

International Outsourcing Transactions: How To Advise Your Advisors

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Most outsourcing arrangements are premised on the idea that a third party can perform some corporate function more efficiently or more effectively than the "outsourcer" organization itself can. Frequently, the parties best able to serve as outsourced service providers are located in jurisdictions outside the United States. It is no surprise, then, that outsourcing transactions with an international component increasingly are an important part of the growth strategy of U.S. companies.

However, pursuing that strategy involves additional risk, much of which might be described, to use a simple sports analogy, as the loss of "home field advantage." To continue that analogy, when you, as a domestic company, engage in an international transaction, not only are you playing on your opponent's home field, you're playing the game using different rules – and at times, those rules may be so different that you feel like you might just be playing an entirely different game.

However, with careful planning and creative, thoughtful advice, you can avoid unnecessary surprises and manage international outsourcing transactions in a way that not only neutralizes this dynamic, but creates value and helps realize the tremendous benefits that these transactions can provide. This article will touch on one important aspect of such an approach: the intelligent, efficient, and coordinated use of legal, tax, and accounting advisors that, in our experience, can help tremendously in reaching these goals.

Start with the selection of local counsel. Simply put, you protect yourself, your company, and your transaction when you select and engage qualified and experienced local counsel. While you may be familiar with and have confidence in an existing local counsel in a particular country or region, it is more typically the case that you will need to rely on recommendations from your U.S. outside legal counsel or business colleagues.

Once you have selected and engaged appropriate local counsel, don't make the common mistake of arbitrarily confining them to performing one or two discrete tasks (such as due diligence, document translation, or responding to specific queries you may raise). Like any other advisor, local counsel are most useful and create the most value when you actively involve them with your U.S. transaction counsel in considering and structuring the transaction as a whole and spotting and resolving the myriad of issues that can,

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and invariably do, arise in international transactions. Just a few of the many areas that require special scrutiny include:

- **Employee matters.** Unlike in the U.S., in many jurisdictions employees and trade unions play a critical role in the transaction process, and failing to plan for this facet can delay, or even kill, a deal. In some cases, there may be statutorily imposed obligations on a local company to inform and consult with employees prior to consummating a transaction, as well as rights afforded to employees displaced by acquisitions or outsourcing arrangements (e.g., the Transfer of Undertakings (Protection of Employment) Regulations, or "TUPE," in the U.K.). Also, a U.S. company will want to seek guidance from local counsel to ensure that employees of the local outsourcing provider, and the severance and other obligations associated with such employees, are not unintentionally assumed as part of any outsourcing transaction. Accordingly, understanding the implications and potential costs of any such features is important from the outset so that they can appropriately be considered and risks can be allocated.

- **Competition concerns.** Depending on the size and competitive impact of the transaction, you may need to consider competition filings or other approvals. In the European Union, for instance, there is a specialized body of law and principles regarding restrictive covenants and their enforceability that must be considered to the extent your outsourcing deal will involve non-competition or non-solicitation covenants.

- **Foreign ownership issues.** In instances where an outsourcing arrangement is part of a joint venture or other corporate transaction, foreign ownership issues may be relevant. Some countries mandate that some or all of the equity interests of entities incorporated in that country must be owned by residents of the home country. Similarly, in some instances countries may require that some portion of the entity's directors and/or officers be residents of that country.

- **Data protection.** U.S. dealmakers are sometimes surprised to find that statutory requirements relating to the protection and disclosure of confidential information, and in particular "personally identifiable information" (e.g., customer names and account numbers), are often more strenuous in jurisdictions outside the U.S.

and may have a very real impact on the manner in which you initially structure a transaction and subsequently manage an outsourced relationship.

- **Tax issues.** Inevitably, local, national, or supranational tax issues that are unique to the locality in which the transaction takes place will play a major role in structuring your transaction. In particular, the overlay of Value Added Tax, otherwise known as "VAT," is a feature of many European transactions that U.S. dealmakers may not be familiar with on the basis of domestic experience alone. Early engagement of local counsel and/or sophisticated tax advisors can help spot these issues and highlight ways to structure the transaction in an efficient manner.

- **"No binding agreement until we sign."** Don't assume, as many U.S. companies do, that so long as you are acting in good faith, you have reasonably liberal rights to discontinue pursuit of a transaction at any time prior to signing a definitive agreement. While this principle is largely axiomatic in the U.S., it may be affected or altered by local law. For example, in the Netherlands, provisions of the Dutch Civil Code may have the effect of limiting (sometimes severely) the freedom of a party to terminate negotiations.

- **Legal opinions.** In some jurisdictions, opinion practice varies considerably from the U.S. For instance, in the U.K., outside counsel typically gives opinions to its own client, rather than to the party on the other side of the deal – if it gives any opinion at all.

- **Cultural differences.** While it may seem otherwise to the uninitiated, the importance of sensitivity to cultural differences cannot be overemphasized. This can manifest itself in several ways:

- **Communication and Negotiating Styles.** Appreciate and be sensitive to this aspect of the negotiation. For example, the earnestness and directness that often characterize American negotiations in a genuine effort to quickly isolate and resolve issues may be perceived by some as brazen and aggressive. And while Americans often "cut to the chase" to speedily identify and quickly resolve problems, your international counterpart may need more time for reflection and consultation – one meeting or conference call may not be enough. Be prepared for this dynamic, and understand its con-

straining effect.

- **Approach to disclosure.** While U.S. dealmakers are accustomed to a vigorous diligence process, where a party's failure to ferret out issues either through diligence or representations generally is its own problem in an acquisition context, this is not universally true in other jurisdictions. For example, the laws and codes of some countries impose upon parties a much higher obligation to affirmatively disclose potential problems and issues.

- **Work hours.** While the difference is not as pronounced as before, Americans still are regarded as tending to work longer hours and give up evenings and weekends more readily than most. Similarly, seasonal vacations in some countries (e.g., July in Norway or August in France) are often longer and more widely embraced such that they can seriously impact transaction timetables.

In addition to the above issues, which are more legal in nature, don't forget tax and accounting. Relevant tax codes and provisions, together with a country's specific accounting conventions, can create real opportunity or hazard for the U.S. dealmaker. These considerations may fundamentally affect the financial model for a given transaction and often militate toward the early engagement of tax and accounting professionals.

If you work with a "Big Four" firm, it typically will have the means and resources available internationally to handle such tax, accounting, and potential structuring issues – in concert with both your outside deal counsel and local counsel. Leverage this expertise, as well as any experience your accountants may have with other clients with multinational operations or transactions.

From reading the above, you might be under the impression that doing an international outsourcing transaction effectively means giving your advisors (including your local counsel and your tax and accounting professionals) free rein and tolerating the attendant fees that come with that approach. That is most assuredly not the case. Your advisors need to be managed carefully, particularly if their understanding of your business and your typical transaction requirements is not robust. In this regard, your regular outside transaction counsel can add enormous value. In addition to playing their usual role in negotiating and documenting the deal, your primary outside counsel should play a true "project management" role – managing and coordinating your external advisors, helping to identify issues and coalesce the input being received from various sources, and being attentive to the efficient, non-duplicative delivery of services from your entire team. Charge them with responsibility for coordinating the inputs and appreciating that a decision or course of conduct suggested in one area may invariably have a "ripple effect" in others.

Our experience demonstrates that this approach, and the resulting premium placed on a tight orchestration of your outside advisors, can help you navigate the complexities of international transactions effectively, and at a cost that won't eliminate the value that motivated you to pursue the transaction in the first place.

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