relevant government requirements and identify potential substantive issues before signing your cross-border deal. Be aware that even if the transaction does not require notice or consent in certain jurisdictions, some government and regulatory agencies may still investigate the transaction and potentially act against it.

Political environment

Don’t underestimate the impact that the political environment of any country where the parties conduct business will have on a deal. The new presidential administration in the United States has promised to make changes to the regulatory landscape affecting businesses operating in the United States. For example, an executive order signed in February repealed portions of the comprehensive Dodd-Frank Wall Street Reform and the Consumer Protection Act. The United Kingdom voted last year to leave the European Union, resulting in increased uncertainty in cross-border deals involving British companies. As you move forward in deal discussions, stay abreast of any current and anticipated political and regulatory changes that may affect your company and the proposed deal.

Communications strategy

Your team should develop a communications strategy to share news and updates regarding the proposed deal. You will want a two-pronged approach: an internal strategy for employees and an external one for the media, analysts, and the public, including customers, vendors, and officials. Your communications team should work with your legal team to ensure compliance with confidentiality obligations and other relevant rules and regulations, including listing requirements. We recommend developing a plan that addresses potentially sensitive issues such as layoffs, labor disputes, and plant closures or relocations.

All parties must commit to confidentiality until the agreement is signed or, in some cases, until closing. This allows for the parties to discuss the terms of the deal without external pressures that may affect the negotiation strategy and leverage. That said, no matter how careful the teams seek to preserve confidentiality, be prepared for leaks, which may trigger disclosure obligations.

Public disclosure may be required depending on the jurisdiction and the stage of the deal. Public companies are generally subject to broader disclosure requirements than private ones. In certain jurisdictions, such as the United States and China, a public company may have to disclose not only the material agreements to sell or acquire, but also any binding letters of intent that the parties execute.

Once a deal is announced, your communications team should hold an all-hands meeting to share the news with employees. Be prepared to answer questions about possible reductions or expansions of staff, as this is likely to be a top concern for employees of a target company. If the deal is significant, expect questions from analysts and the media as well as third parties including customers, suppliers, vendors, landlords, and local community leaders. Your communications strategy should include a quick and efficient way to disseminate information to the public and to field questions that may arise between signing and closing. Communication methods, used to connect with media, analysts, and others, may include a dedicated telephone hotline, an email, press releases, a Twitter feed, or a combination of these tools.

Contingency plans

Cross-border deals often move slower and face additional hurdles than domestic transactions. Anticipate these delays. Maintain alternative options at each stage of the deal. Bottlenecks can often be avoided through careful planning and by being flexible and prepared to restructure the deal if necessary. For example, if antitrust issues are expected to arise in a proposed deal, consider transferring certain assets to a separate standalone entity so that the company can more efficiently divest that entity and its corresponding assets if antitrust authorities require it.

If delays are caused by the other party's lack of cooperation, consider building fees or penalties for these postponements into the written agreement. Ticking fees, or "pay-for-delay" fees, increase the price of the deal as time passes and ideally, will prompt the stalling party to adhere to the agreed-upon timetable.

Post-closing integration and operations

Even after the closing, your legal team likely still has to wrap up the loose ends. In fact, they may need additional support to complete these tasks. Various post-closing filings, including certificates of merger, stock transfer forms, and director resignations/appointments, need to be completed and processed. Some jurisdictions may also require supplemental documents such as real property inventory, management accounts, and audited financial statements to be certified and provided with the primary post-closing filing. Extra staff can help assemble these filings and handle follow-up requests from government and regulatory agencies.

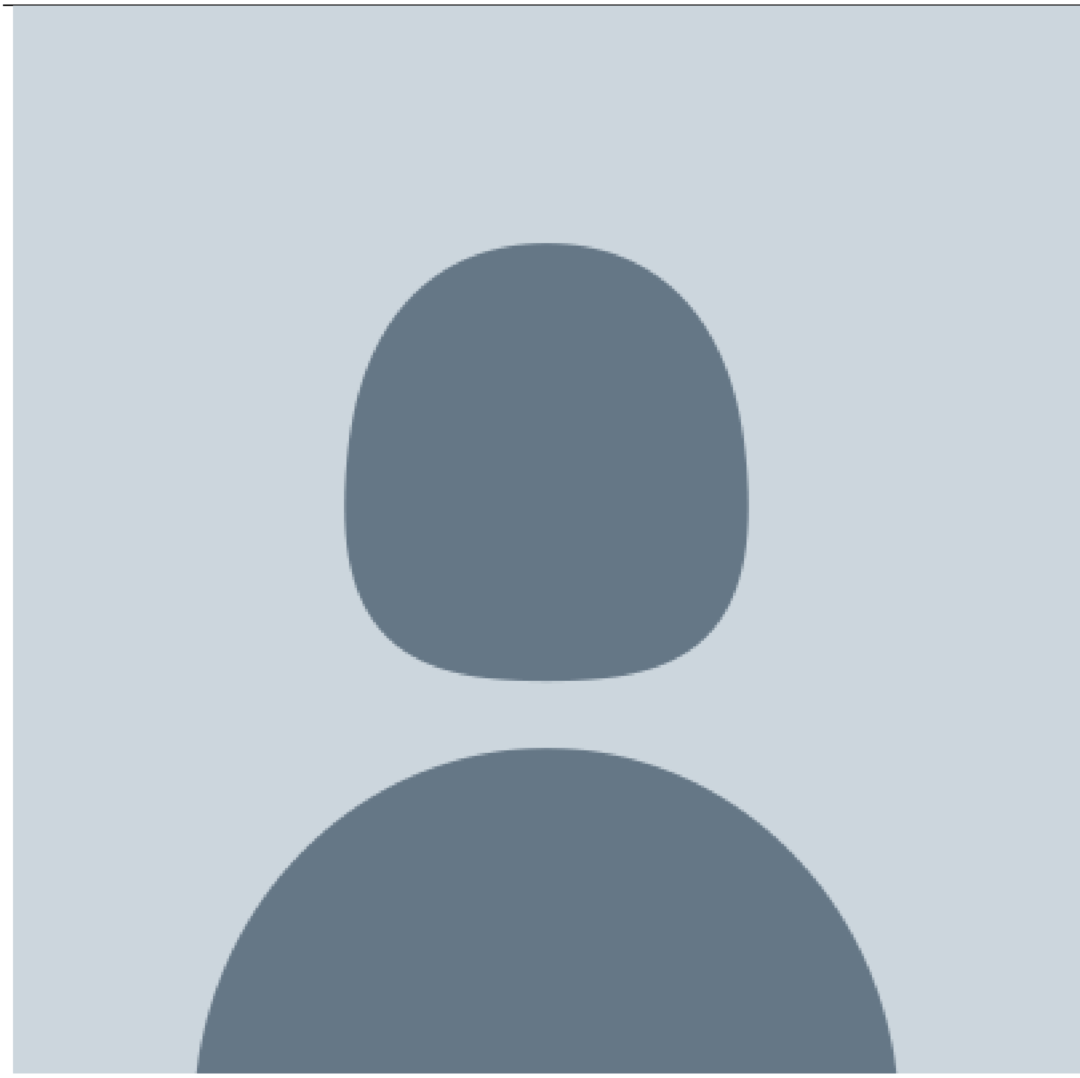
Integration and operational execution will ultimately determine the success of any acquisition. The integration team should continue to meet regularly post-closing and update senior management and, if necessary, the board, on deal and integration progress. An additional benefit of these meetings is the opportunity to review the entire process, highlight successes, and pinpoint how setbacks and delays could be more effectively handled should they arise in future deals. If your company is highly acquisitive, consider creating a standing variation of the integration team, such as a dedicated deal team, to meet regularly to identify issues and challenges for additional transactions.

Remember that each deal is unique, and the strategic and operational decisions that make sense in one deal may not translate to another. Consider the strategic goals of your deal and plan around them. In addition to specific deal tasks, deal teams should track a deal's overall objectives, including intangibles such as morale and culture fit. A disciplined, systematic approach will help to ensure the accurate assessment of a deal's success and enable your company to execute action items post-closing.

Conclusion

Developing and enacting a global acquisition strategy will require thoughtful planning and proactively partnering with counsel and other advisors early on. Identify potential roadblocks and keep your management team informed, particularly if they are inexperienced with global acquisitions. Requirements in different countries may run counter to those in others. Staying ahead of the curve and managing your leadership team's expectations will go a long way to ensure your deal's success and keeping your leadership team happy.

James Williams



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