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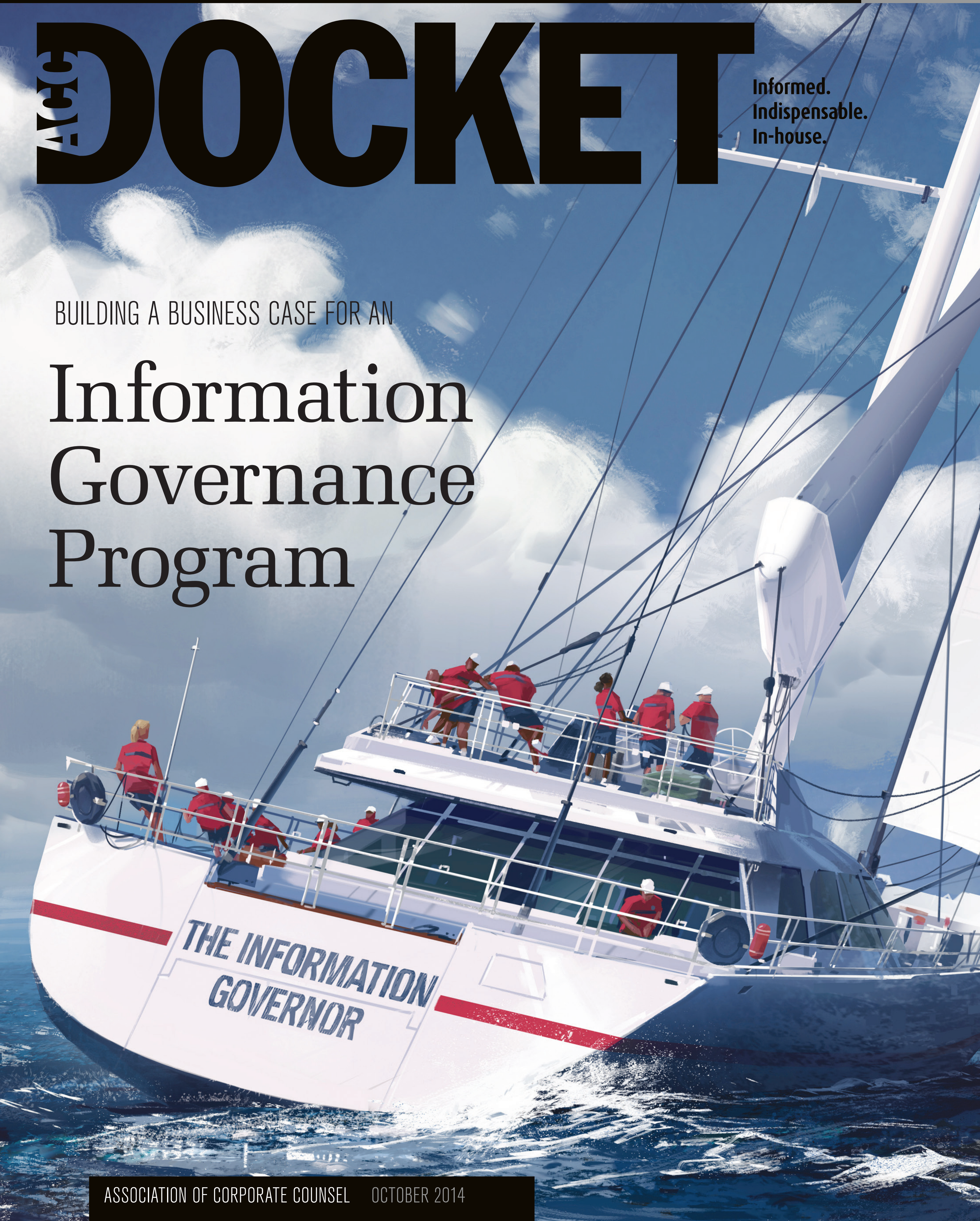

ASSOCIATION OF CORPORATE COUNSEL OCTOBER 2014


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CHEAT SHEET

- *Build relationships.* If there is any way to meet face-to-face early in the process, take advantage of it.
- *Be flexible by considering laws in other jurisdictions.* This may give you the leverage you need to negotiate other items into the deal that are far more important to you.
- *Avoid detours of irrelevance.* Make sure that the deal team focuses on what is important and develops a process that aligns with priorities and a realistic schedule.
- *Be diligent.* Avoid overlooking filings that may be required or risk affecting the overall transaction timing.

A New Frontier: Successfully Navigating the

Pitfalls and Paradigms of Cross-Border Mergers and Acquisitions

By Jeff Levinson, Nicole Nguyen and Matthew Gemello

On a sunny Wednesday in May, at about 5:30 PM, you're at your new standing desk, enjoying the idea that, since you don't make it to the gym as often as you'd like, at least you're not "sitting behind a desk" all day. You think maybe you can leave on the early side and get home for dinner with the family. With a start, you hear footsteps in the carpeted hall outside your office. You glance away from your view of the parking lot, and a second later, you see your CEO walk swiftly in. Since she's been traveling, you have not had a chance to catch up. After quick pleasantries, she gets to the point:

> *"We're going to buy Tech Company A. I've told them we'll pay $40 million. We need to move fast — we don't want anyone else to get in on the deal. We'll need to brief the Finance Committee on Monday. Let's not complicate this. I think we can close in six weeks."*

Before you get a chance to ask any questions, the CEO tells you she has another call that she's late for but that the two of you can talk the next day, and the VP of business development can tell you more about the target, which you know is headquartered in the United Kingdom.

You run through your mental checklist, note that you have to call home first, then fire off a note to outside counsel asking them to call you as you dig out your diligence request list and project management forms for coordinating the different diligence teams, all of which will require some tailoring for this deal. Then you think you better wear more comfortable shoes if you're going to be standing for the rest of the day — and into the night.

While mergers and acquisitions (M&A) among US companies generally follow well-worn paths, cross-border M&A transactions present an array of challenges for in-house counsel to navigate.

Most experienced US in-house counsel and their regular US advisors understand how to effect a domestic deal fairly painlessly, as letters of intent, due diligence, purchase agreements and the like roughly reflect market standards. Of course, companies often conduct intense negotiations over price, escrow, indemnification, and representations and warranties, but counsel will usually be able to reach a compromise that both sides understand as being within the bounds of reasonableness. More importantly, they can reach agreement on key points in a timely way so they meet the often expedited (and frequently challenging) timelines demanded by their CEOs and required by the business.

Cross-border deals require a different approach. Transaction standards and approaches across jurisdictions are not harmonized, and although transaction professionals are seeing convergence in a few key areas like deal protection mechanisms (e.g., no shop/lockup terms, voting agreements, closing conditions, termination rights, etc.) and retention/escrow measures, significant differences in the deal process continue to exist. This lack of harmony with the domestic deal process is further accentuated by differing underlying legal systems and rules governing both the transaction itself and the manner in which the target company is organized in its home jurisdiction and operates globally.

These differences are particularly evident when US buyers seek to acquire private companies in other countries. Perceptions, or misperceptions as the case may be, of deal-making strategies of US buyers and the US legal system often raise red flags for international sellers before the initial legal negotiations have even begun. Legal systems outside of the United States have different rules for M&A — from how diligence is used to allocate risk among the parties to the effect of post-closing remedies in a purchase agreement. However, by understanding cross-border transaction processes and being mindful of the key levers to move the deal forward, in-house counsel can play a significant role in leading a successful transaction.

In-house counsel's main priorities

In-house counsel, along with their outside counsel partners, can bridge gaps by acting as an experienced guide for the acquisition team in managing the cross-border deal. The legal team can play a key role in driving the deal to completion, so as to position the acquired business or asset to achieve the company's intended strategic goals, without losing focus on the following priorities:

- **Risk mitigation:** Identifying business and legal risks through diligence and implementing strategies to mitigate the downside.
- **Value protection** (through deal and integration): Ensuring that the critical economic drivers of the acquisition are maintained throughout the transaction itself and in the post-acquisition integration.
- **Timely closing:** Bringing the deal to successful and timely closing without unanticipated disruptions or undue expense. (See sidebar "Pitfalls to avoid for a successful closing.")
- **Successful integration:** Planning for the successful integration of the target into the buyer's existing corporate organization, along with using one's seat at the table to help business leaders identify and prepare for post-closing operational issues.

Cultural awareness and pragmatic thinking

Overcoming cross-border challenges — navigating different legal systems and choices of law, managing the diligence process, negotiating the transaction documents, and preparing for closing and follow on integration — marks the first step toward concluding a successful deal. The path to success in the cross-border transaction requires innovative thinking and approaches from the in-house legal team. There are three main points to keep in mind when overcoming cross-border challenges: Build relationships with your counterparties, think flexibly and be practical.

Build relationships

While the transaction itself may be a business transaction, don't forget the human element involved in the deal. It may seem obvious, but sometimes,

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it gets lost among deal pressure, short deadlines, long drafting sessions and the timetable established by business leaders. You are dealing with people on the other side, people who have invested their time and livelihood in the operation and success of the business you are purchasing (and are proud of their efforts). Keeping this in mind, it becomes apparent how building peer-to-peer relationships can take on heightened significance in cross-border M&A.

Trust is an essential element in any deal-making scenario; if the parties do not trust one another, delays are sure to result, and friction in negotiating transaction documents may increase. If there is any way to meet face-to-face early in the process, take advantage of it and put in the personal time to get to know your counterparts. Breaking bread and creating a personal relationship will smooth the process — a side benefit to gaining a new colleague. Apply your well-honed emotional intelligence skills, put yourself in the other party's shoes and ask yourself: What would your concerns be if you were in their position?

In some countries, for example, the work-life balance may be an integral part of local custom and tradition, resulting in a different pace than US buyers are typically accustomed to experiencing in domestic transactions. Thus, you may find that your M&A team is ready to work all hours of the night and on weekends to close the deal, while the other side may be working on a different, seemingly less urgent timeline. While your deal team may be perplexed by what is frequently perceived as a lack of urgency from the sellers to conclude the deal, from a cultural perspective, they may find it puzzling that you expect them to give up holiday time or a family vacation they have been planning for months. Finding a convenient time for conference calls that do not always end late in their nights demonstrates sensitivity. Acknowledging and addressing these cultural sensitivities with your peers and getting everyone on the same page at the outset can help create the assurances needed to develop a trusting relationship. Trust can help to overcome social, cultural, geographic and communication challenges. All of this serves the end goal of getting the deal done efficiently and on terms both sides respect. Premised on the "life's too short" standard and the "no @#$hole" rule, trust fosters the collaborative environment that is critical to the long-term success of the acquired business. One of the best post-deal comments from the other side's business leaders in a discussion about the deal process has been: "We were worried about how you would try to do this deal and sandbag us, but you were great to work with."

Think flexibly

Flexibility in thinking and approach is critical to succeed. Cross-border transactions frequently present opportunities for creative deal-making that counsel should seek to leverage for greater success. Free yourself from the rigid perspective of what is the market standard in the United States and embrace these opportunities.

US buyers have historically pushed for US law, often New York or Delaware, to govern the principal acquisition agreement. In many cases, this makes sense. However, choice of law is often an emotional issue for the seller due to lack of familiarity, lack of comfort of using something other than home law, and cost of engaging new outside counsel in that jurisdiction. This is especially true of a smaller target company with more limited resources and less transaction experience. Savvy US buyers may be able to get comfortable with local law by focusing on important transaction elements in the proposed deal and tailoring those issues in an appropriate manner. The specific elements of importance may vary from deal to deal depending on the transaction particulars. In fact, by exploring the real impact of agreeing to something other than US law, you may discover that the laws in the jurisdiction outside of the United States are similar to US law (in some cases, even more protective in certain areas), and that being flexible on this point may give you the leverage you need to negotiate other items into the deal that are far more important to you.

Pitfalls to avoid for a successful closing

- **Confirm all conditions to close have been met (should be tracked by deal team throughout process).**
- **Confirm all required consents are in place prior to close (regulatory, customer, supplier, landlord, employee).**
- **Confirm any new entities established, as needed.**
- **Confirm date/time/place for closing (factor in time difference if planning to sign in different locations).**
- **Confirm signatories are available (and not on vacation) and that all original signatures have been received.**
- **If the agreement has special signing, filing or similar local registration requirements, ensure the parties are aware of those requirements and have accounted for those in the closing agenda (any notarizations/legalizations that may be required should be factored in).**
- **Confirm that all legally required original documents are in parties' possession (original stock certificates or other incidences of ownership).**
- **Ensure all bank information is complete for funding, and consider bank holidays to avoid unexpected delays in funding.**

General disclosures and covering the risk with insurance

In keeping with flexible thinking, US-based buyers should consider the risks and potential workarounds for accepting general disclosures from European sellers. Currently, while most US buyers, both executives and counsel, for many valid reasons, insist on detailed disclosures — among other reasons, it helps to understand exactly what you are buying and what the risks are — deal leverage may necessitate some consideration of the European general disclosure approach. One tool to consider to help bridge gaps (and avoid getting the "You agreed to what!?" question in the future) is third-party representation and warranty insurance. These policies have historically been part of the European practice, and have become increasingly visible to — and used by — US buyers over the last five to 10 years.

Flexible thinking and deal structure

Taking a step back, flexible thinking should also drive transaction-structuring considerations. Although the relative high-level benefits of buying stock versus assets are generally consistent across jurisdictions, there may be local beneficial nuances that warrant consideration at the outset. For example, many of the traditional efficiencies of a stock-based transaction (e.g., transfer of workforce, contracts, permits, etc.) may exist in asset-based transactions that qualify as "business transfers" in many EU jurisdictions. Do not automatically dismiss alternative structures without considering the potential impacts.

For example, consider an appropriate disclosure regime in the definitive agreement and allocation of pre-closing risk. The customary approach on these issues fluctuates significantly from jurisdiction to jurisdiction, particularly when viewed from the buyer-favorable approach that underlies US practice, which typically requires posting thousands of pages of documents in virtual data rooms and preparing (and often negotiating) detailed disclosure materials as part of the principal acquisition agreements. By contrast, general seller-favorable disclaimers are customary in many non-US jurisdictions, particularly western European countries. These disclaimers may be specifically tied to information made available by the seller in the process (e.g., data room, information memoranda, vendor due diligence reports, etc.) or more broadly tied to the buyer's knowledge (actual or, in some cases, deemed) of certain risks inherent in the target company or the markets in which it does business. Understanding local market practice on these issues will facilitate more efficient and effective negotiations. There may be opportunities to trade governing law (i.e., accept non-US law) for a US-style disclosure regime that the buyer (and buyer's executives) finds more comfortable. Alternatively, there may be instances in which a US buyer is willing to accept this shifting of traditional US risk allocation depending on the particulars of the transaction (See sidebar "General disclosures and covering risk with insurance").

Flexibility on both sides can be demonstrated in resolving differences on dispute-related deal terms. US buyers may consider conceding US jurisdiction and venue, and compromising on a neutral jurisdiction, coupled with selection of arbitration, which is more widely accepted and enforceable in other jurisdictions, or another acceptable form of alternative dispute resolution, as the exclusive means to resolve post-closing disputes. This obviates concerns about home-court advantage without sacrificing the (mutual) need for a reliable and predicable arena to resolve disputes. Admittedly, there may be situations in which this concession does not make sense, but from experience, many non-US sellers are not comfortable, again, with what they perceive as a punitive US court system that favors US buyers, and with which they are not familiar and would have to incur substantial expense to understand. Flexible thinking applies from the earliest stage of the deal (See sidebar "Flexible thinking and deal structure"). It is important to note that flexible thinking does not mean conceding to the other side's demands, but it does imply a thoughtful approach to ways of doing deals and avoiding knee-jerk reactions to anything that is different from the US market practice.

Be practical

Taking a practical approach to the deal — making sure that the deal team focuses on what is important and develops a process that aligns with both deal priorities and a realistic schedule — takes on a heightened approach in cross-border M&A, where the breadth of the unknown can be significant. To achieve this, the deal lead — here, the leading in-house lawyer (as opposed to the company's business development lead) — should strive to develop a coordinated plan of attack for diligence and key regulatory issues, such as antitrust filings and labor/works council consultations, with a focus on the key value drivers of the transaction, and then implement remedies and plans for any areas of concern. In short, avoid detours of irrelevance.

Compliance and anti-corruption diligence is an area of particular importance in today's global business environment. However, the sheer breadth of potential issues makes it challenging

Setting expectations

Regardless of whether you follow the steps to success outlined in this article, if you fail to set reasonable expectations within your own organization, you are likely to experience setbacks that may just put an end to the deal.

Part of an in-house counsel's job in a transaction is to effectively manage the deal, deploy the right resources and set reasonable expectations among business executives. To do this, you need to have the right people involved in the diligence process. Fundamental to project management is establishing a primary business point of contact, someone who understands the seller and buyer businesses, the target's technology, product or service, and the expected benefit of the transaction to the acquiring company. Someone with this granular level of understanding will prove essential in setting expectations, because he will have a strong sense of the intricacy of the business and what it will take to understand its operational elements. Having one point of contact on the business side will also facilitate establishing a working relationship with the target company, building trust and open lines of communication.

Similarly, once the data room is populated, you'll need a skilled team of professionals to review the documents, knowing what your current business model looks like, to determine where the gaps and voids are that will need to be addressed either pre- or post-closing. Appointing reliable people who are knowledgeable in their functional areas and accountable for deliverables will help the process run more efficiently. It helps if you have someone in the company whom you can draft to act as "project manager," keeping track of action items, following up on diligence requests, maintaining schedules and coordinating logistics. Do not, however, forget to factor in people's "day jobs"— understanding that while the team is expected to facilitate completion of the transaction, they are also expected to find time to complete their standard daily workload and maintain their functional role within the company. So, when setting expectations, be cognizant of the things your company needs to accomplish in the ordinary course of business, as well as which individuals are responsible for those items (quarter and fiscal year-end financial and corporate filings, tax filings, litigation matters, product launches, engineering deadlines/rollouts, revenue contract completion, IT projects, HR program rollouts, manufacturing pushes and marketing efforts). You should also consider these same elements with respect to the seller (also factoring in foreign holidays); this is particularly true if the seller is a smaller company with limited resources. There is a delicate balance to consider here, but understanding the pain points for all interested parties will assist you in assigning work and setting reasonable expectations with business executives.

to devise a comprehensive approach that is both substantively effective and also cost efficient. Success here requires a detailed understanding of the seller's business, commercial flow and operational set-up, something that frequently cannot be sufficiently understood solely from a review of documents made available through diligence. Consider alternatives that will get the deal team to the real issues more quickly, such as conducting live interviews with key personnel, particularly in the finance and sales organizations, or using a sample group to benchmark adherence to company policies and then adjusting focus as necessary based on results. One of the most effective ways to deal with compliance and litigation diligence is to interview the appropriate executives from the seller along with their counsel, whether in-house or outside. During the diligence inquiry, under the non-disclosure agreement in place, you should be able to get the information you need to make informed decisions as to risk of litigation, contingencies and compliance. You may also be able to identify other individuals to interview and documents to review, and with this approach, you would be able to pinpoint the most relevant information.

Less experienced US buyers frequently overlook filings that may be required under local antitrust or competition filings (often referred to as "merger control" filings in many non-US jurisdictions) that will affect the overall transaction timing. The underlying legal regimes will vary by jurisdiction, but it is important to note that obligations may be triggered in jurisdictions that are not principally involved in the deal (i.e., not the home jurisdiction of the parties) based on the nature of commercial activity or market presence in jurisdictions. It is critical to identify these requirements early in the transaction process and make informed business decisions in developing a plan to address them in a sensible manner from the perspective of both the transaction itself and the go-forward operation of the business.

It is also important to realize that, while taking a practical approach does not always have the preferred end result, sometimes, it is necessary:

> The letter of intent was completed nearly 45 days ago, diligence has been ongoing and somewhat painful, but you feel things are finally progressing. Despite your numerous requests, you are still waiting for a markup of your initial draft of the purchase agreement — the seller has assured you it will be sent by COB your time — and sure

Corporate governance considerations

Another common — but often overlooked — item during the diligence process in a cross-border transaction is understanding ongoing corporate governance requirements in the local jurisdiction. While the implementation of post-closing subsidiary governance regimes is typically part of post-acquisition integration, consider this:

You have just acquired a company that has a representative office in Shanghai. One of the requirements is that you appoint someone to the position of chief representative. Maintaining consistency with your other entities, you appoint your Worldwide Vice President (WVP) of Sales in the United States to this position. One month later, your WVP of Sales visits Shanghai to attend a sales training. The following month, you receive an email from your corporate service provider asking if the chief rep spent any time in China during the prior month, and you answer affirmatively. Suddenly, you are being asked for her income figures so the provider can calculate the tax to be filed in a monthly individual tax return for the number of days the chief representative spent in China. Had you known in advance that any time the chief representative spent in country would be subject to a daily tax on her overall income (including income she derives from US-based work), you likely would not have appointed the WVP of Sales to that position given her extensive travel schedule.

Case-in-point, make sure you understand the local requirements for doing business in the region before you start operating there. Ask questions … and a lot of them. For example:

- **Do you have to have a registered presence in a particular jurisdiction?**
- **Are there residency/nationality requirements for directors?**
- **Are there tax ramifications if a foreign national appointed in a particular position makes an in-country appearance?**
- **What are the ongoing compliance obligations — annual returns, financial statement filings, etc.?**
- **What are the penalties for failing to comply with those obligations on time?**

To avoid any financial filing impact, make sure small details like the fiscal year end syncs to your company at the time of close. You should also make sure any director appointments and resignations are taken care of simultaneously with the close, to the extent possible.

enough, it finally arrives. Your legal and finance teams spend the weekend reviewing the document in an effort to maintain the schedule you have committed to the CEO, only to find that the other side has changed a fundamental term of the letter of intent, which results in the overall value of the deal to your company being significantly depreciated. You spend the weekend discussing this issue internally and determine this is not a point the company is willing to give up. You inform your M&A team to stop diligence and put everything on hold until the parties have had the opportunity to discuss this issue. A phone call with the seller is arranged for first thing Monday morning. The seller informs you that upon further review of the deal, they felt this change was necessary to maintain the value of the deal on their side, and it is not a negotiable point. The parties agree to have additional internal discussions and to follow up with one another by COB with their final positions, knowing that each side considers this item a deal-breaker. After further discussions with your internal teams, everyone agrees that if this cannot be resolved, the deal no longer holds value or achieves the expected strategic goal. At the end of the day, neither party is willing to budge, the deal dies, and it is onto the next endeavor.

While this may not be the way you or your CEO envisioned this transaction coming to a close, the truth of the matter is that not all transactions come to fruition, and there are some practical reasons that warrant walking away from a deal. (See sidebar "Setting expectations.")

Ensuring continued success in the post-acquisition phase by thinking ahead

Positioning the deal for success, with the cooperation of business leaders, happens when you have identified and addressed up front as many potential post-acquisition issues as you can and have prepared for a successful integration.

As lawyers, we understand that the integration phase following every transaction will vary in one way or another. However, when dealing with cross-border transactions, those seemingly meaningless nuances can become unexpected consumers of time and money if you have not taken a proactive approach to dealing with them.

US lawyers tend to have a good handle on what the legal diligence process in a transaction should look like. We tend to focus on those areas we are trained to be concerned about, such as intellectual property, compliance/non-compliance, contracts and litigation-related matters.

As in-house counsel, you have to make sure you are thinking beyond just the transaction itself; we have to think outside-the-box. While the outside counsel firm you likely engaged to help you navigate through the transaction can rest easy once the deal closes, as in-house counsel, this is not the case. Your work continues well beyond the close date in an effort to ensure things continue to run smoothly in the post-acquisition phase. It is often in the post-acquisition phase that we find ourselves scratching our heads and wondering how no one involved in the transaction stopped to consider the impact of that one little nuance.

It is two weeks before the expected close date. Legal diligence is completed. You are putting the finishing touches on the purchase agreement and coordinating the final details of the close date, the wire transfers and the document signatures. You typically handle the basic HR matters on deals and, as part of that, you sit down with your counterpart in your human resources department to ensure they are ready to go with onboarding the 100+ employees in your soon-to-be-acquired company in the United Kingdom. You discuss the new employment agreements to be provided to the employees, which include all the standard bells and whistles you require your employees to sign up to (i.e., non-solicitation, non-compete, invention assignment, car allowances, etc.) … and then it happens … your counterpart politely informs you that the agreements differ from what the employees currently have, and thus, you cannot provide your standard employment agreement under Transfer of Undertaking (Protection of Employment) (TUPE) laws — and you will need approval from the works council before you can implement your benefit scheme. Suddenly, you find yourself in a mad dash to figure out what you need to do (plus how to keep your job and which HR diligence person and outside counsel neglected to point this out to you) and how you report this up to the executive team since the closing now has to be pushed out a week.

If you think this is a rarity, think again. The nuances of international employment law can have a significant impact on the transactions you are working on. In the European Union, the acquired rights directive (and its applicable in-country local equivalent, such as TUPE in the United Kingdom) typically prohibits an employer from changing the terms of employment as a result of an acquisition or merger. These laws, intended to protect employees from any detrimental impact of new ownership, have the unintended consequence of catching some US companies off guard. The existence of these local laws requires that in-house counsel pair up with their human resource counterparts (and experienced outside counsel, often local counsel) to do a thorough analysis of the employment benefits early in a transaction, rather than either simultaneously with or post-closing. It is important to realize that even if employees consent at the outset to the revised employment terms, they may later contest those additional restrictions or reductions in benefits and are likely to prevail. If you intend to provide the employees with equal or greater benefits and employment terms, it is unlikely that the acquired rights directive will have any significant impact. However, you need to be aware of these types of laws and restrictions well in advance.

Likewise, you have to consider the existence of works councils and other labor organizations. Oftentimes, works councils are comprised of a key group of employees within the target company. If there is any animosity toward the transaction by this group of employees, they could delay consents and, in the most extreme cases, approvals that may be required to close your deal. Delaying a deal because of a required consultation period prior to close does not reflect well on the parties responsible for diligence on a deal, so make sure you do your homework and check into local labor laws well in advance of close. (See sidebar "Corporate governance considerations.")

As lawyers, we are hard-wired to assess risk. What we sometimes fail to remember is that the devil may be in the details. If we aren't taking an outside-the-box perspective, we are likely to overlook the potential roadblocks that may be staring straight at us.

It's July 2. Finally, after nearly two months of diligence, in-depth negotiations and many sleepless nights, the final signatures are written, and the acquisition is complete. You have experienced a lot of unexpected issues during this transaction, although you feel you were prepared to handle them due to your team's detailed, risk-focused approach during the diligence process. You feel confident that your internal teams are well prepared for the first day of the integration, knowing there are still a few loose ends that will need tidying up. The potential operational, employment and compliance issues have been thoroughly vetted, and you are prepared to face them head on. The process took a little longer than expected due to a few setbacks, but with reasonable expectations set and both parties taking a flexible approach to negotiations, you were able to complete the deal while mitigating risk and retaining value. You wonder what the next deal will entail and what country it will involve. Then, before you let yourself get wrapped up in those thoughts, you realize it's July 2 and think about how happy your family will be that you can spend some well-deserved quality time with them. Now, if you can just figure out a way to get to the gym more regularly. **ACC**

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