Crossing into the Global Village

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With almost 200 sovereign nations in the world, conducting transactions in foreign countries is becoming an everyday occurrence for many North American businesses. Cross-border/multijurisdictional/international transactions (CBTs) are transactions that may be in the form of joint ventures, mergers, acquisitions, strategic alliances, business process outsourcing, business sales or any combination thereof between one or more U.S. entities and one or more non-U.S. entities on the other side. CBTs constitute a dynamic realm that requires a solid understanding of the legal framework, negotiating points, and practical aspects at each stage of the transaction. Regardless the transaction structure utilized, there are common goals in carrying out all CBTs: (i) achieving certainty of execution; (ii) maximizing the economic benefit of the transaction; (iii) reducing the amount of management time absorbed by the process; (iv) shortening the time frame in which the transaction is completed; (v) controlling the associated transaction costs; (vi) properly identifying and addressing the risks associated with the transaction; and (vii) effectively managing exposure to liabilities. Corporations are always reshaping themselves in response to the ever-changing economy. As such, attorney preparedness is the key to meeting client needs. This article focuses on how attorneys can cash in on CBT opportunities by being adequately prepared.

The first step after finalizing the target company is to execute a letter of intent (LOI), or a memorandum of understanding and a Non-Disclosure Agreement (NDA). The LOI is an important document because it lays the foundation of the transaction, which describes the deal in brief, the estimated price, the time period for closing the deal, the consequences if the deal does not close on time, liability distribution, cost allocation and attorney's fees. The NDA offers protection for all parties to ensure that confidentiality is maintained. As such, the LOI and NDA are critical to the success of the transaction because it protects clients from issues relating to a failure of the transaction and disclosure related liabilities.

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Although some clients may rebuke legal due diligence due to increased time and cost, attorneys have a duty to explain why it is necessary and how it protects the client. Due diligence identifies the risks associated with the corporation and this added knowledge increases the success rate of the transaction. Due diligence has the potential to uncover tax liabilities or other situations requiring huge pay outs, the client will have the opportunity to negotiate the transaction price accordingly. If full blown due diligence cannot be conducted, attorneys may recommend having a (i) limited legal due diligence to address specific business related concerns; and (ii) require an indemnity bond that states the conditions for indemnity, enforcement, dispute resolution and jurisdiction clauses.

One may argue that a legal due diligence report can only highlight the possible issues; however, attorneys can provide potential solutions to the identified issues. These remedies may be in the form of conditions precedent or subsequent to closing. Conditions precedent to closing are usually the conditions without which the transaction cannot proceed, for example, obtaining loan to pay for the transaction or obtaining government approval for the deal. Conditions subsequent to closing are those conditions that are important, but not critical to closing.

Negotiating and executing transaction agreements is the core of any CBT. Attorneys have to be prepared for drafting multiple agreements and meeting deadlines. Usually, in complex CBTs, there is one agreement, commonly called 'master agreement,' and there could be multiple secondary agreements that form exhibits or schedules. A transactional attorney should have a checklist for every stage of the transaction, including designating the party in-charge of each item to ensure smooth execution. Complying with U.S. laws can be troublesome for foreign entities during both the deal-making process and post-closing integration phase. In private transactions, U.S. laws such as the Foreign Corrupt Practices Act can pose pre-closing due diligence disclosure issues or post-closing compliance obstacles for non-U.S. entities in many regions — particularly outside of the European Union.

Enumerated below are aspects of CBTs that U.S. attorneys should be prepared for in order to ensure a successful, timely, and cost-efficient closing with minimal error.

Due Diligence

A detailed checklist with sub-categories explaining each question would guarantee easy understanding for the parties. It should be noted that the information flow will not be smooth because there will likely be a gap in understanding how a non-U.S. corporation functions. Clients should be informed as soon as possible of situations where it will be difficult to obtain information. Attorneys should not assume virtual due diligence will be available in all CBTs.

Non-U.S. Laws

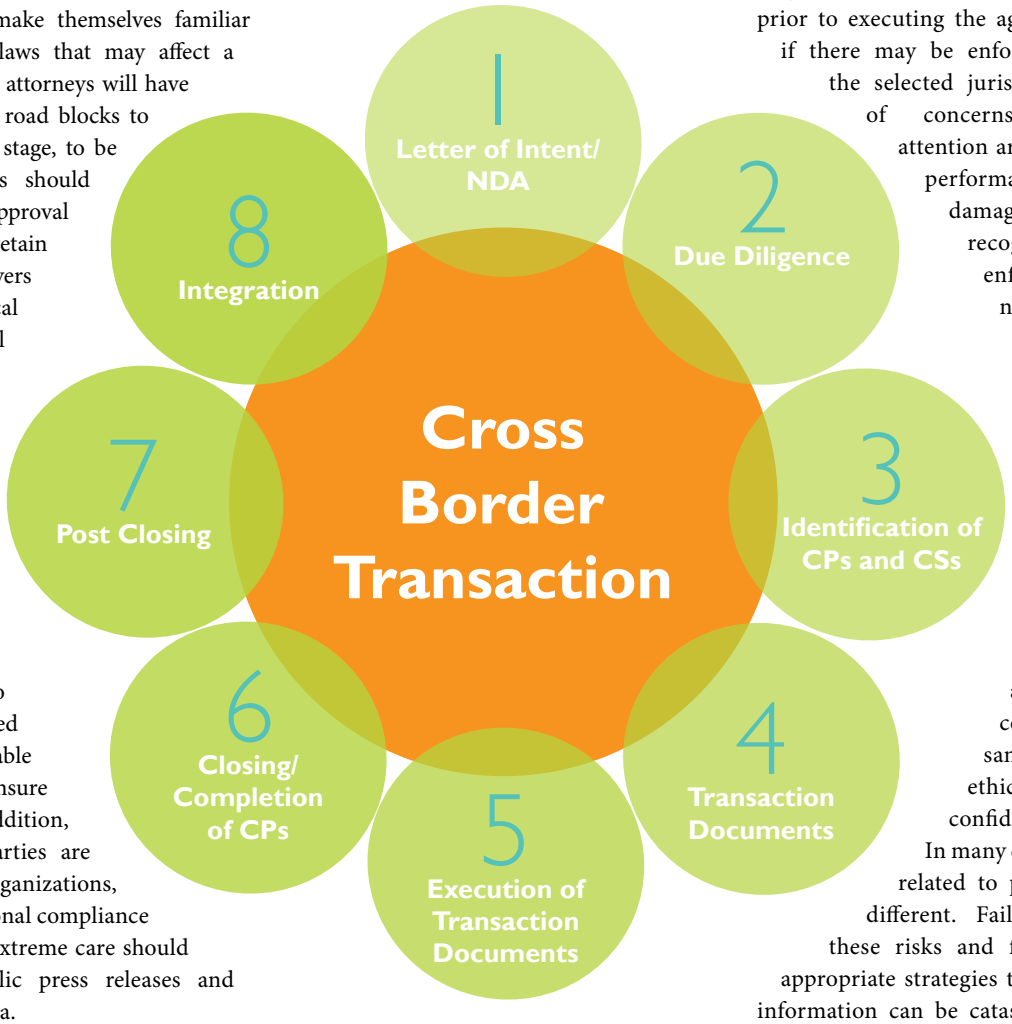
Attorneys should make themselves familiar with all non-U.S. laws that may affect a CBT. By doing this, attorneys will have a fair idea of what road blocks to expect. At the LOI stage, to be proactive, attorneys should get upfront approval from clients to retain international lawyers when needed. Local counsel is beneficial because each country obviously has different laws, such as anti-trust laws, regulatory approvals, employment laws, and assessing and paying transfer tax obligations. An attorney has to prepare a detailed list of applicable laws and ensure compliance. In addition, if one or both parties are government organizations, there will be additional compliance requirements and extreme care should be taken on public press releases and responding to media.

Cultural and Time Difference

Cultural and time differences between parties in different countries in a CBT is an obvious issue that requires contemplation and attention before beginning negotiations. Some cultures have a philosophy that time is expensive, like in China or Japan, and being late is considered an insult. In terms of negotiating norms, it has been said that Germans are always on time, Latins are usually late, Japanese take their time and negotiate leisurely, and Americans are hasty to seal the deal. Some practitioners may be surprised to learn that the main goal when negotiating with an Asian counterpart is to establish a firm relationship, rather than the actual minutia of the deal, which is secondary. Understanding these differences and being mindful of them will (i) be interpreted as a sign of mutual respect and a surefire way to facilitate credibility and trust; and (ii) serve as a strategic advantage that can help lead an attorney to the appropriate tactics for the negotiation.

Bridging the Communication Gap

According to the Ethnologue Languages of the World lists, there are approximately 7,102 languages actively being used in the world. This leads to another obvious pitfall in a CBT: language differences. One of the most important initial steps is to determine what language the contract should be drafted in. If it is necessary to hire an interpreter, which is highly recommended, it is important to speak through him and avoid private conversations in the presence of the other non-English speaking parties. This may be perceived as rude and suspicious behavior. Beyond spoken language, practitioners should be aware of nonverbal communication. Body language can positively or negatively impact trustworthiness, or lead to misunderstandings. It is recommended that the parties meet face to face, or at least utilize video conferencing whenever possible.



Enforcement Clauses

Governing law and choice of jurisdiction clauses form part of boiler-plate language and is often overlooked. Attorneys must guarantee that enforcement is possible, no matter which country's rules apply. Attorneys may need to complete extra groundwork prior to executing the agreement to assess if there may be enforcement issues in the selected jurisdiction. Examples of concerns that require attention are whether specific performance or liquidated damages clauses are recognized and enforceable in the non-U.S. country.

Privilege and Confidentiality

Last but not least, confidentiality and professional ethics adds more dynamic to negotiating a CBT. Every CBT attorney must be aware that not all countries have the same standards of ethics, privileges and confidentiality as the U.S. In many countries, the rules related to privilege are quite different. Failing to recognize these risks and failing to develop appropriate strategies to protect sensitive information can be catastrophic. In CBTs, this privilege can be inadvertently waived, especially for in-house counsel who may work on a transaction, but not be licensed in various foreign jurisdictions. These pitfalls can be avoided through careful preparation and the implementation of precautions, including taking practical steps to protect communications with non-legal consultants and retaining appropriately licensed local outside counsel.

CONCLUSION

As is obvious, this list is not exhaustive of all possible issues as no two CBTs are ever

exactly the same. Similarly, the issue order is not meant to establish any particular priority among these issues as every deal has its own priorities and dynamics. There are many other potential issues and traps for those involved in CBTs.

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