

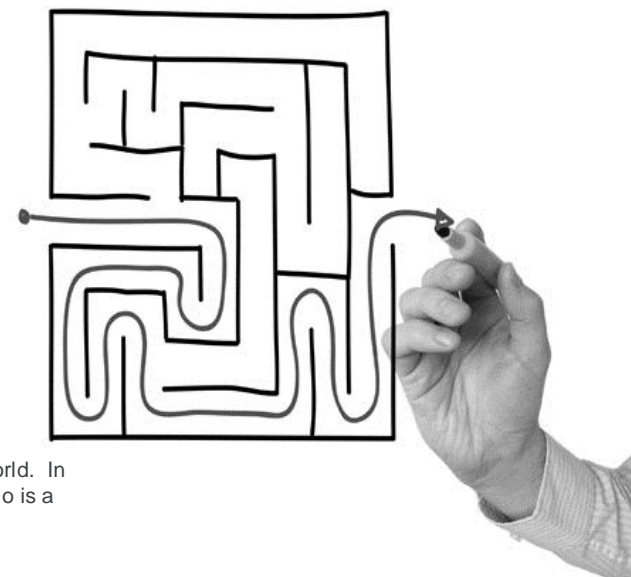
# Winning Strategies in International Cross-Border Deals

## Top 10 Keys to Success for In-House Counsel



Matthew Gemello | Paul Rimas

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# Cross-Border Transactions: What & Why



A “cross-border,” “multi-jurisdictional” or “international” transaction is any transaction involving two or more countries.

Cross-border transactions are not limited to transactions between parties that are headquartered in different jurisdictions; the category includes any transaction that involves key personnel, assets, markets, contracts and/or relationships in more than one country.

Although today’s focus is on cross-border deals (i.e., M&A), cross-border transactions also include joint ventures, strategic alliances, business process outsourcing, supplier and other commercial arrangements.

Today, nearly all transactions are cross-border transactions.

## Cross-Border Deal Focus: High-Growth Markets

- Cross-border M&A has been on the rise, with the market expected to further heat up (cross-border M&A accounted for 36% of activity in 2012).
- Companies continue to expand beyond the BRIC countries (Brazil, Russia, India, China) to include other high-growth markets, including the CIVETS countries (Colombia, Indonesia, Vietnam, Egypt, Turkey and South Africa), among others.
- In a Baker & McKenzie global survey of senior executives on trends in cross-border M&A, 91% of respondents expected cross-border M&A to increase or stay at current levels

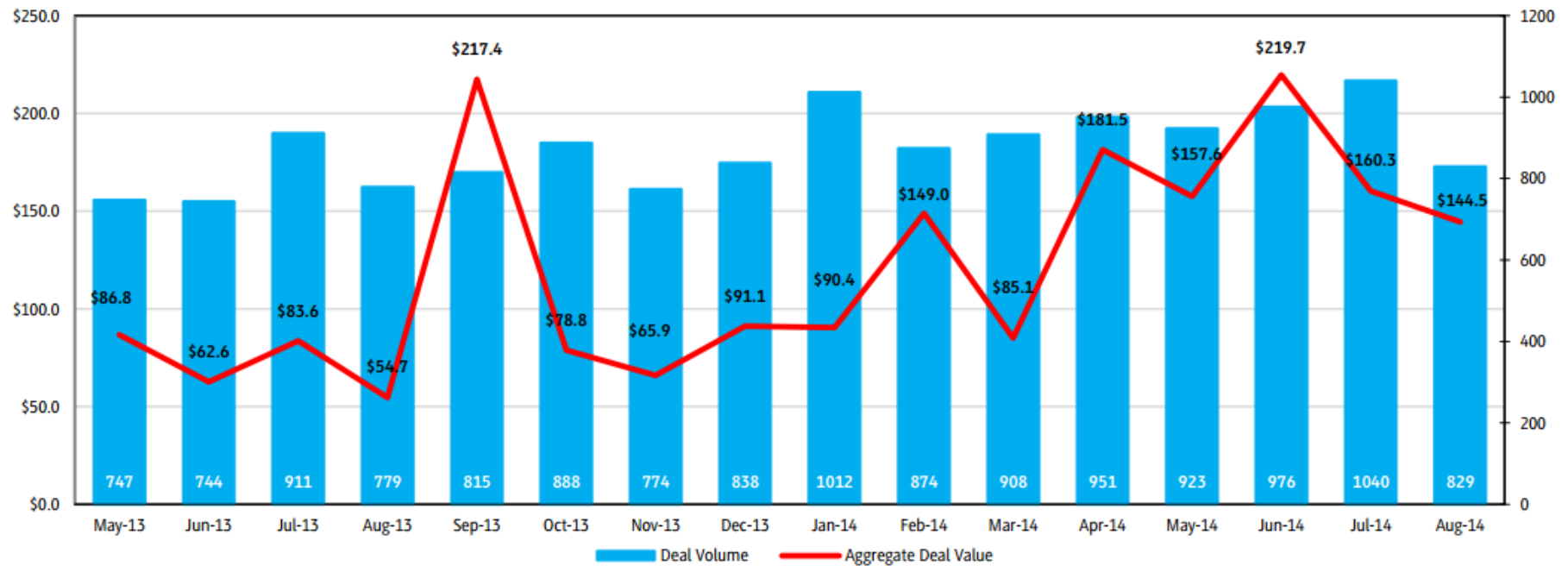


# Trends in Global M&A:

- Global M&A at seven-year high: strategic deal-making, large cash reserves, and record-low borrowing rates
- Global deal values: \$1.75 year-to-date, the highest since 2007
- Number of announced transactions worldwide is actually down 3.5% from 2013 but mega-mergers have made up for the decreased volume
  - Healthcare: \$318.8 billion in M&A activity largely due to the Affordable Care Act
  - Telecoms: \$260.7 billion in M&A activity - notable was the Comcast acquisition of Time Warner and the AT&T purchase of DirecTV
- Inversions – major pharmaceutical deals



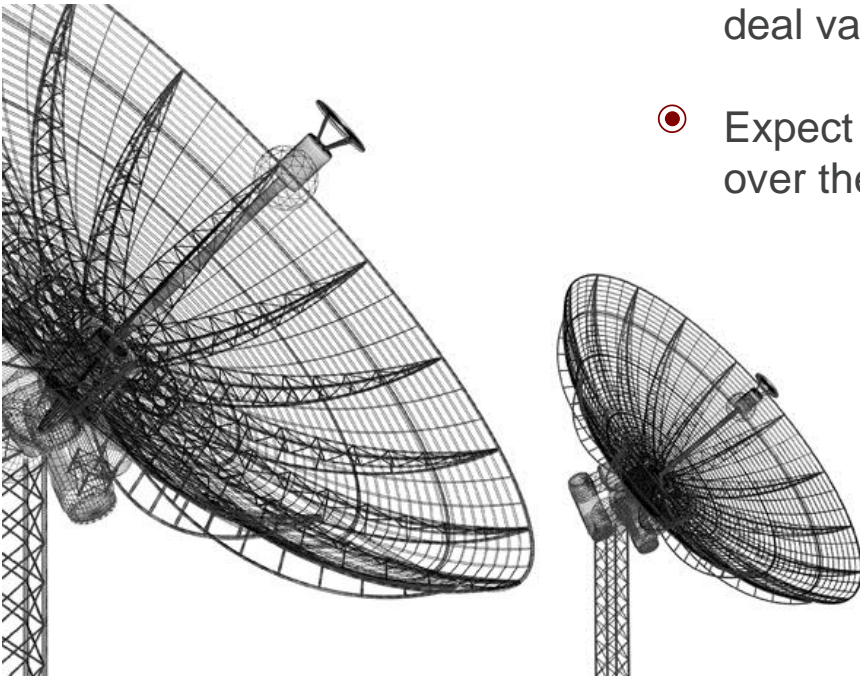
# The US M&A Market Index



Source: FactSet - Flashwire US Monthly Report - September 2014

# Trends in Tech M&A:

- Q2'14: 62 deals with \$26.7b of deal value
- Second-quarter deal volumes and value remain at historical norms while announcements show a noticeable increase
- Hardware and Semiconductor sectors drive increase in deal value
- Expect increased levels of deal activity for technology over the coming quarters



Source: US Technology deal insights, Q2 2014 Update – PwC

# 10 Essentials to Successfully Navigate a Cross-Border Deal

- ① Kickoff
- ② Transaction Structure
- ③ Due Diligence
- ④ Anticorruption
- ⑤ Antitrust / Regulatory
- ⑥ Employee Transfers and Benefits
- ⑦ Negotiating / Drafting
- ⑧ Dispute Resolution
- ⑨ Deal Execution
- ⑩ Integration Planning





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# Kickoff



# Kickoff

## Goal

- Run a smooth cross-border deal in spite of international “complications”

## Risks

- Not bridging different legal systems, accounting standards, management structures
- Not coordinating and executing across multiple borders in multiple time zones

## Best Practices

- Build a deal team with cross-border skills and sensitivities
- Identify and address up-front language, cultural, employee and legal differences
- Prioritize project management with a focus on key roles and realistic timing



**Tip #1: Proactively manage through unique elements of cross-border transactions to minimize deal disruption and maximize deal success**

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# Transaction Structure

# Transaction Structure

## Goal

- Agree on an international transaction structure that maximizes overall value

## Risks

- Acquiring unwanted assets or personnel or assuming unwanted liabilities
- Not acquiring the assets and personnel needed for Day 1 readiness
- Missing tax savings opportunities or causing increased tax costs
- Triggering avoidable regulatory or third-party approvals that could affect closing or timing

## Best Practices

- Identify early the potential structures (e.g., asset v. share v. mixed transactions)
- Understand the effect of the structures on the commercial, tax, legal, personnel and IT aspects of the transaction across key jurisdictions
- Allocate ... very carefully ... all tax burdens between the parties
- Leave room in any preliminary agreement (e.g., letter of intent) for additional negotiation of the structure following key due diligence
- Structure local asset transfers in a manner that minimizes the transfer tax burden



**Tip #2: Analyze all potential deal structures, jointly select best overall approach**

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# Due Diligence

# Due Diligence

## Goal

- Conduct risk-based diligence cost effectively across multiple jurisdictions

## Risks

- Overlooking risks that are significant negative value drivers
- Duplicating efforts with cost overruns among diligence team members

## Best Practices

- Identify main jurisdictions, assets, personnel and relationships
- Prioritize key areas of concern
- Scope diligence with specific budgets for topics and jurisdictions
- Assign responsibilities among business, financial and legal team
- Define form and regularity of diligence reports
- Quantify diligence results and feed into deal team



**Tip #3: Identify key risk areas and scope diligence by subject and jurisdiction**



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# Anticorruption

# Anticorruption

## Goal

- Identify corruption-related aspects of business during diligence and develop early in transaction process remedial steps to reduce post-closing risk

## Risks

- Being subjected to civil fines and penalties and/or criminal prosecution
- Losing key contract relationships and value of business
- Generating negative impact on either party's and business's reputation

## Best Practices

- Focus diligence investigation on relevant jurisdictions, customers, key relationships
- Understand market and best practices in business's industries
- Consider business's compliance history as well as its policies and procedures
- Partner with forensic accounting team to "follow the money"
- Understand how business actually conducts activities in "tough" jurisdictions



**Tip #4: Make anticorruption diligence a fundamental component of diligence investigation and take an active, pragmatic and multi-faceted approach**



# Anticorruption (extra tips)



- In M&A deal, ensure that the buyer's compliance program applies as quickly as is practicable to target
- Train the directors, officers and employees, and, when appropriate, the agents and business partners of target on the buyer's anticorruption compliance program and procedures
- Conduct an FCPA-specific audit of all newly acquired entities as soon as practicable after acquisition
- Disclose to the government any corrupt payments discovered as part of this post-acquisition due diligence

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Antitrust / Regulatory

# Antitrust / Regulatory

## Goal

- Manage smoothly through any antitrust/regulatory clearances

## Risks

- Failing to address antitrust/regulatory approval issues across key jurisdictions, resulting in delays or restructured (or even failed) transactions

## Best Practices

- Conduct preliminary antitrust/regulatory analysis very early in transaction process
- Assess applicability of “Gun Jumping” rules in light of planned activities
- Identify industry or other regulatory concerns (e.g., CFIUS)
- Identify both procedural and substantive requirements and impact on deal timing



**Tip #5: Identify and develop early plan for clearing antitrust/regulatory concerns to prevent surprises and facilitate smooth closing and integration**

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# Employee Transfers and Benefits

# Employee Transfers and Benefits

## Goal

- Facilitate an orderly and smooth employee transition

## Risks

- Inadvertently triggering severance or other HR-related termination liabilities
- Failing to comply with required approvals, consultations and/or notices for employee representative groups (e.g., unions, works councils)
- Disrupting workforce/benefit plans with attendant damage to business

## Best Practices

- Understand and account for the method of transfer and implications under local law
- Identify early in the process approval or consultation requirements
- Drill down on all employee benefits and employee expectations
- Assess applicability and impact of privacy and data protection laws
- Timely establish local subsidiaries where new employer entities are required



**Tip #6: Get all of the people-stuff right ... gather, plan and execute**



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# Negotiating / Drafting

# Negotiating / Drafting

## Goal

- Use the negotiating/drafting process to bring the parties together and eliminate potential deal disruptions from differing transaction perspectives

## Risks

- Failing to appreciate (and bridge) other parties' cultural and legal social norms, leading to frustration or even failure in deal process
- Not resolving differing perspectives on “transaction style”

## Best Practices

- Understand and account for culture and perspective in negotiation
- Negotiate governing law (and “transaction style”) very early in process



**Tip #7: Take the time to understand/appreciate differing perspectives and leverage for your benefit in negotiation**



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# Dispute Resolution

# Dispute Resolution

## Goal

- Implement an efficient and reliable process to resolve post-closing disputes

## Risks

- Falling into potential bias and other “home court” traps
- Not factoring increased time and costs of foreign process and venue
- Assuming judgments are easy to enforce internationally

## Best Practices

- Provide detailed roadmap for anticipated - and inevitable - post-closing disputes
- Do not simply delegate the financial adjustments to the accounting team
- Consider most likely disputes (and party initiating claims) and choose appropriate forum
- Build in security and other self-help tools
- Consider international arbitration for bespoke issues and confidentiality
- Understand the best way to resolve disputes is to avoid them



**Tip #8: Identify and address (prior to closing) most likely post-closing disputes**

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# Deal Execution

# Deal Execution

## Goal

- Plan for and achieve a smooth transaction execution and closing

## Risks

- Failing to timely close
- Allowing less-material aspects of deal to delay closing of entire transaction
- Not identifying interrelationship of formalities (e.g., gating items)
- Failing to identify and address local requirements

## Best Practices

- Carefully plan through document execution and closing requirements
- Draft very detailed step plan for closing with timelines and responsibilities
- Consider any funding-related issues to pre-position and/or deliver deal consideration
- Develop protocol to delay local closings or other isolated aspects of larger transaction
- Plan for any required notifications/deliveries immediately following closing
- Assume every aspect will be more complicated than a wholly-domestic transaction



**Tip #9: Meticulously identify and plan closing logistics**

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# Integration Planning

# Integration Planning

## Goal

- Maximize deal value through an efficient post-closing integration

## Risks

- Losing value in business
- Not realizing the modeled synergies
- Incurring significant diversion of management attention

## Best Practices

- Begin preliminary integration planning at the very outset of transaction
- Involve all key functional areas (e.g., corporate, tax, employment/HR, benefits, real estate, IT, trade compliance)
- Prioritize IT integration
- Leverage results from diligence as integration playbook
- Require business to rectify any noncompliance matters prior to closing



**Tip #10: Don't wait until closing to start integration planning**



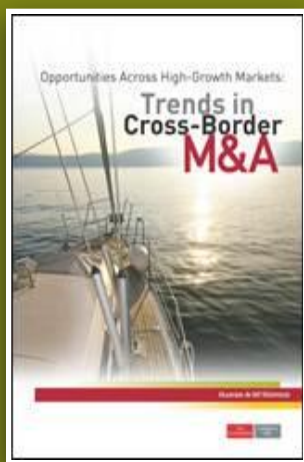
# Top 10 Tips for Successful Cross-Border Transactions

- ① Proactively manage through unique elements of cross-border transactions to minimize deal disruption and maximize deal success
- ② Analyze all potential deal structures, jointly select best overall approach
- ③ Identify key risk areas and scope diligence by subject and jurisdiction
- ④ Make anticorruption diligence a fundamental component of diligence investigation and take an active, pragmatic and multi-faceted approach
- ⑤ Identify and develop early plan for clearing antitrust/regulatory concerns to prevent surprises and facilitate smooth closing and integration
- ⑥ Get all of the people-stuff right ... gather, plan and execute
- ⑦ Take the time to understand/appreciate differing perspectives and leverage for your benefit in negotiation
- ⑧ Identify and address (prior to closing) most likely post-closing disputes
- ⑨ Meticulously identify and plan closing logistics
- ⑩ Don't wait until closing to start integration planning

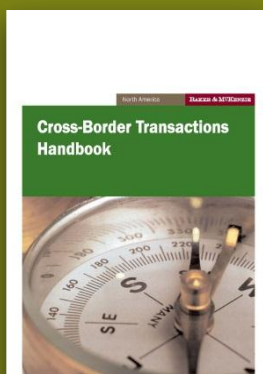




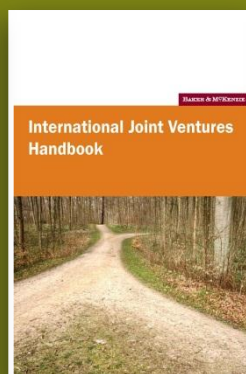
# Suite of Baker & McKenzie Resources



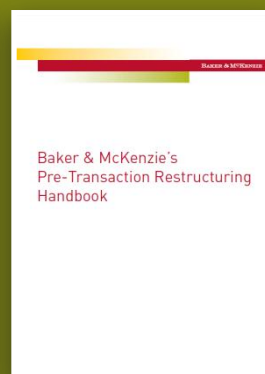
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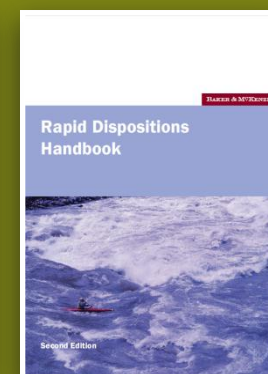
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Paul Rimas is the Deputy General Counsel of Trimble Navigation Limited, a global leader in construction technology, geospatial, and precision agriculture solutions, based in Sunnyvale, California.

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Prior to Trimble, Mr. Rimas was an attorney at several leading Bay Area law firms, focused on emerging companies and technology transactions. Mr. Rimas is a graduate of Boston College Law School and Brown University.

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Matthew has been recognized as a leading lawyer by Legal500 and SuperLawyers Northern California, and was selected by the San Francisco and Los Angeles Daily Journal (2013) as one of the top ten Emerging Law Firm Leaders in California.



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