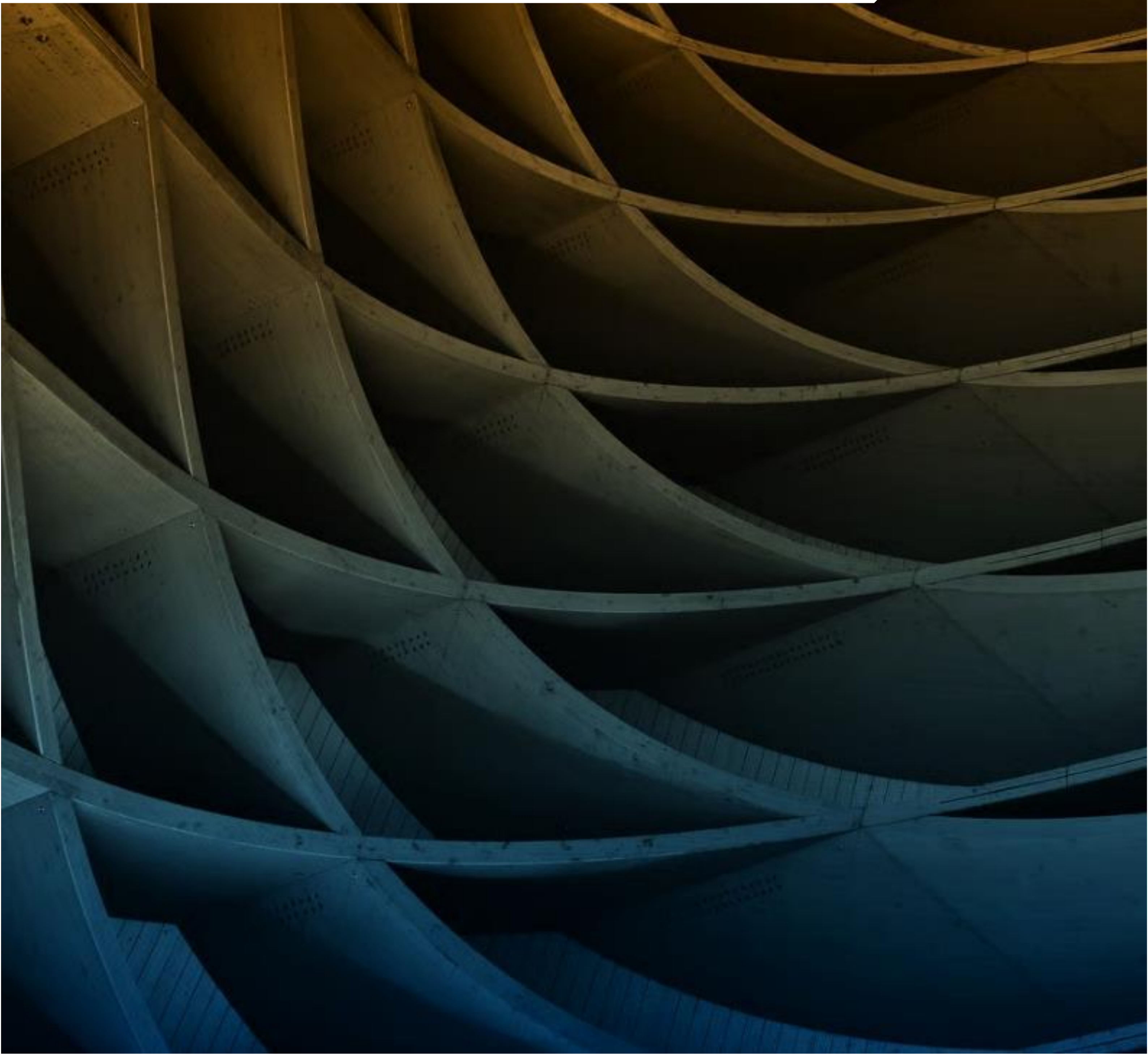
Baker McKenzie.

Field Guide to Going Global

Legal Resource for Companies Taking Business Models, Products and Technology International

2026



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Introduction

Introduction

In this fifth edition of the Field Guide to Going Global, we address topics that our clients frequently ask and should think about before expanding into new jurisdictions. We hope it will serve you well as a roadmap, checklist, issue spotter, or initial reference guide. Our guidance should be helpful whether you are working for a start-up company or a large multinational enterprise that is broaching new frontiers.

In a handy booklet, we cannot provide legal advice or answer all questions. No book can substitute legal advice on a specific situation. We want to help you orient yourself, point you in the right direction, focus your fact gathering, and assist you with scoping projects.

As a starting point and for example purposes, we chose the perspective of a US-based technology company going abroad. This is because our California team led the effort to prepare this guide and because of our Firm's history: Russell Baker and John McKenzie founded our law firm in 1949 with the mission to help US companies expand internationally. Since then, our Firm has grown with its clients, established offices where clients needed cross-border legal advice, and created global teams that are able to assist start-up companies and multinationals alike with international legal matters. Many Baker McKenzie attorneys, including the authors of this Field Guide, are qualified in more than one jurisdiction and have lived abroad. Based on our experience advising companies around the world, we believe that the perspective, recommendations and examples in this Field Guide are helpful to companies in any country, regardless of where they originally started.

Today, we have more than 70 offices in over 40 countries and serve more and more companies that are founded outside the US. This book includes combined know-how of more than 6,000 Baker McKenzie attorneys and tax professionals collaborating every day on global commerce. In the back of this Field Guide, we list the colleagues who helped write this fifth edition, but you should feel free to reach out to any Baker McKenzie attorney worldwide with any questions you have.

We all look forward to hearing from you and receiving your suggestions and feedback for future versions of this Field Guide.

Lothar Determann
Baker McKenzie, Palo Alto

1 Overview

Ground rules for going global

Technology companies have been riding the wave to global expansion faster than firms in most other sectors. Whether they make enterprise software, smartphones or AI systems, as soon as tech firms have a viable product they can turn to find global markets hungry for the latest and greatest innovation. At the same time, more and more companies define and present themselves as technology companies, even if they might traditionally have been considered a publishing house, retailer, medical device maker or car manufacturer.

On the quick trip from the garage to foreign markets, tech businesses face a number of common legal issues. Startups cannot always address these issues proactively due to limited time and resources. Therefore, having a checklist of important issues to keep in mind is key to navigating the early days of international expansion.

Intellectual property

To exploit their intangible assets, tech businesses need to own, perfect and protect their intellectual property (IP) rights. Like property rights in real estate and chattels, IP rights are territorial and subject to different legal regimes in every country. When entrepreneurs pick names for their company and products, they should think ahead about whether trademark registrations and domain names are available, how the chosen names sound in other languages and what connotations a term may have abroad.

While copyrights are as territorial as other IP rights, they are largely harmonized by international treaties. Authors tend to acquire copyrights simultaneously in their home country and around the world simply by writing their works down, be it text or software code. Patents, however, require local filings, prosecution and greater budgets; therefore, companies must be more selective and strategic about where to obtain patents.

Tax planning

In choosing a home base for their company, entrepreneurs are often focused on personal preferences for quality of living, availability of capital and talent, customer demand and costs of doing business. However, they should also consider the tax and overall regulatory environment most favorable for their business. Even at an early stage, the business should try to develop a strategy for long-term tax efficiency.

Taking international orders as they come

Most startups initially focus on domestic success. At this stage, unsolicited purchase orders or requests for trial arrangements from abroad may start arriving. Why not seize the opportunity to earn extra revenue and establish the product internationally?

A company that is unsure of the foreign legal, tax and customs regimes that apply to its products can contractually shift most foreign compliance and tax burdens to a foreign business customer. Many companies refer to their primary place of business in sales terms, including in the choice of law, dispute resolution forum, and place of delivery or performance, like for example the “Incoterm Ex Works.” In some cases, however, a choice of a foreign law can be just as good or better for a company. If a foreign buyer insists on a contract governed by their domestic law, a comparative analysis may prove helpful. Also, if you change the choice of law clause in a contract, you have to adapt the entire agreement to the applicable law, a process we often refer to as “localization.” If you

merely change the governing law, you may render various clauses invalid or unenforceable, because the new governing law may require different terminology and apply greater restrictions.

Companies have to ensure compliance with export control laws before they supply any products or transfer technical know-how to foreign buyers, even if the buyers come to their jurisdictions. Sales and supplies (physical or electronic) directly or even indirectly to embargoed countries or “restricted parties” and transfers without the required prior approvals or notifications can result in serious penalties, particularly in the US and increasingly under other countries’ laws. Even demonstrating restricted technology to a foreign buyer can constitute an illegal “deemed export” by a US company. Getting products into markets also requires an understanding of and compliance with constantly evolving customs and import laws and regulations, including changing tariffs and duty rates, customs clearance and import documentation requirements with significant financial and import delay implications for non-compliance or incorrect country of origin and valuation determinations.

Going global online

Once a company goes “live” with a website or mobile site, it immediately becomes subject to various foreign laws. Under public international law, every country can and does enact laws that apply worldwide, including trade laws, competition regulations, data privacy laws, content restrictions and consumer protection laws. While countries generally have neither the interest nor the resources to enforce these laws outside their borders, a few types of laws tend to cause companies trouble if not addressed early on.

A company that sells to consumers in other countries should clarify to visitors of its website or mobile site that it is intended only for residents of jurisdictions for which the company has conducted at least some basic legal due diligence. Firms should try to keep out consumers from other jurisdictions by limiting credit card acceptance, delivery locations for physical products, or geofencing the availability of the entire site or e-commerce functionality. For specifically targeted jurisdictions, consumer site operators should familiarize themselves and comply with tax obligations, translation requirements and restrictions on contract terms. Requirements to collect, report and pay value-added taxes (VAT) on sales to consumers in Europe, for example, can result in significant liability over a few years and catch start-up companies by surprise if not addressed appropriately.

Data privacy laws in Europe and other countries require affirmative opt-in choices for marketing emails and cookies placement, specific disclosures in privacy notices, data subject access rights and adequate safeguards for international data transfers. An operator of a passive dotcom site can relatively safely rely on a disclosure that it complies only with the laws of its home jurisdiction. However, an interactive site that places cookies on foreign computers, ships abroad and targets consumers in other countries with translated websites should consider additional compliance steps to satisfy data privacy laws in the targeted jurisdictions.

A company that delivers products to specific foreign countries needs to familiarize itself with local compliance requirements relating to its products. Those include restrictions on material composition like rules on hazardous substances such as RoHS and REACH in Europe, electronic waste recycling, product safety, warnings, labeling, recycling and registration requirements for medical devices, import bans or license requirements for encryption products and technical standards, as well as normal customs and import requirements for the importation of goods.

Signing up suppliers and distributors

A company that buys components, products or services like contract manufacturing and web hosting from abroad needs to consider import restrictions like customs laws, as well as comply with local withholding tax obligations at home and adjust its contracts. Additionally, those firms should consider numerous tax and legal issues when selecting the best distribution model. Options include buy-sell models, which involve sales to wholesale distributors, resellers and franchisees, and referral agent

models, where intermediaries receive a commission for referring buyers. Each distribution model has pros and cons in terms of risks, opportunities and the degree of control preserved by the company. The trade-offs vary between jurisdictions, subject to the following general principles:

- By appointing dependent agents in other jurisdictions, companies can establish a taxable presence with resulting tax reporting and remittance burdens, known as a PE problem.
- If a company engages an individual person as a commission agent or other intermediary, employment laws and rules on misclassification have to be considered.
- By selling products to intermediaries abroad, companies can exhaust their IP rights over the sold items, which can prompt undesired reimportation and price disruptions.
- Under mandatory dealer protection laws in many countries, particularly Latin America, Europe and the Middle East, intermediaries are entitled to severance and other protections against termination. In some cases, companies can mitigate risks with contractual disclaimers, alternative dispute resolution clauses and/or by picking a less protected distribution model.
- Franchise laws are often much less developed outside the US, but some countries have also enacted disclosure requirements and termination protections. Companies need to clarify to what extent a foreign reseller may use the manufacturer’s marks, company name and domain URL in the reseller business, as well as keep control over foreign trademark and product registrations.
- Under foreign competition laws, particularly in Europe, companies face prohibitions regarding resale price maintenance, territory and customer allocation, and other restraints of trade. As a rule of thumb, companies are allowed to exercise more control in the context of commission agency than buy-sell arrangements.
- Commission agents tend to involve greater risks of entanglement with foreign anti-corruption laws and the US Foreign Corrupt Practices Act, particularly in the context of sales to governments or government-owned businesses.
- As a company enters into riskier contractual relationships with companies abroad, it is more likely to face disputes. Arbitral awards tend to be enforceable in most developed nations under the New York Convention, whereas court judgments (particularly injunctions) are often not recognized in other countries.

Putting boots on the ground

As companies intensify foreign expansion, they will eventually find it necessary to have full-time, local representatives to supervise and audit suppliers, develop business or engage in direct sales. At this stage, foreign labor, corporate and tax laws will become acutely relevant.

Employees enjoy protections under local labor laws regardless of the contractual choice of law or attempt to characterize a relationship as one of independent contractors. Misclassified employees create increasing exposure each year a firm does not comply with labor laws and payroll tax requirements. Most countries do not recognize the concept of “employment at will” and imply or require employment contracts. Companies should use employment agreements that conform with local law, are translated into the local language and efficiently protect employers with respect to foreign labor laws by providing, for example, probationary periods during which termination is relatively less restricted.

Working hours, whistleblower hotlines, computer monitoring and other programs must also be adapted to, and in many cases approved by, local governments to avoid running afoul of mandatory local laws. Granting stock options or other benefits is subject to various mandatory local law

restrictions and consequences that need to be carefully considered and addressed to avoid costly surprises down the road.

Employees, offices and other foreign presences usually trigger tax reporting and remittance duties on the basis that they constitute taxable “permanent establishments” (PEs) of a company in another jurisdiction. This can result in double taxation and administrative burdens that can be avoided or mitigated by the incorporation of a local subsidiary. In this regard, entity options have to be examined.

During trial phases, companies occasionally establish temporary arrangements, with the assistance of local “employee leasing,” with businesses or contractors working from home under time-limited contracts. These arrangements have various disadvantages and, as a rule of thumb, companies should seriously consider incorporating a local company or other entity if they engage a salesperson, a provider of chargeable service or more than two other kinds of employees for more than six months in a foreign jurisdiction.

Additionally, companies need to document funding arrangements with foreign subsidiaries in intercompany agreements that comply with international transfer pricing principles and reflect arm’s-length commercial arrangements.

International M&A

Apart from early organic growth, tech companies frequently expand internationally through mergers, acquisitions, spin-offs, asset sales and other corporate transactions. Companies that buy or sell businesses across borders face a maelstrom of international tax and legal issues. Tax, corporate and securities laws often treat international deals quite differently from domestic ones and companies need to give careful thought to the transaction’s overall structure. Rules on if and when letters of intent are binding vary. Data privacy laws, language barriers and unfamiliar documentation practices can hamper due diligence investigations. Different rules on antitrust filings, collective labor consultations and acquired employee rights apply in case of business transfers and, in some cases, even mere asset transfers or license arrangements.

Prioritization

Which foreign laws and legal issues matter most to a company expanding into new jurisdictions depends on the degree of nexus it has or will establish abroad. Companies should prioritize their consideration of particular areas of law based on the phase of global expansion they are in, and we are presenting topics accordingly in this Field Guide.

In the passive phase, companies passively accept orders from abroad. Particularly relevant are IP (Chapter 2), export controls and sanctions (Chapter 3), and choice of law and dispute resolution (Chapter 5).

In the active online phase, companies actively sell online to customers abroad. Companies sometimes refer to virtual global expansion as “soft launches” when they intentionally start targeting particular markets in other countries. Rules for e-commerce (Chapter 6), data privacy and cybersecurity (Chapter 7), product and regulatory compliance (Chapter 8), and customs and import requirements (Chapter 4) are becoming more important.

In the intermediary phase, companies appoint distributors, resellers, sales representatives or other intermediaries abroad. Companies now need to focus on distribution law (Chapter 9), franchise law (Chapter 10) and competition law (Chapter 11).

In the boots-on-the-ground phase, companies incorporate subsidiaries and hire employees. Now they have to fully comply with all foreign laws applicable to their new presences and consider rules for foreign incorporations (Chapter 12), employment (Chapter 13) and global equity (Chapter 14).

All along, companies have to consider tax compliance and planning (Chapter 15) and corporate development (Chapter 16).

Takeaways

When you examine foreign law issues concerning global expansion plans, you need to know more to make concrete assumptions regarding the exact nexus of the business to the foreign country. Ideally, you prepare a detailed statement of facts, plans and questions for counsel. Depending on which phase of expansion you are in — One: passively taking orders from abroad, Two: actively selling online, Three: contracting with distributors abroad, or Four: boots on the ground — you should prioritize particular topics for your legal review (but remain conscious of additional issues that may have to be addressed sooner rather than later).

Passive phase: Accepting orders from abroad

2 IP

Introduction

When your company goes global, its IP strategy must shift to a coordinated, multi-jurisdictional approach. Risks arise from the territorial nature of IP rights; IP rights in one country do not automatically extend to others. Risks also arise from inconsistent legal regimes, enforcement challenges and operational issues. Overall, early planning is essential to preserve value, avoid loss of rights and maintain control over IP assets. This chapter is intended to provide a roadmap of key IP considerations for those planning to take their company's business abroad, whether it takes the form of product distribution, sale of services, a license grant or other forms of collaboration with a local partner.

Commercial vs. IP goals

The commercial goals of any cross-border transaction involving technology must be considered in tandem with IP-related objectives. Among the potential commercial goals may be expanding product sales into new markets, creating new products for new markets, developing new localized technology, forging a new relationship with a local partner to exploit its marketing know-how or otherwise facilitate fast entry into the new market, or increasing margins through reduced production costs.

The goals from an IP perspective may include exploiting and expanding the existing technology portfolio, securing access to valuable third-party marketing intangibles, or developing technology, perhaps, but not necessarily, localized for the particular market. However, due to the significant risks in exposing your IP in a new market, IP goals should always prioritize protecting and maintaining existing IP rights in the company's trademarks, computer software and other technology, including know-how, trade secrets and other forms of proprietary information.

Unfortunately, legal enforcement of IP rights against infringement and counterfeits is lax in some countries, and the remedies for infringement are often more limited in terms of damages and injunctive relief. Risks also include misappropriation of trademarks and technology, piracy, reverse engineering and inadvertent facilitation of competing market solutions. Part of the risk assessment for any foray into a new market includes identifying the steps necessary and available to secure and protect a business's IP in that market, and reduce or manage the residual risks which may nevertheless exist despite taking those steps.

Moreover, the long-term objectives of the proposed transaction should be considered at the planning stage. If the transaction involves, for example, a license, distribution arrangement or joint venture with a third party, one should consider whether the alliance is intended to be a transition to direct market presence in the future. If so, a company must plan how it will secure not only the IP rights but also the practical ability (for example, access to customer information) to operate in the market without the participation of the local alliance partner when the time is ripe.

The challenge in this area is often balancing the push from the local distributor, licensee or partner, to obtain as much access and control of your company's technology as possible, against the pull of safeguarding your company's rights in the technology and improvements.

Selecting the appropriate transaction structure: Is it a license, services agreement, sale of a product or some combination of the foregoing?

There are many different types of transaction structures that may be used for the sale of technology products and services. These include licenses, services (including Software-as-a-Service models),

distribution, supply and other forms of collaboration like a joint venture for the development and sale of a localized product. Different types of transactions have different implications from an IP perspective. A joint venture or joint development agreement may appeal because of its collaborative flavor and the desire to benefit from a local partner's technology, customers, connections and knowledge of the market. Indeed, it may be the only structure legally available to enter into some markets. Structures that contemplate a non-US entity co-owned by your company and the joint venture partner, with specified relative share interests, generally present greater IP risks, as your company may be contributing IP by license to an entity in which it does not have effective control, and the new IP developed for the local business may be locked into the joint venture entity itself. In such cases, an assessment should be undertaken to determine whether the proposed transactional structure allows your company to retain sufficient interest and flexibility in critical IP. Other structures, such as a distribution agreement or license with more defined technology access, or a service agreement contemplating provision of a service from the server of the principal as in a Software-as-a-Service (SaaS) agreement, but not actual transfer of code or know-how, may in some cases be sufficient and more protective of key know-how.

The important issue to note is that technology is constantly evolving. The original technology to which the partner and/or licensee has been exposed may evolve into different versions/derivatives of the original form, giving rise to ownership issues in the improvements and possible noncompliance with the original terms of use.

Identifying the IP to be used and/or secured in the new market; what's in, what's out and implications

When considering a transaction involving the transmission or use of a business's technology abroad, the principal must identify at the outset what trademarks, patents, trade secrets, know-how, inventions, software, other copyright protected materials and confidential information might be used in the new market.

Trademarks

Any trademarks to appear on the products in the new market should be validly applied for and registered in the new market as soon as possible and, ideally, well prior to the commencement of activity. This is because in many countries other than the US, the owner of a trademark is the first applicant for registration in the market. This allows third parties to register marks before the expanding company enters the market. Generally, trademark applications must be filed on a country-by-country-basis.

There are some exceptions. The Madrid Protocol provides a means for a trademark holder in a Madrid Protocol member country to apply for trademark protection in multiple countries through the filing of one international application in the home IP office, for example, with the US Patent & Trademark Office based on a US basic application. After a review for formalities only by the World Intellectual Property Organization (WIPO), an international registration may be issued, but it remains the right of each country designated for protection to determine whether protection for a mark may be granted. Accordingly, designated countries may refuse to register the trademark, requiring a response under local trademark rules. Once the trademark office in a designated country grants protection, the mark is protected in that country just as if that office had registered it. The disadvantage of using the Madrid Protocol is the risk of central attack, that the international registration is completely dependent on the original basic application or registration issued in the office of origin. This means that, during the first five years of the life of the international registration, if the basic application or registration is refused, withdrawn, cancelled or restricted, in whole or in part, then the international registration will be cancelled, and all the dependent national registrations will fail. Accordingly, this approach is best used when there is already a home country registration or a high degree of confidence that the basic application will issue.

Another exception is a European Union trade mark (EUTM) application, covering all of the countries of the EU, which may be submitted to the European Union Intellectual Property Office in Alicante, Spain at a cost that is much lower than the cumulative cost of filing separate applications in each member state. The EUTM can be designated in a Madrid Protocol application. The main disadvantage of using the EUTM application is that an earlier registration in one member state alone may defeat a EUTM application in its entirety. If that happens, conversion to national applications is possible.

In many countries, if a mark is to be used by a third party, such as a licensee or distributor, not only should the mark be registered in advance, but a registered user agreement must also be filed with the local trademark office for the principal to be able to enforce its trademark rights. So, the first step is to do a search of the local trademark registry to ensure the mark is available for registration and to register the mark, including the local language equivalent. The English language version generally will not automatically cover the local language equivalent or transliteration.

When licensing trademarks, it is important to identify specifically the trademark to be used and to specify the licensee’s permitted activities strictly and narrowly to be only as broad as needed for the transactions contemplated. Ideally, the applicable governing law of the licensor’s home country should govern the contract, but the contract may nevertheless end up being construed by a local court or arbitration panel. In that event, clarity of the terms will be critical. The rights should be specified as nonexclusive unless otherwise expressly agreed, and if exclusive, whether they are exclusive vis-à-vis the licensor as well as third parties. Permitted users should be expressly identified. It is necessary to specifically identify the geographic scope of the permitted use, expressly set forth restrictions (i.e., non-sublicensable and non-transferable without consent) and clarify who will control taking legal action for infringement and the defense of third-party infringement claims. It should always be the owner/licensor, irrespective of who pays for it. And lastly, it is also necessary to include quality control provisions. In some countries, quality control by the licensor is required by law in order for the licensor to enforce trademark rights against infringement. But even where it is not required as a legal necessity, it is imperative from a brand management perspective to have clear contractual ability to preserve the reputation and value of the brand.

Patents

The company should consider whether technology to be used in the new market is already covered by a patent application or is patent-eligible. US patents do not provide any protection abroad. Generally, the decision on where, outside the US, patent protection will be sought is made when filing an international patent application via the Patent Cooperation Treaty (PCT) based on a US patent application. A PCT application can be filed with the receiving office (the US patent office, in our example) up to 12 months from the US application’s filing date and reserves the applicant’s right to file in over 140 countries that are members of the PCT. Ultimately, the applications enter national stage in each of the relevant jurisdictions, and the national or regional authorities (such as the European Patent Office) administer matters related to examining applications and issuing patents under national law.

The bottom line is that, at the time of filing the PCT application, your anticipated foreign markets should already be identified, as you do not get a chance to seek protection once the patented technology has already been publicly disclosed by way of the earlier patent application.

In addition it should be noted that public disclosure before filing may destroy the required novelty in certain jurisdictions, with some jurisdictions offering a grace period for “self-disclosures” but others applying stricter rules. Patentability standards and subject matter eligibility also vary from jurisdiction to jurisdiction and enforcement may be uncertain in some countries.

Copyrights

Copyright interests in software code and content created in the US will be observed in other countries that are party to the Berne Convention. No formalities, such as registration or use of a copyright notice, are required under the Berne Convention.

Title to works of authorship, including software, created by employees acting within the scope of their duties, is automatically vested in the employer company in the US under the "work made for hire" doctrine. But "work made for hire" may not work when you create customized local software versions or solutions in other countries. In some countries there is no applicable work made for hire doctrine, and you may need to contract with employees to secure exploitation rights in copyrighted works such as software. Additionally, even in countries that have adopted the "work made for hire" doctrine, copyright created by independent contractors will not vest automatically with the employer. For these reasons, the best approach is to ensure that employees and contractors have signed assignment agreements or other written instruments transferring IP rights in any technology or other works they create to your company. In all cases such agreements should be reviewed by local counsel to ensure they will be effective under the applicable laws.

Know-how, trade secrets and confidential information

Where a third party such as a licensee or distributor in a new market will be gaining access to your company's know-how, trade secrets or other confidential information, it is critical that the use rights are specified with as clear boundaries as possible consistent with accomplishing the business goals.

Care must be taken to identify specifically the IP to be licensed. Inventions should be identified with particularity. Know-how should be described in as much detail as practicable with clear reference to the field of use and the licensed products to be manufactured and sold. Consider and specify whether the licensee is permitted to manufacture the product, or whether its rights are limited to marketing and sales. You should reserve, and the licensee or distributor should acknowledge contractually, your company's ownership and exclusive interests in these IP rights, as well as all improvements and derivatives developed for the local market.

Speaking of improvements, if you are committed by the business arrangement to make your own future improvements available to a local partner, the scope of improvements to be made available should be appropriately circumscribed; perhaps to evolutionary, as opposed to revolutionary improvements, to avoid giving access to more than what you actually intend.

In light of the difficulties in effectively enforcing prohibitions against reverse engineering, if practical, a US company might consider reserving the right to service its products directly to minimize the risk of reverse engineering.

Again, your company should have the contractual right to control all issues involving enforcement of IP rights against third parties (irrespective of who is required by the applicable law of the jurisdiction to be the plaintiff). Allowing a local licensee or distributor to control enforcement can have very serious adverse consequences on protection of the IP going forward, as its interests may not necessarily be aligned with the interests of your company.

Ownership and rights to joint developments and technology innovations

If the business arrangement necessitates a local partner being involved in the creation of derivatives and improvements to your technology, a key issue will be the ownership of and relative rights of the parties in those improvements. This issue can arise not only as to the specific improvements intended by the collaboration, but also with respect to discoveries and inventions incidental to non-developmental activity.

Ownership of improvements

If the developments are improvements to a company's background technology, the company will often try to provide in the relevant contract that title to all improvements are automatically vested in or assigned to the company. In some countries, providing in advance for such automatic assignment of the improvements is not legally possible, in which case the rights may only be acquired through license-back to the company on an exclusive or nonexclusive basis.

Ownership of original developments

Ownership of new original developments that are not improvements to either party's background technology is more difficult to address. Parties often leap to the concept of joint ownership of IP rights in these circumstances because it sounds appealingly fair. This is, however, rarely a good option. Joint ownership of trademarks is impossible in some countries. The default rules under law for rights of use, transferability, enforcement and obligations of co-owners to account to each other differ from country to country and depend on the type of IP involved (e.g., patent versus copyright). Joint ownership is rarely an effective solution because it inevitably results in surprises or uncertainty as to the respective parties' rights. It is often cleaner for IP in original developments to be assigned to one party, with such party granting a license back to the other party on specified terms addressing the foregoing issues.

March in rights

In some countries, local compulsory licensing laws permit the government to use patented technology if necessary in an emergency or for reasons of national interest. Such rights can also result from cooperation with local government or quasi-governmental institutions, such as a joint development project with a government lab or public university.

Conclusion

One of the keys to successfully managing your IP when you go global is advance planning. A thorough inventory and due diligence on your own IP portfolio is an essential first step toward consciously deciding which IP rights should or should not be exposed to local distributors, licensees or other local players in new international markets.

Secondly, becoming aware of the potential legal issues from the start, and indeed well before you put boots on the ground in your new market, is essential. Clear and register your trademark rights locally as early possible. Once your brand has become hot is often too late. By then, it is likely that a third party will have already registered it and will hold your mark hostage. Moreover, don't fall for letting a local distributor register it for you, as you may find it difficult to recover the registration if the relationship sours.

Finally, it is important to align your goals in terms of IP portfolio development with your business goals, and continuously review them to make sure that they remain consistent and complement each other as you take your tech business global.

3 Export controls and sanctions

A key consideration for any business in expanding internationally is first understanding how various export control and sanctions regulatory programs in their home jurisdiction may apply to the proposed business, what the corresponding legal and compliance risks are, and how to mitigate those, both on the front end and on an ongoing basis. US export controls and sanctions enforcement are particularly advanced and developed, and provide us with plenty of examples for this chapter. However, it is important to note that many other jurisdictions have their own export control and sanctions regimes. Any global business has to carefully assess how its different legal entities and local presences are affected and how to navigate conflicts.

US export controls and sanctions affect who US companies can do business with, where, with what products and technologies, and what those can be used for. These measures impact all aspects of business — research and development, upstream and downstream supply chains, electronic delivery of products (e.g., via app stores, cloud offerings, SaaS, etc.), technical services, payment flows and banking options, etc. Before initiating international business activities, companies should consider the following three core export control and sanctions regulatory regimes.

Export Administration Regulations

Sending or making available software, hardware or technologies internationally, by physical shipment, electronic downloads, transfers within the cloud, etc., can trigger export licensing requirements under US laws. In particular, the export, reexport and in-country transfer of commodities, software and technology (together referred to as “items”) subject to US jurisdiction may be subject to export control licensing requirements and restrictions under the US Export Administration Regulations (EAR), found at 15 C.F.R. Parts 730-774. Even where **items subject to the EAR** are commercial in nature, the export, reexport, or transfer (in-country) of may require authorization from the Commerce Department’s Bureau of Industry and Security (BIS), in the form of either a license exception or a specific license. Licensing requirements can be triggered by any one of the following factors: (i) the nature and export classification of the item (its sensitivity); (ii) where the item is going (the destination); (iii) who it is going to (the recipient/end user); (iv) what it will be used for (e.g., a sensitive end use); (v) any risks of diversion; and (vi) the availability of any EAR “license exceptions” (broad authorizations in the EAR that overcome the need for specific export licenses, provided certain conditions are met). Any US company contemplating offering its products, technologies or services internationally must understand the following key concepts:

- The export controls in the EAR have extremely broad extraterritorial application in that they apply not only to direct exports of commodities, software and technologies from the US to another country, but also to (i) reexports of US-origin items by anyone from one foreign country to another; (ii) exports from one foreign country to another of foreign-made products that incorporate US-origin parts, components, materials and/or software; and (iii) in some instances, exports from one foreign country to another of the foreign-made direct product of US-origin technology or software even if it has no US-origin content per se. Determining (ii) and (iii) requires a complex analysis. Thus, for example, if a US company has its products manufactured by a foreign contract manufacturer, using US parts, components or materials, or based on US designs or using US manufacturing equipment or software design tools, and then directs that foreign contract manufacturer to ship the finished products directly to customers, those shipments may be subject to US export control requirements and restrictions under the EAR even if they never come into the United States. Determining when an item with US-incorporated content or derived from US technology or software is subject to the EAR can require a complex analysis.

- The EAR make no distinction for US export control purposes between physical shipments of commodities, software and the physical embodiments of technology (e.g., blueprints, design data, specification sheets, etc.) on the one hand, and intangible transfers of software and technology (e.g., electronic transmissions of software and technology, technical assistance and training for foreign nationals) on the other hand. Thus, a software company that provides its products to foreign customers exclusively by means of electronic fulfillment, through downloads over the internet is engaged in exporting that software for export control purposes to the same extent as a software company that delivers its products to foreign customers in the form of physical carrier media (e.g., CD-ROMs, etc.). Correspondingly, the EAR include a "**deemed** export" rule, under which the release or disclosure of proprietary US software source code or technology to a foreign national is deemed to be an export of that source code or technology to the foreign national's home country. This "deemed export" rule can trigger licensing requirements for companies that hire foreign national employees and contractors, either in the US or abroad, to engage in research and development activities.

- Although the EAR generally do not apply to the furnishing of services, there are a number of circumstances in which the furnishing of services to foreign customers may involve exports that are subject to the EAR and require licenses. This is particularly the case for companies offering cloud computing services and software as a service (SaaS). For example, to the extent that a US company provides to a foreign customer or allows the customer to download a "thin client" or other code or technology necessary to access and use cloud computing services or SaaS, that transfer of code or technology constitutes an export subject to the EAR and may require an export license. In some cases, transferring certain technology and software within the cloud between servers in different countries can trigger export licensing requirements too. In addition, there are specific provisions of the EAR that even restrict the furnishing of services to a foreign party where the US company knows (or has reason to know) that the services may be used by the foreign party in connection with, or in support of, activities related to the proliferation of weapons of mass destruction, military-intelligence end uses or end users, the development or production of advanced semiconductor chips or related semiconductor manufacturing equipment.

- The US Government maintains various lists of persons and entities that are subject to export prohibitions or restrictions designed to prevent their access to US products and technologies. Those lists include the Commerce Department's Denied Persons List, the Entity List, and the Military End User List, among others. An export license from BIS may be required for the **export, reexport or in-country transfer of any item subject to the EAR** to any person or entity identified on such restricted parties lists or where they are a party to an export transaction (e.g., as a purchaser). In most instances, any application for an export license involving one of those prohibited or restricted parties will be summarily rejected.

- The export controls set forth in the EAR apply not only to exports to third parties, but also to "in-house" or "related-party" transactions. Thus, exports of items to foreign subsidiaries of a US company are subject to the export controls of the EAR and may, in fact, require export licenses from BIS in certain instances. Correspondingly, the transfer of software or technology to a foreign entity for research and development purposes, and the transfer of parts, components, materials, software and technology to a foreign affiliated contract manufacturer, are export transactions under the EAR, even if the results of the research and development activities, or the products manufactured by the foreign contract manufacturer, as the case may be, will be delivered exclusively to the US company and will not be made available to any third party.

International Traffic in Arms Regulations

Companies developing or manufacturing defense articles or working in or with customers in defense-related sectors will need to consider a separate set of export control regulations, the US International Traffic in Arms Regulations (ITAR), found at 22 C.F.R. Parts 120-130 (ITAR). The ITAR govern the export of "defense articles" and "defense services." Virtually any export of any such

“defense article” or “defense service” **to any foreign destination** requires prior authorization, in the form of an export license, from the State Department’s Directorate of Defense Trade Controls (DDTC). In addition, any US company that is engaged in the manufacture of “defense articles” or the furnishing of “defense services” is required to register with the DDTC, even if that company does not actually export any such “defense articles.”

For ITAR purposes, “defense articles” are those hardware and software products and related technical data enumerated on the United States Munitions List, which is codified as section 121.1 of the ITAR. Importantly, however, a commercial product may become a “defense article” and, therefore, be subject to the ITAR export controls if it has been designed, modified, adapted or customized for military use even if not enumerated on the United States Munitions List. In addition, a US company that provides technical assistance to a foreign customer in the installation, integration or implementation of a commercial product into a defense article, or the use of that commercial product with a defense article, may be engaged in the furnishing of a “defense service” subject to the ITAR export controls.

Sanctions regulations

A third US regulatory regime to consider is the trade and economic sanctions regulations administered separately by the US Department of the Treasury’s Office of Foreign Assets Control (OFAC) under various Economic Sanctions Regulations, found at 31 C.F.R. Parts 500 et seq. OFAC sanctions reflect prohibitions and restrictions imposed by the US government on (i) certain sanctioned countries and territories (e.g., Cuba, Iran, North Korea, Russia, the Crimea region, the Peoples’ Republics of Donetsk and Luhansk), (ii) certain entities and individuals that (A) are owned or controlled by, or affiliated with, the government of a sanctioned embargoed country, (B) have been identified as supporting other restrictive regimes (e.g., in Afghanistan, Balkans, Belarus, Myanmar, Central African Republic, Democratic Republic of Congo, Ethiopia, Hong-Kong, Iraq, Lebanon, Libya, Mali, Nicaragua, Russia, Somalia, South Sudan, Venezuela, and Yemen) or (C) have been identified as engaged in certain sanctionable activities, such as support for international terrorism, the proliferation of weapons of mass destruction, narcotics trafficking, grave human rights abuses, transnational crime, malicious cyber-enabled activities, corruption, foreign interference in US elections, among others. OFAC maintains several restricted parties lists, including OFAC’s Consolidated Sanctions List and the Specially Designated Nationals (SDNs) List. Under OFAC’s 50% Rule, entities that are owned, directly or indirectly, 50% or more by one or more SDNs are themselves treated as SDNs.

OFAC sanctions broadly prohibit **US persons** from engaging in activities, directly or indirectly, involving sanctioned territories or persons. This includes not only exports, but also sales, the provision of services, funds flows, imports, etc., basically any activity that involves a sanctioned territory or party or in which an SDN has a direct or indirect interest. US persons include US companies and their non-US branches (including financial institutions), US citizens and permanent residents (wherever located or employed), and anyone while physically within the US. OFAC sanctions against Cuba and Iran also extend even to foreign subsidiaries of US corporations. Also, under US law, any transactions conducted in US dollars even outside the US should be assumed to implicate US financial institutions (US persons) and thus trigger OFAC sanctions jurisdiction.

Certain US sanctions programs, such as those against Cuba and Iran, apply extraterritorially (e.g., to subsidiaries of US companies) and can create conflicts with local laws in other jurisdictions. For example, the EU, Canada and Mexico have enacted countermeasures or “blocking” statutes that prohibit local companies and persons from complying with certain aspects of the US embargoes of Cuba and, in some cases, Iran, and/or require notification to local authorities related to compliance with those measures. Companies need to navigate carefully to avoid tripping up over conflicting obligations.

OFAC sanctions have vastly expanded in recent years and are a favorite tool of the US government in targeting countries, parties and activities deemed a threat to US national security or foreign policy. It is particularly important that US suppliers of cloud computing, SaaS and other services understand that OFAC sanctions prohibit the furnishing of services, directly or indirectly, to sanctioned countries and SDNs. This can be mitigated to some extent through measures such as geoblocking.

In some instances, the restrictions of the EAR and OFAC sanctions overlap. In those limited circumstances in which US government policy supports the supply of goods, technology or services to otherwise embargoed countries (e.g., personal communications devices and software, medical equipment and supplies, other humanitarian goods, etc.), prior authorizations of both OFAC and BIS may be required for any export or reexport of these items.

Licensing analysis

The following steps provide a high-level analytical framework for assessing potential export control or sanctions licensing requirements or restrictions.

Commodity jurisdiction analysis

When exporting products or technologies, a threshold issue is determining which export control regime (i.e., the EAR commercial or “dual-use” export control regime, or the ITAR defense articles export control regime) applies as a jurisdictional matter to the company’s products, technologies or services. To that end, the company must determine if its products or services constitute “defense articles” or “defense services,” as the case may be; if not, the EAR will apply. Importantly, as noted above, a product that was initially designed and developed exclusively for commercial applications may be converted into a “defense article” for export control purposes if it is modified, adapted or customized for military use. Correspondingly, a company may be engaged in the furnishing of “defense services” within the meaning of the ITAR if it provides technical assistance to its customers in the integration of its commercial products or technologies into military hardware.

The ITAR provides a procedure by which US exporters may obtain formal rulings from the DDTC on whether their products constitute “defense articles” subject to the jurisdiction of the ITAR export controls. This procedure can be useful where there is doubt as to the proper export control status of that product.

Export classification analysis

For items subject to the jurisdiction of the EAR (most items), the next step in the export control and compliance analytical framework is determining the **classification** of the products and technologies for export control purposes. This classification involves determining the entry on the EAR Commerce Control List that describes the products. Each entry is called an “export control classification number” (ECCN). Accurate classification of products, software or technologies that are to be exported is the foundation of an effective export control program, as the ECCN is key to determining the export control requirements (including, where applicable, BIS export licensing requirements) and restrictions applicable to that item.

Commercial items that do not come within the scope of any specific ECCN on the Commerce Control List are properly classified in category “EAR 99” and are generally eligible for export, without export licenses, to all foreign destinations, **except** certain sanctioned countries or where there are end-user or end-use concerns.

Export license analysis

Once the ECCN for a particular commodity, software or technology is identified, the next step is to determine whether an export license from BIS will be required for any proposed export transaction involving that item. That export licensing analysis involves the following two steps:

- Determine whether the item is “controlled” for export to the proposed destination. Each ECCN identifies the reason or reasons why the particular commodity, software or technology covered by that ECCN is controlled for export (e.g., NS-controlled for national security reasons, NP-controlled for nuclear nonproliferation reasons, MT-controlled for missile technology reasons, EI-controlled for encryption reasons, AT-controlled for anti-terrorism reasons, etc.). The reason or reasons why a particular item is controlled for export should then be matched up against the EAR Commerce Country Chart, which identifies the category of export controls applicable to each country. More sensitive technologies will be “controlled” to more destinations. Correspondingly, more sensitive destinations from a US national security and foreign policy standpoint will trigger licensing requirements even for less sensitive technologies.
- Determine whether an export license is required for the export of the controlled item to the proposed destination. If the foregoing analysis shows that a particular item is “controlled” for export to the proposed destination, then an export license from BIS will be required for the export of that item to that destination, **unless an export license exception is applicable to the proposed export transaction**. Part 740 of the EAR sets forth a series of export license exceptions which authorize the export, without the need for specific BIS export licenses, of controlled items under specific terms and conditions. Importantly, the determination of whether an export license exception is available must be made on a transaction-by-transaction basis, because (i) most export license exceptions apply only to exports of controlled items to certain specific foreign destinations, and (ii) the terms and conditions of a particular export license exception may apply to some, but not all, exports to the same foreign destination. If no export license exception is available for the export of a controlled item to a particular destination and customer, then an export license from BIS will be required for that export transaction.

End-use controls

Even if the particular products or technologies are otherwise “not controlled” and are eligible for export to the foreign destinations (e.g., EAR99 items) without export licenses based on their classification, they may require licenses if destined for a prohibited or restricted end-use. For example, an export license is required for the export or reexport of virtually any item subject to the EAR, including commodities, software and technologies classified under EAR99 if, at the time of export, the US exporter knows (or has reason to know) that the item or items will be used, directly or indirectly, in certain restricted activities, such as those related to the proliferation of weapons of mass destruction, military-intelligence end uses or end users, the development or production of advanced semiconductor chips or related semiconductor manufacturing equipment.

End-user controls and broader restricted party screening

Licenses may be required from BIS and/or OFAC if the transaction involves any person or entity on any of the US government’s lists of prohibited and restricted parties (i.e., the BIS Denied Persons List, the BIS Entity List, the OFAC List of Specially Designated Nationals or other OFAC lists, etc.). Accordingly, any US company should implement compliance measures to **screen** the parties to any proposed transaction against all of those US government lists of prohibited and restricted parties to avoid engaging in any transaction with any such restricted or sanctioned party. It is important to bear in mind that because civil penalties can be imposed based on **strict liability** (i.e., where the government does not need to show intent or knowledge on the part of the violator), a failure to screen can lead to a violation and penalties even if unintentional. While screening is not a legal requirement per se, US regulators expect companies to adopt a **risk-based** approach to screening. For example, companies with thousands of individual consumer customers may take a different approach to those with a smaller set of customers. It is also important to screen parties not only in the downstream supply chain but also upstream, as well as other involved parties, for example, to check for sanctioned banks of counterparties. These days, US regulators have higher expectations, particularly for technology companies, when it comes to screening for restricted parties, and less tolerance for screening errors and failures.

Export clearance procedures

Compliance with export control requirements in relation to physical shipments is monitored by US government authorities by means of an export declaration filing requirement. Subject to certain limited-value exceptions, each physical export of any commodities or mass-market software subject to the EAR requires the filing of electronic export information (EEI) with the Census Bureau through the automated export system (AES), in accordance with the requirements of the Foreign Trade Regulations, found at 15 C.F.R. Part 30.

Special additional clearance requirements apply to the export of any defense articles and the concomitant filing of EEI with the Census Bureau, made under authority of a DDTC export license issued pursuant to the ITAR. Typically, EEI for any export transaction is filed on behalf of the exporter by its freight forwarder. However, it is important to understand that in submitting EEI to the Census Bureau through the AES, the freight forwarder is acting as the **agent** for the exporter. As such, any errors or omissions on the part of the freight forwarder in submitting that EEI may result in **the imposition of compliance penalties on the exporter**. In that context, US Customs and Border Protection regularly imposes a civil penalty in the amount of USD 10,000 (adjusted annually for inflation and USD 17,412 as of June 1, 2026), for the filing of false, inaccurate or incomplete EEI as part of the AES record for an export transaction. Penalties apply for submitting that false, inaccurate or incomplete EEI even if the underlying export transaction has been duly authorized in accordance with the regulatory requirements of the ITAR or the EAR, as the case may be.

Enforcement of export controls and sanctions

Compliance with the requirements of the EAR, ITAR and OFAC sanctions is vigorously enforced by a number of US government law enforcement agencies, including, but not limited to, the Department of Justice, the Commerce Department's Office of Export Enforcement, various agencies within the Department of Homeland Security, DDTC, OFAC and the Federal Bureau of Investigation. Because these programs are viewed as critical to US national security and foreign policy interests, penalties for violations of the various programs can be very severe and enforcement scrutiny, particularly over evasion, is extremely high. Civil penalties can be imposed based on strict liability where the government does not need to show any knowledge or intent on the part of the violator; even "innocent" mistakes or negligence will often trigger a monetary penalty. Criminal violations require showing willful intent. The current range of penalties in the event of violation is as follows: (i) criminal fines up to USD 1 million per violation for corporate violators and imprisonment for up to 20 years for individual violators; (ii) civil fines up to USD 250,000 per violation (adjusted for inflation annually and USD 377,700 as of June 1, 2026)for the EAR and most OFAC sanctions programs; and (iii) administrative sanctions in the form of a suspension or revocation of export licenses, or a restriction or denial of export privileges. In addition, especially in the case of a violation of the ITAR export controls, the exporter may be debarred from eligibility to receive or participate in US government contracts.

In the context of OFAC sanctions, the US government also has authority to impose "secondary sanctions" against persons acting even outside US jurisdiction for providing material support for sanctioned territories or parties or engaging in sanctionable activity. This can include being designated as an SDN, effectively cutting the party off from US markets, suppliers and the US financial system.

Considerations for non-US companies

All companies, wherever located, doing business with US companies or dealing with US products or technologies also need to be aware of US export controls and sanctions. As explained above, these rules apply extraterritorially and are routinely enforced against non-US companies. Many other countries now impose similar types of export control and sanctions restrictions that all companies will

need to consider. For example, a Japanese company buying US products for resale and distribution in different markets will need to confirm with the US manufacturer/seller what the export classification of the product is and should be prepared to answer questions from the US manufacturer/seller about where and with whom the products will end up. When that Japanese company reexports the US product from Japan to, e.g., China, it will need to consider both US and Japan export controls and, if there is US person involvement in the reexport or the reexport sale involves US banks or US dollars, also OFAC sanctions.

Conclusion

US export controls and sanctions are an increasingly deployed tool to address US national security and foreign policy concerns, including in areas such as emerging technology, cybercrime and human rights. Because of the pervasive nature and complexity of the US export control and sanctions programs, compliance with them can be a major challenge for US businesses that are just entering the international marketplace. Companies should invest time and resources to fully understand the implications and take steps to mitigate the risks both on the front end and on an ongoing basis as export controls and sanctions evolve.

4 Customs and import compliance

When companies expand internationally and begin shipping goods across borders, customs laws can quickly become a central compliance issue. Unlike many regulatory regimes that apply only after a company establishes a local presence, customs obligations are triggered immediately upon importation of goods. Even a company operating remotely and selling goods online may need to address customs clearance, duty payments, and import documentation requirements in each destination country.

Customs laws govern how goods are classified, valued and declared when they cross international borders. These determinations directly affect the amount of duties and taxes owed and whether goods may legally enter a country. Errors in customs compliance—whether due to misunderstanding or insufficient processes—can result in shipment delays, penalties, retroactive duty assessments, seizure of goods, or even criminal liability.

From a practical perspective, customs compliance requires coordination among legal, tax, logistics and supply chain teams. The key foundational concepts that determine customs treatment in most jurisdictions are: (i) customs valuation; (ii) tariff classification; and (iii) country of origin, all of which need to be supported by maintaining records to support verification by customs authorities. In addition, companies should consider available structuring options to mitigate duties and streamline import requirements.

Customs valuation

Customs valuation refers to the method used to determine the value of imported goods for duty assessment purposes. In most countries, valuation rules are based (to varying degrees) on the WTO Customs Valuation Agreement, which prioritizes the “transaction value” of the goods—i.e., the price actually paid or payable—subject to specified adjustments.

Transaction value and adjustments

The starting point for valuation is typically the invoice price between the buyer and seller. However, this price must often be adjusted to include certain additional elements, such as:

- Assists (e.g., molds, tooling, or design work provided by the buyer free or at reduced cost)
- Royalties and license fees related to the imported goods
- Packing costs and commissions
- Certain transportation and insurance costs (depending on import terms)

These adjustments are frequently overlooked, particularly in the case of importations between related companies or where intellectual property is licensed separately from the sale of goods. Failure to properly include dutiable elements can result in underpayment of duties and subsequent enforcement action.

Related party transactions

Many multinational companies import goods from affiliated entities. In such cases, customs authorities may scrutinize whether the declared transaction value reflects an arm’s-length price. While transfer pricing analyses are relevant, customs authorities do not automatically accept transfer pricing methodologies for customs valuation purposes. Companies should ensure consistency between transfer pricing and customs valuation positions where possible and document the basis for declared values.

Alternative valuation methods

If the transaction value cannot be used—for example, where the price is unreliable or not sufficiently determinable—alternative methods may apply, including:

- Transaction value of identical or similar goods
- Deductive value (based on resale price in the importing country)
- Computed value (based on production costs plus profit)
- Fallback methods

These alternative methods are more complex and can introduce uncertainty, making it preferable to structure transactions so that transaction value remains acceptable.

Tariff classification

Tariff classification determines the applicable duty rate and import requirements for a product. Goods are classified under a country's tariff schedule, which is generally based on the Harmonized System (HS), a globally standardized nomenclature administered by the World Customs Organization.

Determining the correct classification

Each product must be assigned a classification code based on its objective characteristics, such as:

- Material composition
- Function and use
- Technical specifications
- Degree of processing

Even small differences in classification can result in materially different duty rates or regulatory requirements. For example, whether a product is classified as a "finished good" or a "component" can affect both duty rates and eligibility for preferential treatment.

Binding rulings and consistency

Many jurisdictions permit importers to obtain advance or binding classification rulings from customs authorities. These rulings can provide certainty and reduce risk, particularly for complex or high-value goods.

Companies should also ensure that classification decisions are applied consistently across jurisdictions, unless local differences require otherwise. Inconsistent classification across markets can trigger audits and undermine credibility with customs authorities.

Country of origin

Country of origin refers to the country where a product is considered to have been manufactured or substantially transformed. Origin determines eligibility for preferential duty rates under free trade agreements (FTAs), as well as the applicability of trade remedies (such as antidumping and countervailing duties), quotas, and labeling/marking requirements.

Non-preferential origin

Non-preferential origin rules are used for general customs purposes, including the application of ordinary duty rates, trade remedies, and marking requirements. These rules typically rely on a

"substantial transformation" test—i.e., where the product last underwent a meaningful manufacturing process that changed its character or use.

Different jurisdictions may apply different tests (e.g., tariff shift, value-added thresholds, or specific processing requirements), which can result in divergent origin determinations for the same product.

Preferential origin and free trade agreements

Preferential origin rules apply when companies seek reduced or zero duty rates under FTAs (e.g., USMCA, EU agreements, ASEAN agreements). These rules are typically more prescriptive and may require:

- Specific changes in tariff classification
- Minimum regional value content (RVC) thresholds
- Compliance with detailed production requirements

To claim preferential treatment, importers must generally maintain documentation (such as certificates of origin) demonstrating that the goods meet applicable rules. Improper claims can result in retroactive duty liability and penalties.

Import compliance requirements

Beyond valuation, classification and origin, importing goods often triggers a range of additional regulatory requirements, including:

- Import licenses or permits
- Product safety certifications and testing requirements
- Labeling and marking rules (including origin marking)
- Environmental compliance requirements (e.g., hazardous substances restrictions)
- Pre-shipment inspections or customs filings
- Recordkeeping obligations

These requirements vary significantly across jurisdictions and product categories. Companies should conduct product-specific regulatory analyses before shipping goods into new markets to avoid delays or refusals at the border.

Duty mitigation and customs planning strategies

Companies can often take proactive steps to reduce duty exposure and improve customs efficiency. These strategies should be considered early in supply chain design and contract structuring.

Free trade agreements

Proper use of FTAs can significantly reduce or eliminate customs duties. To take advantage of FTAs, companies must:

- Ensure goods satisfy the applicable rules of origin
- Maintain supporting documentation
- Structure supply chains to meet regional content requirements

While FTAs can offer substantial savings, compliance can be administratively burdensome and requires ongoing monitoring.

Free trade zones and bonded facilities

Many jurisdictions offer free trade zones (FTZs), special economic zones or bonded warehouses that allow goods to be imported without immediate payment of duties. Duties may be deferred or eliminated depending on the subsequent use of the goods.

Common benefits include:

- Duty deferral until goods enter domestic commerce
- Duty elimination for re-exported goods
- Potential duty reduction based on manufacturing processes ("inverted tariff" benefit in some jurisdictions)

These programs can be particularly valuable for companies engaged in manufacturing, assembly or distribution across multiple markets.

Duty Deferrals for Temporary Imports

Companies may import goods temporarily without paying duties under programs such as temporary importation under bond (TIB), carnet systems or similar regimes. These programs are typically available where goods are:

- Used for exhibitions, testing or demonstration
- Temporarily imported for repair or processing before being re-exported
- Temporarily used in a country without being sold

Strict requirements apply regarding the duration and permitted use of the goods, and failure to comply can result in full duty liability.

Duty drawback

Duty drawback programs allow companies to recover duties paid on imported goods that are subsequently exported or used in exported products. While potentially lucrative, drawback claims require detailed recordkeeping linking imports to exports and can be administratively complex.

Supply chain structuring

Companies can often reduce duty exposure through strategic decisions about:

- Where goods are manufactured or assembled
- How products are designed and described
- Incoterms and allocation of importer responsibilities
- Pricing structures and inclusion of dutiable elements

These decisions should be made in coordination with tax and transfer pricing teams to ensure alignment across customs, tax and commercial objectives.

Conclusion

Customs compliance is a foundational element of international trade and often one of the first regulatory regimes a company encounters when expanding globally. Determinations of customs

value, tariff classification and country of origin directly affect the cost, timing and legality of cross-border transactions.

Companies should not treat customs as a purely operational or logistics issue. Instead, customs considerations should be integrated into broader legal, tax and supply chain planning from the outset. By developing robust processes and leveraging available mitigation strategies—such as FTAs, bonded programs and careful supply chain design—companies can manage risks, reduce costs and support efficient global operations.

5 Choice of law and dispute resolution, draft contracts wisely

When a US company expands internationally, disputes can arise with international business partners, leading to the possibility of litigation outside the US. Companies should be aware of this possibility and recognize that there are ways to mitigate the risks of being hailed into a foreign court, most notably through the use of choice of venue and arbitration clauses. This chapter identifies some key issues of which a company should be aware regarding the importance of contractual choices of law and non-US litigation, offers some high-level points to keep in mind about international arbitration, and provides some practical guidance regarding dispute resolution clauses. The treatment here is far from exhaustive.

Choice of law

In the context of cross-border agreements, the choice of governing law matters because the chosen law determines what certain terms mean, if anything (e.g., “reasonable,” “merchantability” or “undue delay”), which substantive obligations each party has concerning topics and situations that are not expressly prescribed in the contract, to what extent liabilities can be limited or disclaimed, whether contracts may be assigned, which side has the burden of proof, when claims become time-barred under a statute of limitation and many other details.

In the US, parties need to consider that for commercial contracts, state law generally governs, and, therefore, there are 50 different choices of law. Hence, companies should avoid a contractual choice of “United States law.” In some areas, state laws are fairly well harmonized, and, particularly in the case of sales of goods, results are fairly consistent across states. If one business sells goods to another, it often does not matter much whether they choose California or New York law. Most US states require a nexus for a choice of their law to be valid; therefore, companies should consider choosing the law of a state where one party is incorporated or doing business. In some areas, variation between state laws is often of considerable significance, for example, concerning consumer protection or dealer termination.

A choice of “UK law” should be avoided for the same reason why a choice of “US law” is not appropriate: The contract laws of England, Wales and Scotland differ and should be particularly selected. English law is a popular choice of governing law, even outside the UK, and English law does not require a nexus to be chosen. English law offers more freedom and flexibility than other bodies of contract law. However, there are some important exceptions, notably implied terms, the construction of limitation and exclusion clauses and English courts’ broad rights to determine whether limitations and exclusions are enforceable. In contrast to the US, English courts can and regularly do interfere with exclusions and limitations of liability agreed by commercial parties, more so than courts in the US. Also, terminology varies in the two jurisdictions separated by a common language — the US and UK — as the common US style contractual exclusion of implied “warranties,” for example, would not exclude conditions and indeterminate terms. This is a common problem in US agreements that have switched to English law without a localization review being undertaken. Unless exclusions are expanded to cover conditions, warranties and other contract terms, they are likely to be ineffective.

Other jurisdictions’ contract laws tend to be even more rigid and inflexible, perhaps led by Germany, which blacklists disclaimers, limitations of liability, unilateral termination rights and many other commonly used commercial terms not only for consumer contracts but also in a business-to-business context, unless each clause is individually and seriously negotiated. This generally means that German law presents a great choice for buyers (who benefit from unlimited warranties and liability) and a bad choice for sellers. Companies should consider this implication when negotiating choice of

law clauses in a cross-border context instead of always insisting on their home jurisdiction's laws. A US company that buys products or services from a German company should welcome a choice of German law in the contract. Also, a company that sells under a choice of German law should carefully document the negotiation of commercial risk allocation clauses if it wants to stand a chance of disclaimers or limitations of liability being enforceable — and not set aside by a German court as unfair standard contract terms.

International litigation — key issues to keep in mind

Differences between civil law and common law jurisdictions

Once exposed to litigation in foreign courts, US lawyers quickly learn that litigation in the US is unique. Jury trials, punitive damages and especially broad discovery are concepts not employed by most of the world's judicial systems. Many of the striking contrasts between US and foreign litigation are attributable to differences between common law and civil law systems. For instance, under many civil law systems, cases are presented primarily on the basis of written evidence, parties must rely on evidence in their possession or voluntarily disclosed by opposing or third parties, the judge primarily questions witnesses, and the losing party is generally required to pay at least a portion, if not all of the attorneys' fees of the prevailing party.

Enforcing judgments in international litigation

Companies conducting business abroad are often exposed to a greater risk of being sued outside the US, just as foreign companies doing business in the US risk being sued in the US. Accordingly, it is important to be knowledgeable about (i) the bases on which foreign judgments will be enforced in the US and (ii) the bases on which US judgments will be enforced abroad.

Enforcement of foreign judgments in the US

The US has not ratified any treaty providing for the enforcement of judgments from other countries. Nevertheless, foreign-country judgments have long been recognized and enforced in the US. In the seminal US Supreme Court case *Hilton v. Guyot*, international comity provided the basis for enforcing foreign country judgments. Some courts still look to factors identified in *Hilton* — the opportunity for a full and fair trial abroad, a trial conducted upon regular proceedings, and proceedings following due citation or voluntary appearance of adversary parties — to determine whether to enforce a foreign judgment.

An alternative to enforcing foreign judgments under the non-statutory comity standard is the Uniform Foreign Country Money Judgments Recognition Act ("**Act**"), which has been adopted in nearly all of the states, the District of Columbia, the US Virgin Islands and Puerto Rico. Section 4 of the 2005 revision to the Act provides various circumstances in which a domestic court may not recognize a foreign-country money judgment, including where: (1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law; (2) the foreign court did not have personal jurisdiction over the defendant; or (3) the foreign court did not have jurisdiction over the subject matter. Notably, some US courts will enforce a foreign court's judgment recognizing an arbitral award even when the arbitral award itself cannot be enforced because the statutory enforcement periods are different for foreign judgments and arbitral awards.

Additionally, a US court need not recognize a foreign-country judgment for the following reasons, among others: (i) the defendant did not receive notice of the proceedings in sufficient time to enable them to defend; (ii) the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case; or (iii) the judgment is repugnant to the public policy of the particular state or of the US.

Still, these provisions demonstrate that a foreign judgment could be enforced even if the foreign country did not provide the same procedures (e.g., oral testimony, cross-examination of the other side) as found in the US. As the drafters of the Act explained, “a mere difference in the procedural system is not sufficient basis for nonrecognition. A case of serious injustice must be involved.”

Enforcement of US judgments abroad

As the US is not a party to any treaties or conventions on the recognition of foreign judgments, US judgments are not enforced abroad as easily as those of countries that do have judgement-enforcement treaties with other countries. Nevertheless, many countries will enforce a US judgment if it meets the statutory requirements of the country in which such recognition and enforcement are sought. Foreign courts look to several factors, including: (i) that the US court that rendered the judgment had jurisdiction over the foreign defendant according to the standards of jurisdiction of the country in which enforcement is sought; (ii) that the US judgment is final and enforceable under the applicable US federal or state law; and (iii) that enforcement of the judgment in the foreign country does not violate that country’s public policy. Courts in many countries employ greater scrutiny if the US judgment was obtained by the default of the foreign defendant and are unlikely to enforce punitive damages awards.

Attorney-client privilege in the international context

As companies grow their foreign business, in-house lawyers are often hired outside the US. It is imperative that the company not presume those foreign lawyers will be cloaked with the same attorney-client privilege that applies in the US.

Although common law countries, such as England, Canada and Australia, have privilege laws for in-house lawyers that closely resemble US law, the law differs significantly in many other countries. In some civil law countries, for example, outside lawyers enjoy the privilege, but not in-house lawyers. In others, such as Mexico, there is no privilege per se; however, these jurisdictions usually have limited concepts of discovery or impose strict confidentiality obligations on lawyers, or both. These differences operate in practice to limit the disclosure of attorney-client communications. There are also a host of countries (e.g., China, Switzerland, Argentina and Japan) in which the law is either in flux or has never been certain enough for in-house lawyers to know with confidence whether they are protected by the privilege.

Also significant in this regard is EU law because it will apply to EU investigations, regardless of the law of the EU country in which the investigation is taking place. In September 2010, the highest court of the EU, the Court of Justice of the European Union (CJEU), ruled that under EU competition law, the privilege does not extend to communications with in-house lawyers. Companies should expect that the CJEU will apply the same reasoning in other highly regulated areas of law, and not just competition law.

Mediation

Companies should also be aware of the growing use of mediation outside the US. Mediation is a non-binding form of alternative dispute resolution in which the parties mutually agree to participate and attempt to reach a negotiated settlement, often facilitated by a mediator. Unlike arbitration or litigation, a mediator does not impose a decision; rather, the process is designed to help the parties reach a voluntary resolution that preserves business relationships and limits costs. In the US, mediation is frequently embedded within the litigation process itself. Many federal and state courts require parties to engage in mediation at an early or intermediate stage of the litigation, and judges may order mediation as part of active case management. Other jurisdictions have also started to adopt mediation as a cost-effective procedure and ensure early settlement of any dispute. In Italy, for example, parties must attempt mediation before litigating certain types of claims, such as disputes related to financial contracts and property.

Mediation also plays a role in the arbitration context. Major arbitral institutions, including the American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR), require mediation on a voluntary basis at the preliminary stage of proceedings to encourage early settlement, though any party can opt out of mediation. Further, the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention") provides a uniform framework for enforcing mediated settlement agreements across borders and is increasingly being adopted amongst nations, though the US is not a party.

International arbitration

Understandably, parties often prefer to arbitrate rather than subject themselves to the risks and uncertainties of litigation in the local courts of foreign countries. Arbitration is seen to offer a neutral tribunal and forum, and has the advantage of being a reliable and uniform system of enforcing awards in national courts under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"), a treaty ratified by almost all major trading nations.

Adjudication in arbitration or court?

As companies ask whether they should agree to arbitrate their disputes rather than proceed in court, they should consider several factors, including the following: (i) whether the law permits the subject matter of the dispute to be arbitrated (ii) the likely place of enforcement of any judgment or award; (iii) the "quality" and neutrality of the tribunal; (iv) the cost and speed of the process; (v) the general convenience; and (vi) the availability of discovery procedures. The impact of any of these factors will naturally vary among jurisdictions, transactions and the nature of the dispute.

Importantly, the national law of some states prohibits the arbitration of certain kinds of disputes (e.g., patents, consumer, antitrust and insolvency). More fundamentally, under the New York Convention, the recognition and enforcement of an award may be refused by the courts of other countries if a court in the award-rendering country finds that the arbitration agreement was "not valid under [its] law" or the award has been set aside by a court in which the award was made.

For these reasons, the choice of arbitration "seat" is often more important than the choice of the substantive law governing the contract. The law of the place chosen as the legal seat will also usually govern the procedural rules of the arbitration if they are not set forth in a separate set of rules established by the parties or the chosen tribunal itself.

Interim and "emergency" relief

Generally, interim and provisional remedies are available in international arbitration so long as they are permitted under the law of the seat of the arbitration (as is the case in all major arbitration venues).

Once an arbitral tribunal is constituted, it has the authority to grant interim and provisional relief. As a practical matter, constituting a tribunal takes time (often months), which traditionally meant that parties to an arbitration had no alternative but to resort to the courts for such relief. However, a number of arbitral institutions, including the ICDR, the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the Singapore International Arbitration Centre (SIAC), have established rules for "emergency arbitration," which provide for the immediate (often within a day or two) appointment of an "emergency" arbitrator with authority to grant "emergency relief," pending appointment of the arbitral tribunal in accordance with the parties' agreement.

Discovery in international arbitration

Generally, there are few provisions in international arbitration rules concerning discovery. However, when significant sums are in dispute, some exchange of documents usually occurs. The International Bar Association has adopted Rules on the Taking of Evidence in International Commercial Arbitration ("**IBA Rules**"), which are widely used in international cases, often by party agreement prior to or at the

time of the preliminary hearing. The IBA Rules permit parties to request “a narrow and specific requested category of documents that are reasonably believed to exist.” The IBA Rules also establish a method for resolving disputes about document production.

The ICDR’s Guidelines for Arbitrators Concerning Exchanges of Information, which have a similar effect, apply in ICDR cases absent the parties’ agreement in writing to the contrary. The major institutions have also adopted guidelines or protocols to encourage arbitrators and parties to deal with electronic evidence in the most efficient and cost-effective manner possible.

The nationality of the arbitrators can make an important difference in these matters. Arbitrators from civil law jurisdictions typically decline to enforce requests for broad categories of documents or prehearing witness depositions. If, however, the arbitrators or one or both of the law firms involved are accustomed to US or UK court litigation, there will be an expectation that no evidentiary hearing should be held without some document discovery.

When lawyers of this same disposition represent both parties, or serve on the arbitral tribunal, an international arbitration can come to resemble litigation in the US, with detailed document requests, depositions and corresponding objections. Depositions under oath remain relatively rare in international arbitration, although informal pre-hearing “information sessions” or interviews with opposing witnesses and counsel may be conducted to facilitate the parties’ understanding of complex information, particularly concerning technical matters or damages.

Managing international disputes with dispute resolution clauses

When a party uses properly tailored dispute resolution clauses in its underlying international agreements, several of the risks relating to the use of foreign courts and foreign law can be reduced. There are four types of dispute resolution clauses that should be considered for inclusion in any international contract: (i) governing law (or choice of law); (ii) forum selection (venue); (iii) arbitration; and (iv) attorneys’ fees clauses.

Governing law clause

Corporate counsel often reverts to using the law of their company’s home jurisdiction or other laws without critically examining such laws in relation to foreseeable litigation that may arise. Although such laws may be good choices, they may not be the best choice.

Importantly, limitations on liability, which are widely enforced across the US (assuming they are not unconscionable), often violate the public policy and/or law of foreign countries and must be considered when drafting the clause. Additionally, if the agreement involves important IP rights, counsel should analyze whether the foreign jurisdiction in which the company will be doing business provides the same level of protection as in the US.

Forum selection clause

As with governing law clauses, corporate counsel often selects as the arbitration or litigation forum the jurisdiction in which the company is headquartered. This is not ideal in every situation. For example, if a future dispute is likely to occur between a party’s foreign subsidiary and a foreign business in a foreign country, then the parent company’s “home” jurisdiction probably has very little, if any, interest in the outcome of the dispute and is not likely convenient to any of the relevant witnesses. These cases open themselves to possible motions to dismiss based on the inconvenience of the forum selected, as well as the availability of an alternative, convenient forum abroad. Moreover, if a court judgment is rendered in a forum in which the defendant or respondent has no assets, there may be additional issues raised as to enforcement of the judgment.

When including a forum selection clause, parties need to decide whether that forum will be the “exclusive” forum for resolving all disputes. If the language does not so indicate, then the clause will

be considered as a submission to the jurisdiction of the chosen forum but also allows suits to be brought in any other forum that also has personal jurisdiction.

Finally, even if the parties have agreed to arbitration, it would be wise to include a forum selection clause that would be triggered in the event the parties must petition courts for emergency or provisional relief, or if the arbitration is somehow waived. In these scenarios, parties would be consigned to the courts, and it would be wise to have selected a court in advance that is most favorable.

Arbitration clause

If parties choose to arbitrate their disputes, the arbitration clause in their agreement should contain the following essential terms:

- A mutual commitment to binding arbitration and a clear statement of the scope of the disputes that will be arbitrated
- The place of arbitration, preferably by city, state and country. Parties should be mindful that the place of arbitration is not necessarily the place where hearings will take place because, under most international arbitration rules, arbitrators can designate where hearings will occur. Thus, a party may want to separately designate in the agreement where arbitral hearings are to take place to ensure it is a desired location.
- The arbitral institution to administer the arbitration and the rules to be applied (If certain provisions of certain rules are not favorable, a party should “carve them out” of the agreement.)
- The number of arbitrators, any special expertise they should have and the method of their selection (if it will be different from that set forth in the rules of the institution)
- The language to be used in the arbitration

Although not an essential part of an arbitration clause, parties might want to include a provision setting forth the extent and scope of discovery or disclosure to be allowed. For example, the parties may want to address whether depositions will be used (a rarity in international arbitration). In addition, if discovery or disclosure of “electronically stored information” will create issues, procedures for dealing with them can be included.

In addition, parties may want to consider whether to include a mediation clause in the agreement, stating that parties should first engage in mediation before proceeding with arbitration. If so, parties could proceed either by separate mediation and then arbitration, or under a combined approach where the same individual acts as both mediator and arbitrator (often called “med-arb” clauses). When considering including such a clause, parties should still aim to be as specific as possible regarding location, relevant rules, and mediator selection to avoid any possible ambiguity.

Attorneys’ fees clause

In the US, attorneys’ fees are generally not recoverable by the prevailing party unless there is a contract or statute that allows for such recovery. Consequently, if a dispute is to be resolved in a US forum, the international agreement should include an attorneys’ fees clause if the party wants to ensure such fees will be awarded.

The rules of most international arbitral institutions allow the arbitrators to award attorneys’ fees even if the agreement does not have a clause. If the parties prefer that each side bear its own costs and attorneys’ fees, regardless of the outcome, they should provide this in their arbitration clause.

Conclusion

A company planning to do business overseas will do well to anticipate the potential for disputes with its international partners and understand the risks that can arise when managing such disputes. Most importantly, the company should recognize that the rules and practices that apply in resolving domestic business disputes may not apply in the international arena. It is worth the effort and expense to understand the differences, the risks involved and the tools available to help manage those risks.

Active online expansion phase: Selling to customers abroad (also known as “soft launch”)

6 Going global online — basic e-commerce considerations

Almost every business operates a website. More and more also offer mobile sites. Most websites and mobile sites are instantly available anywhere in the world upon launch — and are subject to the laws of every country around the globe. For some businesses, their sites may constitute the primary method of selling goods or services, e.g., businesses that may sell “cloud” services. For other businesses, their sites may only be used to advertise and market a traditional “brick-and-mortar” business. And for other businesses, online sites may complement traditional sales and distribution channels by offering additional methods to sell products or services. Unless the product or service that is offered by the business is clearly intended to serve a local market almost exclusively, businesses may want to expand their reach by doing business globally. In this case, a business will consider designing its website for an international audience. In doing so, the business should take into consideration the potential legal obstacles and pitfalls of going global online.

This chapter summarizes some of the most important issues that a company going global online should consider with regard to its websites and mobile sites.

E-commerce aspects

As soon as a company goes live with a website or mobile site, it becomes subject to foreign laws. Almost every country has enacted laws and regulations that address the sales of goods or services and related marketing and advertising activities. These laws and regulations include trade laws, competition regulations, data privacy laws, content restrictions, product homologation requirements and consumer protection laws. Although the international enforcement of these laws may be difficult and expensive for regulatory authorities, there are at least a few categories of laws and regulations that tend to trip companies up sooner or later if they are not considered.

A company that engages primarily in “business-to-business” transactions and sells to foreign businesses may be in a better position to enforce against its business customers the terms and conditions provided in its terms of sale (e.g., choice of law, dispute resolution forum and place of delivery/performance). However, a company that engages primarily in “business-to-consumer” transactions and sells to consumers in other countries is subject to various mandatory consumer protection laws that trump contractual terms. In this regard, a business may try to limit sales to residents of particular jurisdictions for which the company has conducted at least some basic legal due diligence, and may try to keep consumers from other jurisdictions out if possible (e.g., not providing the website in the local language, limiting credit card acceptance, limiting delivery locations for physical products or limiting geo-targeting). For jurisdictions that are specifically targeted, website operators should, at a minimum, familiarize themselves with contract formation requirements and comply with translation requirements, restrictions on contract terms and information requirements.

Mexico provides a useful illustration of how these principles apply in practice. Businesses that actively target Mexican consumers online should expect meaningful scrutiny with respect to pre-contract disclosures, the clarity and accessibility of consumer-facing terms, pricing and delivery transparency, and the evidentiary robustness of online consent mechanisms; depending on the business model, digital platform operators may also face VAT registration, withholding and record-keeping obligations. More broadly, Mexico reflects a wider trend across Latin America toward a more assertive e-commerce regulatory environment that combines consumer-protection, tax-enforcement and platform-accountability objectives, underscoring the need for local adaptation rather than reliance on a single set of standardized online terms.

How to conclude a valid contract

Companies that intend to enter into contracts with customers through their websites should familiarize themselves with the requirements that lead to valid contract formation in the targeted jurisdictions. If they have a choice between different legal entities in an international group, they may want to choose an entity and contractually governing law in a jurisdiction that provides relatively favorable contract formation principles, because courts around the world often begin the analysis of contract formation by assessing whether the contract would be valid under the laws chosen in the contract terms at issue. The analysis does not always end there, particularly if consumers are involved, but it usually begins there. Therefore, international businesses can improve their position with respect to online contract formation by making a thoughtful choice regarding the contracting entity and governing law.

Under state law in the US, which is relatively friendly to online contract formation in comparison to international laws, contract formation requires an agreement of the parties. The method chosen to conclude the contract must manifest the intent of the parties to form an agreement through offer and acceptance, and a meeting of the minds as to all essential elements.

Companies can primarily decide between two ways of contract formation on the internet: “clickwrap” (or click-through) agreements, in which users are required to click on an “I agree” box after being presented with terms and conditions, or “browsewrap” agreements, where a website’s terms and conditions are generally posted on the website via a hyperlink at the bottom of the screen and indicate acceptance through continued use of the site. There are also variations of these agreements: one type of clickwrap is a so-called “scroll wrap” where the user may scroll through the terms before clicking “I agree”; and one variation of the browsewrap is called a “sign-in wrap,” where signing in to a site is contingent on accepting the site’s separately stated terms. Of these methods, companies should strongly consider clickwrap solutions, including the scroll wrap, to increase the likelihood that the terms will be found to be enforceable against consumers.

For online terms to create binding contracts, courts generally focus on two elements: (i) was there reasonable notice of the online terms; and (ii) was there a reasonable manifestation of assent? For example, in *Nguyen v. Barnes & Noble Inc.*, the US Court of Appeals for the Ninth Circuit held that the user had insufficient notice of the terms of use accessed through a link on the site and did not manifest its assent merely through use of the site; thus, the user did not enter into an agreement with the online merchant to arbitrate his claims. Even clickwrap agreements must be structured to evidence the user’s assent to the terms. In *Cullinane v. Uber Technologies, Inc.*, the First Circuit Court of Appeals found that merely clicking “I Agree” to use the site without presenting the terms of service did not reasonably notify the user of the terms or reasonably manifest the user’s assent to those terms. However, the Pennsylvania District Court held in *Feldman v. Google, Inc.* that the user has a duty to read the terms that were presented in a scroll box with an “I agree” button immediately below the box.

Under German law, to form a valid contract over the internet, there must be an offer and an acceptance, just as in offline scenarios. A website displaying articles and prices (e.g., in an e-commerce store) is usually regarded as an “invitatio ad offerendum,” i.e., inviting an offer in which it is the customer who is regarded as making a binding offer by clicking an “order button.” The online merchant accepts the customer’s offer by express declaration or by sending the goods to the customer. To effectively include terms and conditions, it is usually sufficient if the online merchant makes the terms and conditions available on the ordering page via a clearly labeled link and in a printable manner directly above the “order button”. However, not least for reasons of evidence, many companies require the customer to accept the terms and conditions, e.g., by checking a box. To avoid doubts, companies should provide clear wording and hyperlinks to referenced terms next to check boxes in order to assure that consumers will be found to accept particular terms when they check the box.

In the EU, the EU Consumer Rights Directive (2011/83/EU) has established an additional requirement to form a legally binding contract. The EU Consumer Rights Directive requires that online merchants make it absolutely clear to consumers that there is an obligation to pay by using a button or a similar function labeled “order with an obligation to pay” or a corresponding unambiguous phrase such as “pay now.” If a merchant does not comply with this obligation, consumers will not be bound by the contract terms.

Particular requirements apply to continuous subscriptions, auto-renewals and “negative option” contracts where customers have to take action to avoid additional charges. The US Federal Trade Commission (FTC) has brought actions under the Restore Online Shoppers’ Confidence Act. Some US states have even stricter laws in this area.

Fully localize terms or merely conform to mandatory laws?

Website clickwrap or browsewrap terms often include one or more documents, including terms of use, terms of sale or service, an acceptable use policy and a privacy notice or policy. Terms of use, for example, may include terms governing the use of and access to the site, ownership of company IP and licenses, ownership of user-generated content, changes and modifications to terms, limitation of liability, disclaimers, warranties, choice of law and dispute resolution. However, simply because a particular provision may be enforceable under the laws of one jurisdiction does not necessarily mean that it is enforceable in another jurisdiction in which the other party and its assets are located.

In addition, there may be laws and regulations that require or prohibit certain terms and conditions, including cancellation and withdrawal rights, manufacturer warranties, limits on auto-renewals, disclaimers, dispute resolution clauses and limitations of liability. Such “mandatory” laws will apply regardless of the governing law that a company chooses in its standard contract terms and may affect the substantive rights of the parties and the enforceability of some or all of the terms of the online contract.

When going global online, companies generally take one of three approaches to address the impact of local law on their contracts: (i) companies can fully localize the terms, i.e., adapt them to the laws of the country that the company is targeting (and have such law as governing law); (ii) some companies keep one law, e.g., California law, as the chosen governing law and do not consider or address the impact of foreign laws; or (iii) companies keep one chosen contract law, but adapt their terms to certain “mandatory” laws that will apply in the target country despite the chosen governing law.

Companies that take the first approach and fully localize terms have the advantage that their terms will be better understood by foreign customers and welcomed by regulatory authorities in the respective country; this can reduce the risk of claims and disputes. A disadvantage of this first (full localization) approach, however, is the cost involved in localizing the terms and the potential resulting lack of uniformity among terms drafted for different jurisdictions.

On the other hand, if a company maintains one choice of law without considering foreign mandatory laws, it may violate foreign laws that carry administrative or even criminal sanctions (e.g., competition laws), and the online contract may be voided, in whole or in part, to the extent it is inconsistent with local “mandatory” laws. German consumer protection laws would apply, for example, in addition to California governing law, where a consumer is located in Germany. Such mandatory laws are vigorously enforced by consumer protection associations in Germany and often asserted without regard to a particular consumer’s situation. In the EU, the Better Enforcement Directive (2019/2161) additionally introduced that member states shall foresee significant fines under certain conditions in B2C scenarios for the use of unfair standard business terms.

As a middle ground, companies may consider localizing their online contracts for the mandatory laws of their biggest markets. This approach tends to yield more uniformity in the interpretation and enforcement of the online contract; however, it may make online terms somewhat less protective of the merchant by expressly accommodating pro-consumer mandatory terms, and companies have to

carefully consider the repercussions of such accommodations under the law they choose as governing in their terms. For example, companies should think twice before they remove disclaimers of implied warranties of merchantability in contracts governed by California law merely to accommodate German consumer protection laws that may not recognize such disclaimers.

Are there translation requirements?

Some countries have enacted laws that strictly require contract terms to be translated into the local language. Others may not give effect to contract terms that have not been translated. Most countries will allow consumers to challenge the enforceability of contract terms that are offered only in a language that is not the official language where the consumer resides; US companies will find it particularly hard to argue that anyone does or should understand English if they translate some content or advertisements on their sites, but not the legal terms.

Companies must consider strict translation requirements and, as a rule of thumb, translate legal terms wherever they translate any other text. The French Toubon law, for example, requires translations under penalty of law. Under German law, there is no explicit legal requirement to translate contract terms; but if a company provides parts of the website in German language and provides the terms in English only, there is a risk that German courts will challenge the validity of the contract with a consumer due to insufficient disclosure of the contract terms (since it cannot be assumed that every German user understands the English language). This applies to Mexico and other Latin American countries as well. Although companies are not legally obligated to provide translations of their terms, using a language that is not native to the region may result in those terms being unenforceable.

What are the information requirements on a website?

Companies should adhere to foreign information and disclosure duties, for example, regarding company contact details and instructions on the rights of cancellation and withdrawal.

The EU Electronic Commerce Directive (2000/31/EC), for example, requires that contact details be made easily, directly and permanently accessible and include, among other things, the name and address of the company, details that provide for fast electronic contact and direct communication, including an email address, and trade register and registration number. The Electronic Commerce Directive sets out minimum standards, but the member states were allowed to implement further information requirements. The obligation to provide contact details applies to website operators, regardless of whether the website just provides information or contains an e-commerce store.

Furthermore, companies that enter into distance contracts with consumers, e.g., via an e-commerce store, are required — before the sale — to inform the consumer of a consumer’s right to withdraw from the contract within a withdrawal period of 14 days. To do this, merchants may use the model instructions on withdrawal provided by the EU Consumer Rights Directive as locally implemented. Failure to do so will extend the cooling-off period for consumers in the European Economic Area (EEA) from 14 days to 12 months and 14 days. The EU Directive 2023/2673 introduces that EU member states shall foresee from June 2026 that companies which enter into distance contracts with consumers by means of an online interface must also provide for a withdrawal function to be labelled with “withdrawal from contract here” or an unambiguous corresponding wording. Additional information requirements were also introduced by the Better Enforcement Directive (2019/2161) e.g., for online marketplaces.

Since 9 January 2016 also information obligations pertaining to alternative dispute resolution to be complied with on the website and in the general terms and conditions (as applicable) resulting from the country-specific implementations of EU Directive 2013/11/EU on alternative dispute resolution for consumer disputes might apply to companies established in the EU. In certain states in the US, buyer’s remorse laws permit the cancellation of contracts (including contracts formed online) for a limited number of specific types of consumer transactions, such as home loans, home improvements

and weight-loss assistance services. The remorse period and types of contracts impacted vary by state.

Considerations for dispute resolution clauses

Contracts in both the brick-and-mortar and the online world routinely specify the dispute resolution forum in addition to the governing law of the contract for the reasons discussed in Chapter 5 of this Field Guide. If the parties are silent in their contract on the venue for resolution of the dispute, they may find their dispute being heard in the other party's courts (subject to the requirements of personal and subject matter jurisdiction, and the doctrine of forum non conveniens). For the merchant, this can lead to unpredictable and inconsistent results.

Companies offering online terms and conditions frequently prefer to arbitrate rather than litigate their disputes. For companies in the US, there are a number of benefits to arbitrating disputes: parties to arbitration have greater control over shaping the dispute resolution process, including limiting the timing of submissions and arbitral findings; limiting or eliminating costly discovery procedures; and maintaining the confidentiality of the submissions proceedings and decision. Perhaps the most significant benefit to arbitration is the enforceability of arbitration decisions abroad. While judgments of US courts are not automatically enforced in the courts of other countries, arbitral decisions are recognized and enforceable in the courts of countries that are parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

In the US, there is a strong public policy in favor of the arbitration of disputes, but only if the parties have expressly chosen to arbitrate in the contract. As a result, whether the parties to an online contract have agreed to arbitrate their dispute will often turn on whether a valid contract was formed. Even where the parties to an online contract have manifested their assent to the terms, they must not be unconscionable. In *Laster v. AT&T Mobility LLC*, the lower courts found that an online agreement to arbitrate claims individually, and give up any right to class actions, was unconscionable and therefore unenforceable under California law. The US Supreme Court reversed the US Court of Appeals for the Ninth Circuit in *AT&T Mobility LLC v. Concepcion*, finding that the arbitration clause found in AT&T's terms — including the consumer's right to participate by phone or written submission, the merchant bearing the filing fees and arbitration costs of both parties, guaranteeing the consumer a minimum recovery if an award exceeded its last settlement offer, and permitting only the consumer to recover its attorney's fees — met the interests behind class action litigation, and the online contract's mandatory arbitration clause was therefore not unconscionable. Given the benefits of arbitration discussed above, the US Supreme Court's substantive guidance for an enforceable agreement to arbitrate helps online merchants craft valid arbitration clauses that can increase the likelihood that arbitral decisions will be enforceable in the consumer's jurisdiction.

Privacy and data protection law compliance

As discussed in more detail in Chapter 7 of this Field Guide, privacy and data protection laws are developing and evolving rapidly. One detail is particularly important for e-commerce launches: the selection of the entity that concludes online contracts, sells as merchant of record, assumes control over data processing and takes responsibility for information provided on a website. Before starting to collect personal data from abroad, companies should consider their global corporate structure. Requirements regarding data protection laws vary from country to country and, depending on the applicability of the data protection laws, a company must usually comply with the respective data protection laws where it operates.

Many member states of the EEA apply their data protection laws to any company in the US or elsewhere for the processing of personal data of data subjects who are in the EU, where the processing activities are related to the offering of goods or services to data subjects in the EU or the monitoring of their behaviour, which may include even if just cookies are placed through a website. However, an entity located in an EU member state might benefit from the "one-stop-shop" for

cross-border processing. Therefore, a company that has entities in many European countries might choose one entity that operates the website/webshop and collects, processes and/or uses personal data, such as information gathered by cookies, registration information or data in connection with an online purchase.

7 Data privacy and security compliance

Data privacy laws and regulations in the US are developing and evolving rapidly. Within the US, laws that regulate data processing broadly (and not just for a specific industry) increasingly apply, and regulate and restrict the collection, use, storage, disclosure and destruction of personal data. While some of the evolving US laws align with privacy law principles existing in laws around the world, such as data minimization principles, there are many differences between US privacy laws and privacy laws around the world.

Key differences include the following:

- **Omnibus statutes**: Unlike in the US, many Asian, European and Latin American countries have enacted one comprehensive data privacy statute. In some cases, this makes compliance outside of the US easier because there is one key law to consider. But it often means that privacy law obligations and restrictions apply under the laws of a jurisdiction into which an organization is expanding, where none existed under US laws.
- **Default prohibitions of data processing**: In the EU, data processing is prohibited by default, and companies must find specific justifications and permissions. Failing to identify and document the "correct" legal basis for a data processing activity can and has led to regulatory fines, even where an activity as such has not been found unlawful. Under US laws, companies are generally allowed to process personal data unless a particular restriction or prohibition applies.
- **Data protection authorities**: Outside of the US, and particularly in Europe, there are numerous data protection authorities with varying agenda and enforcement powers (there are 48 data protection authorities in the EEA because there are 18 in Germany alone). Neither the US federal government nor any states had established European-style data protection authorities until the California Privacy Rights Act required the creation of a new California Privacy Protection Agency in 2020.
- **Data protection officers**: It is legally required to appoint data protection officers in many jurisdictions outside of the US, as is the case, for example, for most companies in Brazil, Canada, Colombia, Germany, Mexico, New Zealand, the Philippines, Singapore and South Korea. Failing to satisfy formalistic and binary compliance requirements can lead to an organization's compliance program being reviewed more broadly by a regulator.
- **Restrictions on international data transfers**: Laws in Europe, Japan, China and many other countries impose restrictions on international data transfers, and companies must implement some mechanism to overcome such restrictions and often assess the "adequacy" of data privacy laws in non-whitelisted countries before sending personal data there. In the EU, mechanisms to overcome international data transfer hurdles are constantly changing (new contractual mechanisms were approved in 2021 and a Data Privacy Framework based on self-certification was approved in 2023). In the EU, enforcement is active against business-to-consumer as well as business-to-business organizations. The US has traditionally stood for free trade and free information flows. International data transfers are not specifically restricted under US laws.

In the large economies of Brazil, Canada, India, Japan and China, some of the general data privacy and security requirements are similar to the EU General Data Protection Regulation (GDPR). However, requirements are not identical across jurisdictions. For example, data subject rights differ compared to the GDPR in Brazil under its General Personal Data Protection Law (Lei Geral de Protecão de Dados Pessoais (LGPD)). Canada's different provinces have increasingly different and prescriptive requirements. China has its own prescriptive requirements related to international data transfers under the Personal Information Protection Law (PIPL) that include local filing requirements

(the details of which are evolving). Since 2023, India's Digital Personal Data Protection Act has had a concept of "significant data fiduciaries" that are subject to additional requirements, such as appointing an independent data auditor. Relying on consent for international data transfers out of Japan requires that information about non-Japanese legal systems be included directly in the privacy notice to data subjects.

European and other countries require affirmative opt-in choices for marketing emails, consent for placing cookies on a user's computer, specific disclosures in privacy notices, data subject access rights and adequate safeguards for international data transfers (e.g., the conclusion of standard contractual clauses). An operator of a passive website can relatively safely rely on a disclosure that it complies only with the laws of its home jurisdiction. However, an interactive website that places cookies on foreign computers, ships abroad and targets consumers in other countries with translated websites should consider additional compliance steps to satisfy data privacy laws in the targeted jurisdictions. This applies in particular if a company "touches ground" in a foreign country by incorporating subsidiaries. The GDPR is, due to its wide geographical scope, not limited to companies located in the EU but also impacts many companies outside of the EU to the extent they target EU data subjects.

When expanding internationally, organizations should consider what requirements and restrictions apply in different jurisdictions and where development work, including to develop AI or automatic decision-making products, should take place. Restrictions apply in numerous US states to "selling" and "sharing for cross context behavioral advertising" personal data. In the EU from 2025, the EU AI Act (which, while not a privacy law, impacts data processing at large) is slated to regulate the foundational models that underpin generative AI products.

As an organization first considers expanding internationally, it should consider the following threshold issues:

Who is in charge of data privacy and security compliance in the organization?

A company going global should determine who is in charge of its data privacy and security program. This applies in particular to larger organizations, which usually have a number of individuals that could be responsible for maintaining the data privacy program, such as in-house attorneys, information technology staff, audit departments or human resources personnel. Furthermore, a company should determine whether it is legally required to appoint data protection officers. Under the GDPR, a company must appoint a data protection officer (i) if the company's core activities consist of processing operations that, by virtue of their nature, scope and/or purpose, require regular and systematic monitoring of data subjects on a large scale, (ii) if the company's core activities consist of the large-scale processing of special categories of data and data relating to criminal convictions and offenses, or (iii) if the appointment of a data protection officer is mandated by a member state law. A company may assign responsibility for data privacy and security to a global privacy lead or steward even when formal data protection officer appointment obligations are not triggered, which could improve data governance and reduce regulatory and data security risks. The company should be clear in terminology and any appointment documentation where a non-legally prescribed role is filled (a legal entity organized under US law would typically be required to notify any formal data protection officer role under EU law to every single data protection authority in the EEA in the local language).

A company should also implement organizational or administrative safeguards, such as making sure that all stakeholders are instructed and trained regarding their responsibilities, in particular, the information technology department (regarding data security, retention and access restrictions), security personnel, the human resources department (regarding worker files, global worker databases, monitoring and whistle-blower hotlines) and sales and marketing personnel (regarding direct marketing).

What does the company do to keep data secure?

In the US, there is a growing number of state and federal laws and regulations that specifically address the security of data, including personal data. For example, the US Securities and Exchange Commission (US SEC) has adopted rules on cybersecurity risk management, strategy, governance and incident disclosure by public companies.

Numerous US states have enacted laws that require a business to implement reasonable security procedures and practices, which are appropriate for the size and nature of the business, to protect personal data from unauthorized access, destruction, use, modification or disclosure. In addition, many US states have laws with specific requirements that apply to the protection of Social Security numbers (SSNs) (e.g., restrictions on the online collection of such data types, printing SSNs on cards and not disclosing SSNs in response to data subject access requests) and credit and debit card numbers (e.g., truncation requirements).

These laws will typically apply to any business that owns or licenses sensitive personal data about a resident of a state that has those requirements, regardless of the business's physical location or where that sensitive personal data is stored or processed. Further, there are a number of US federal laws that include requirements to implement and maintain security procedures and practices for special categories of personal data (e.g., information relating to health).

Around the world, many data privacy laws contain requirements that relate to data security. In many jurisdictions, these requirements take the form of generally stated obligations to maintain "reasonable" or "appropriate" technical and organizational security measures to protect regulated personal data. Moreover, the requirements often specify that the "reasonableness" or "appropriateness" of the security measures depends on whether the data is "special" within the meaning of local laws. In the EU, for example, such categories of personal data typically include information about health/medical conditions, racial or ethnic origin, trade union membership, religious or philosophical beliefs, political opinions, and sexual orientation or sex life. However, in a growing number of jurisdictions around the world, there are laws that require businesses to implement specific data security safeguards. Certain organizations exporting personal data about a large number of Chinese residents, or any "important data," are subject to an onerous security assessment requirement under the PRC Cyberspace Administration.

Companies should establish a data security program, starting with a security policy that describes sufficient physical, technological and organizational data security safeguards, e.g., database access controls, device encryption and multifactor authentication. When engaging new workers, companies should make sure that all workers are familiar with the security policies and confirm whether they are actually complying with them. Human error and bad password practices are still the cause of a surprisingly high number of data security incidents. Threat actors leveraging AI tools generate less clumsy phishing attacks than in years past, and it is critical that workers be vigilant to reduce the risk of successful attacks.

In many cases, companies will engage third-party contractors to provide services, e.g., providing information technology services or providing an ethics reporting hotline globally (to comply with US law) and locally (to comply with the EU Whistleblower directive as locally implemented). These third parties will often process personal data on behalf of the company. Every single service provider should be carefully selected and monitored with respect to data security, and the company should ensure that appropriate contracts are in place.

In addition, companies should be prepared to respond to data security breaches. Ransomware and other cyberthreats can escalate to becoming business critical within hours. Companies should have an incident response protocol that they are ready to activate and that all workers are frequently trained on. Companies should be aware of the legal requirements for notifying regulators and data subjects of a breach, the timing of such notifications, the content of any such notice and whether

regulatory authorities and/or other third parties must be notified in each country where they are subject to applicable laws. Since the cybersecurity and personal data breach notification laws and their requirements differ from country to country — and all 50 US states have personal data breach statutes — companies should prepare in advance to be able to respond to any cybersecurity or personal data breach properly. Increasingly, each jurisdiction (within and outside of the US) has its own unique requirements for responding to and reporting a data breach with specific forms that need to be filed (in the local language). For example, companies in the EU may not only be subject to reporting obligations under the GDPR, but also, for example, to reporting obligations pursuant to the NIS2 Directive as locally implemented. Companies doing business in India are required to report certain cybersecurity incidents to the Indian government's Computer Emergency Response Team (CERT-In) within six hours. Responding to a cybersecurity incident or personal data breach often requires an organization to work around the clock, and an organization going global should consider staffing their global organization to ensure coverage in multiple time zones.

Furthermore, companies should have a data retention and deletion program in place that ensures that data is securely discarded after it is no longer needed or legal to store. Data deletion is legally required under the laws of most jurisdictions, and having retained data longer than necessary can increase the burdens on an organization responding to a cybersecurity incident or personal data breach as well as expose failures to delete data as legally required.

Where will data be hosted and accessed from?

Laws and consumer and business customers around the world may require or favor data being is hosted in, and only accessed from, the local jurisdiction or region. When going global, businesses should consider if they will accommodate keeping data locally or if business demands require that data be accessed from a parent company that is in a different jurisdiction or by "follow the sun" customer support teams operating from multiple jurisdictions. Keeping data locally can reduce frictions as a company goes to market in a jurisdiction with default prohibitions on international data transfers (such as all jurisdictions in the EEA and the UK) and can reduce the need to negotiate data transfer terms with customers.

Which privacy notices and consents will be required?

Most companies going global will need worker privacy notices (assuming a local workforce is engaged), website and, as applicable, product privacy statements in which the company informs workers, website visitors and customers about how their personal data will be collected, processed, transferred and/or used. Even a corporate representative of a business customer (about whom often only basic contact details are collected) is entitled to receive a privacy notice under most omnibus privacy laws. For example, under the GDPR in the EU, companies must provide the following information: the identity and contact details of the company; the purposes of the processing; the recipients or categories of recipients of the data; the categories of personal data concerned and from which source the personal data originate, whether the provisioning of personal data is obligatory or voluntary; the legal bases for processing and, if applicable, the legitimate interests; the period for which the personal data will be stored; the contact details of any authorized representative and data protection officer; if applicable, certain information on international data transfers; the existence of the right to request access, erasure, rectification and restriction and the right to object, to withdraw consent and to data portability as well as the right to lodge a complaint with a supervisory authority.

Which privacy notices and consent processes need to be localized to new jurisdictions will depend on how an organization is going to market.

Many companies will also need consent for most or specific data processing operations. In Asian and Latin American countries, consent is often required by default for all personal data processing activities, even in the employment context. In the EU, consent as a legal basis for processing is disfavored in the employment context due to the imbalance in the relationship between employees

and employers. However, consent is required in the EU for particular processing activities. For example, the EU Cookie Directive (2009/136/EC) requires consent before most cookies can be placed. The national laws of the European countries that have implemented the EU Cookie Directive vary slightly on how consent can or must be obtained. Some countries' requirements may be satisfied if the company presents a conspicuous notice; others expect a pop-up prompt or an affirmative check box.

Companies might also need consent for direct marketing and the processing of sensitive data. Outside of the US, opt-in consent is commonly required for direct marketing, even to business contacts. Under evolving US state privacy laws, consent requirements are becoming more common where certain sensitive personal data is processed or if personal data is processed beyond data minimization principles but is not yet a default requirement.

Will you receive or send data on persons in other jurisdictions across borders, e.g., workers, consumers or individual representatives of corporate customers?

Implementing mechanisms to overcome international data transfer hurdles and satisfying requirements to have certain data processing and transfer terms in place with vendors and partners as well as intragroup among affiliates is an immediate priority for organizations going global. These compliance requirements are often binary and must be disclosed in privacy notices. For compliance with European data protection laws, companies must check whether they or their business partners have appropriate data transfer agreements, binding corporate rules or consent programs in place. For example, if a company implements a global human resources database that is provided and hosted by the parent company in the US, the company should take appropriate measures, such as completing standard contractual clauses. Data Transfer Impact Assessments assessing the adequacy of foreign (such as US) law are also increasingly required when personal data is transferred outside of the country in which the data subjects are located. In China, such assessments will need to be filed locally for some organizations.

What will your marketing team do?

Most companies send marketing materials to their customers via email, and many implement online tracking technologies to send targeted advertising. Companies should check whether they are obligated to obtain prior consent and find out what the consent requirements are (e.g., is opt-in consent necessary or is opt-out consent sufficient?). European laws, such as German laws, generally require express opt-in consent for sending marketing emails and before deploying online tracking technologies, such as placing any cookies that are not strictly necessary, to provide a service the individual has requested (remembering what is placed in an online shopping cart is necessary, targeted advertising is not). In the US, by comparison, it is generally sufficient to offer an unsubscribe mechanism for email marketing and (under certain US state laws) opt out for targeted advertising. Data protection authorities around the world are increasingly focused on online tracking technologies and manually review public-facing privacy disclosures on this topic as well as take advantage of tools to scan company websites to determine if a company's disclosures are consistent with technologies used on the sites.

Will data protection authorities or other government entities notifications or approvals be required?

Especially for each jurisdiction in which an organization establishes an office, engages workers or has some other physical presence, companies should find out whether a regulatory authority must be notified about databases or the processing of personal data and whether any approvals or authorizations must be obtained. In the EU, some filing requirements no longer apply since the GDPR became operative, but in other parts of the world, including in China, new filing requirements are just becoming operative.

8 Product and regulatory compliance

Offering products and services to new markets is an exciting venture that could bring in additional revenue streams and competitive advantages. However, doing so without fully complying with the regulations of a new jurisdiction could expose companies to risks of complaints, investigations, penalties and reputational harm. The types of regulations that may apply to a company's products and services are as varied as the types of products and services that companies actually offer. This chapter outlines some categories of regulatory issues that companies may need to consider as they launch their products and services in new jurisdictions.

Contract law

When entering new markets, companies typically need to enter into commercial relationships with business partners and seek to conclude sales agreements with customers. Companies must be aware of the diverse legal systems and norms that govern their agreements. Some jurisdictions have laws or legal doctrines that render certain contractual clauses unenforceable, such as where they contravene public policy, are considered abusive or violate local consumer protection regulations. In some cases, merely including certain abusive or unfair clauses in contracts (particularly consumer-facing standard terms) could expose a company to fines and penalties. Some jurisdictions may also not recognize certain concepts that are taken for granted in a company's home jurisdiction and vice-versa. For example, different jurisdictions may approach the concepts of equitable remedies, punitive damages, representations and warranties, and IP rights in different ways. It is imperative for a company to understand how contracts are enforced in a new jurisdiction and what the legal effects of particular clauses are to ensure that the contracts adequately advance the company's interests.

Electronic signatures

Different jurisdictions have enacted different laws addressing the validity and enforceability of e-signatures and electronic documents. Laws may categorize e-signatures by sophistication of their underlying technology and whether they have been specifically approved by the government, and may only recognize and validate certain categories of e-signatures in certain contexts. For example, in some jurisdictions, only e-signatures that meet certain technical thresholds may be given evidentiary weight in court. Companies that rely on e-signatures should understand whether and the extent to which their chosen methods of digitally executing contracts address issues surrounding the validity and enforceability of a person's consent, data security issues and risks of fraud, record-keeping requirements, and, in the context of cross-border online transactions, international standards and agreements that govern electronic transactions.

Artificial Intelligence

Companies offering AI products globally should assess whether AI-specific laws apply to them as developers, providers, deployers, users, importers, distributors or other participants in the AI value chain. Emerging AI regulatory regimes increasingly impose obligations across several recurring categories, including transparency, impact and risk assessments, risk mitigation, governance, data governance, security, technical standards, registrations and government notifications, prohibitions on certain AI practices, and required contractual clauses. Depending on the jurisdiction and use case, companies may need to maintain inventories of AI systems and use cases, provide notices when individuals interact with AI or are subject to automated decision-making, disclose information about training data or AI-generated content, document permissible purposes and risks, and provide sufficient information to downstream users so they can meet their own legal obligations.

Companies should also expect that higher-risk AI systems, general-purpose or frontier models, and AI used in sensitive contexts may trigger more extensive obligations, such as pre-deployment impact assessments, bias or fundamental rights assessments, post-market monitoring, incident reporting, human oversight, AI literacy or training measures, technical logging, cybersecurity controls, conformity assessments, local representative requirements, and regulator-facing documentation. These AI-specific requirements often overlap with other legal regimes, including data protection, cybersecurity, consumer protection, product safety, employment, intellectual property and sector-specific laws. As a result, companies expanding AI products internationally should build AI compliance into their broader global launch process, including mapping AI use cases, classifying risk by jurisdiction and deployment context, documenting governance and accountability measures, reviewing data and model supply chains, and ensuring that contracts allocate the information, access, cooperation and responsibility needed across the AI value chain.

Language requirements

Some jurisdictions require contracts, product-related information such as labels, instructions and safety warnings, privacy notices, customer service communications, promotional materials and other content to be available in the official languages of the jurisdiction. Beyond compliance, providing content in the local language is crucial for user accessibility and safety, and can drive adoption of a company's products and services. Some jurisdictions, such as France and the province of Quebec, have prescriptive requirements regarding when a local language must be used, even in commercial contexts between parties that speak English. Companies should keep in mind that, especially when translating legal documents, it is important to ensure that local language versions are legally and technically accurate to avoid misrepresentations and potential legal issues. Further, language and cultural norms are not static. Companies need to stay updated with changes in language usage, legal requirements and cultural trends to maintain relevance and compliance.

Government preapprovals

Depending on a company's industry and the functionality of its products and services, it may need to obtain government-issued or -endorsed certifications, permits, licenses or other authorizations before it may offer them in a jurisdiction. There may be threshold government registrations that apply, such as corporate and tax filings to start doing business in a jurisdiction. Then, various product-related approvals may be necessary. For instance, companies dealing with wireless communications must adhere to local regulations concerning spectrum usage and obtain the necessary certifications to ensure their products do not interfere with existing communication networks. Similarly, in industries such as healthcare, pharmaceuticals and cosmetics, demonstrating product safety and efficacy through rigorous testing and compliance with health standards is mandatory to gain market access. This process often involves extensive documentation, adherence to local manufacturing and packaging standards and, in some cases, local clinical trials or product testing. Moreover, environmental considerations are increasingly becoming a part of governmental authorizations. Companies may need to demonstrate compliance with local environmental laws, including regulations on emissions, waste management and sustainable resource usage. For technology and electronics companies, this may extend to electronic waste management and adherence to guidelines on hazardous substances. Securing government authorizations is a multifaceted process that demands thorough preparation, understanding of local regulations and, often, strategic partnerships with local entities. These steps are essential not only for legal compliance but also for building trust with local authorities and customers.

Ongoing regulatory requirements

Even if it may not be necessary to obtain government or regulatory approval before offering specific products or services in a jurisdiction, companies must ensure that their offerings comply with and consider local regulations on an ongoing basis to mitigate risks of complaints, investigations, penalties

and reputational harm. For instance, companies should ensure that they only collect, use and disclose users' personal data in accordance with applicable data privacy and security laws, including by furnishing privacy notices, obtaining consents, undertaking impact assessments, entering into data protection agreements and implementing security measures, as appropriate and necessary to comply with local laws. As another example, companies selling products to consumers must continuously adhere to consumer protection laws, which in some cases protect not only natural persons but also small and medium-sized businesses. Requirements in this context can include providing clear and accurate product descriptions, ensuring transparent pricing and fees, granting consumers a mandatory "cooling-off" period to return products, and complying with consumer rights regarding refunds, warranties, repairs and spare parts. Furthermore, companies involved in manufacturing or distributing physical products must ensure continued compliance with local product safety standards. This includes regularly updating labels to reflect accurate ingredient lists, safety warnings and usage instructions in accordance with local regulations, and managing product recalls where the need arises. In addition, companies must ensure that they comply with anti-bribery and anti-corruption laws. This involves not only drafting and circulating compliance policies, but also implementing compliance personnel, spot checks, technical controls and training sessions. There are numerous categories of regulations that could apply to a company venturing into a new jurisdiction, and it would be prudent to perform regulatory due diligence both before entering a new market and on a regular basis to keep up with current developments.

Labeling, packaging and marketing

Many jurisdictions have specific requirements regarding the information that must be included on labels and the way products are packaged. This can include mandatory disclosures about ingredients, nutritional information, usage instructions, safety warnings, product composition, and manufacturing and supply chain details. Additionally, many regions have strict guidelines on language use, requiring labels to be in the local language or provide multilingual information. Environmental considerations are also increasingly important, with many jurisdictions implementing regulations on sustainable packaging to reduce environmental impact and prescriptive requirements around recyclability and biodegradability. Companies entering new markets must also navigate a complex landscape of advertising laws, which can impose restrictions on content deemed misleading or offensive, regulations governing comparative advertising, requirements for disclosing product information and specific obligations that apply in regulated industries such as pharmaceuticals, medical devices, alcoholic beverages, financial products and services, insurance, tobacco products, jewelry, precious metals and pewter, clothing, textiles and children's products. Furthermore, with the growing importance of digital marketing, companies must also be aware of online advertising regulations, including rules regarding data privacy, direct marketing (such as marketing via email or text message) and social media promotions.

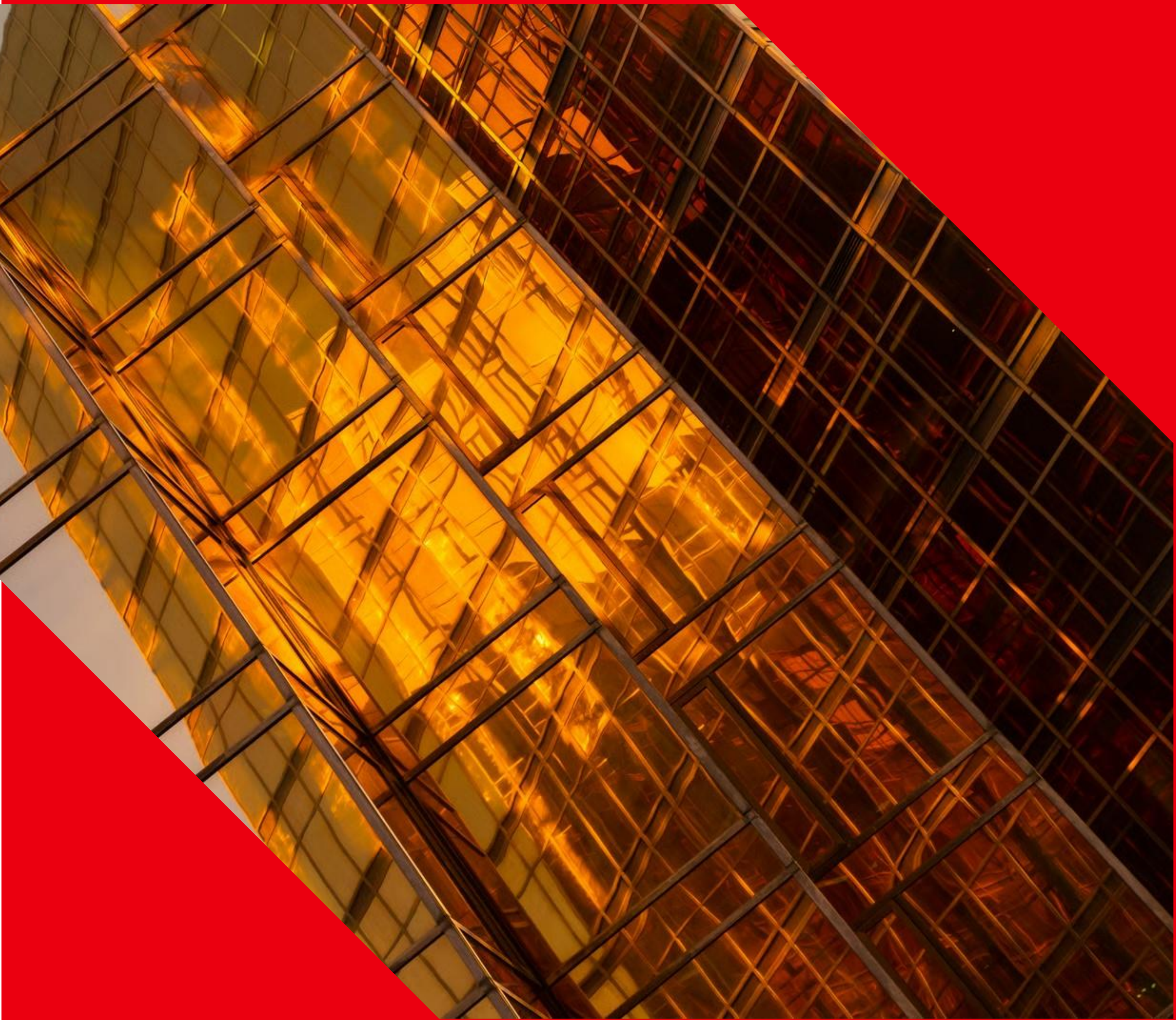
Third-party distribution

Some companies rely on third-party channels such as resellers, commissionaires, agents or franchisees to distribute their products in new jurisdictions. Doing so effectively requires a deep understanding of local business practices and legal frameworks. For example, in some jurisdictions, terminating a relationship with a reseller, franchisee or other business partner can be legally challenging and often requires adherence to strict regulations or the provision of substantial notice and compensation. It is possible that dealer protection, franchise and similar laws can apply to a business relationship even if the agreement between the parties never contemplated or expressly characterized the relationship as a regulated arrangement. Navigating competition laws is also a critical aspect of entering a new market. This involves ensuring that agreements with distributors, resellers or agents do not violate antitrust laws, which are designed to prevent monopolistic practices and promote fair competition. These laws can dictate pricing strategies, market conduct and even the selection of business partners. Noncompliance can result in significant penalties, legal challenges and reputational damage.

Contracting with the government

Engaging in business activities with government entities in new jurisdictions presents a unique set of challenges and considerations. When doing business with the government, companies must navigate a complex web of public procurement laws and regulations, which often include strict bidding processes, transparency requirements and anti-corruption standards. Adhering to these regulations is crucial, as violations can result in severe legal penalties, including fines and disqualification from future contracts. Additionally, companies must be cognizant of any local content requirements or preferences for domestic suppliers, which can be a significant factor in securing government contracts. Building relationships with government agencies also requires an understanding of the political and bureaucratic landscape, as well as compliance with local lobbying and influence laws. Moreover, companies should be prepared for heightened scrutiny and public accountability standards, as government contracts are often subject to public and media oversight. Successfully doing business with the government in a new jurisdiction requires not only a solid legal compliance strategy but also a commitment to ethical business practices and transparency, fostering trust and credibility with government partners and the public alike.

Intermediary phase: Appointing distributors, resellers, franchisees sales representatives and other intermediaries abroad



9 Dealing with dealers: international distribution and sales representative agreements and terminations

To gain traction in foreign markets, manufacturers often rely on independent sales intermediaries like distributors and sales representatives. These tend to be well connected in their territories and promise manufacturers a relatively easy road to entering or growing new markets without the risks of direct investment required by establishing their own local sales presence with employees, a local subsidiary company and importation capabilities. However, relationships with independent sales intermediaries or “dealers” come with their own set of risks. Properly structuring foreign-dealer relationships to consider the specific legal risks in various countries is key to achieving a company’s market expansion goals.

Choosing the right distribution model

Manufacturers have a number of options for structuring the engagement of a foreign dealer, including a true agency model (the foreign agent acts and contracts in the name of the manufacturer), a referral agent model (the foreign referral or promotion agent — often referred to as sales representative, commercial agent or broker — receives a commission for referring buyers but does not negotiate/conclude any contracts on behalf of the manufacturer) and a buy-sell model (involving sales to wholesale distributors, resellers, franchisees and/or retailers). There are also hybrid models where, for example, a dealer acts as a buy-sell distributor for a certain class of customers or accounts, but as a sales representative for larger customers or global accounts of the principal.

The terminology, commercial practices and laws vary between jurisdictions and industry to industry and each distribution model has pros and cons with regard to risk, opportunities and the degree of control preserved by the principal. The trade-offs vary between jurisdictions, subject to the following general principles:

- By appointing dependent agents in other jurisdictions, companies may establish a taxable presence (i.e., permanent establishment) with resulting tax reporting and remittance burdens (also known as a PE problem).
- If a company engages an individual person as a commission agent or other intermediary, employment laws and rules on misclassification must be considered.
- As further discussed below, many countries around the world have laws (dealer protection or commercial agency laws) in effect that protect local dealers from unjustified termination or nonrenewal. These laws are generally of mandatory application and restrict termination regardless of the terms of the agreement between the parties, and they can result in significant exposure to the principal. Most of these laws apply broadly to sales representatives and buy-sell distributors, but in many countries these laws only apply to sales representatives.
- Buy-sell distributors typically bear product compliance obligations as a matter of local law when acting as importer of record and introducing products on the market in their home jurisdictions. Therefore, a buy-sell distributor can help foreign manufacturers address local requirements relating to the translation of warnings, labeling, recycling, registration requirements for medical devices, import bans or license requirements for encryption products and technical standards. However, even if a distributor formally assumes local product compliance requirements under a contract, often only the manufacturer is in a position to efficiently apply labels, conform products to legal restrictions on material composition (including rules on hazardous substances such as RoHS and REACH in Europe) and ensure compliance with product safety rules. Also, a distributor may (and often does) act as the local registrant if the products require a sanitary registration that

can only be held by a local entity. However, this comes with the risk that the distributor may use this against the principal in the event of termination, by refusing to transfer or cancel such registration unless the principal agrees to pay the compensation being claimed by the distributor.

- By selling products to buy-sell distributors abroad, companies can exhaust their IP rights with respect to the sold items, which can weaken shrink-wrap license models, result in a loss of control over distribution activities, create channel conflicts, prompt undesired reimportation and favor price disruptions.
- While franchise laws are often much less developed outside the US, some countries have enacted disclosure requirements and termination protections applicable to franchise relationships. Companies must be careful to clarify to what extent a foreign reseller may use the manufacturer's marks and brands, company name and domain URL in the reseller business in order to maintain control over foreign trademark and product registrations, in order not to unintentionally trigger local franchise laws and related requirements and protections. In many countries, the definition of a "franchise" is broad and even certain distribution relationships can trigger the application of the local franchise law. Please refer to the chapter in this guide about franchising for more details regarding franchising laws.
- Under foreign competition laws, particularly in Europe, companies face prohibitions regarding resale price maintenance, territory and customer allocation and other restraints of trade. As a rule of thumb, companies are allowed to exercise more control in the context of commission agency arrangements than in buy-sell arrangements.
- Commission agents tend to involve greater risks of entanglement with foreign anti-corruption laws and the US Foreign Corrupt Practices Act, particularly in the context of sales to governments or government-owned businesses.
- Manufacturers can remain liable under US export control and sanctions laws if their products end up in a prohibited country or are purchased by restricted entities or individuals, even if this happens without the manufacturer's knowledge.
- In a buy-sell distribution model, where the dealer will be purchasing products, principals should be careful in evaluating any credit terms to grant to the distributor. While requiring advance cash payment or a letter of credit would help address the risk of nonpayment, these terms may not be practical, and principals may have to grant at least some credit terms to the foreign dealer. However, collecting a debt in many foreign jurisdictions can be difficult and time-consuming, as security interests laws in many countries are not as developed as in the US, and local collection proceedings can take years. Principals should carefully evaluate the local security interest and other payment guarantee options before agreeing to credit terms with a foreign distributor.

Planning ahead — termination

In addition to the considerations flagged above, companies should plan their exit strategy at an early stage. After having entered a particular market, a company may outgrow the local dealer's capacities, develop different needs or simply discover that a particular dealer was never effective in the first place.

Under mandatory dealer protection laws in many countries, particularly Latin America, Europe and the Middle East, commission agents — and in some countries also resellers and franchisees — are entitled to protection against termination and severance. Companies can in some cases mitigate risks arising under dealer termination laws with contractual disclaimers, liability caps or other mitigating provisions and alternative dispute resolution clauses, but, in most cases, companies must either pick a distribution model that does not trigger the local dealer protection laws (e.g., appoint resellers in jurisdictions where only commission agents are protected) or budget for the exposure that typically

manifests when the company attempts to terminate or modify a sales intermediary relationship. Additionally, resellers that are treated like agents (e.g., required to report their customer contact information) are often entitled to agent-like protections, even in jurisdictions like Germany or Colombia, where “plain resellers” are generally afforded far less protection.

Mandatory dealer protection laws and related considerations in different jurisdictions

US

The US has not enacted any comprehensive dealer protection law. By default, manufacturers and their sales intermediaries are free to agree on termination periods, severance and other terms by contract. Nevertheless, companies must carefully assess their particular relationship in light of various state laws offering specific protections to sales representatives and resellers of certain types of equipment. Also, some arrangements can trigger requirements under US federal and state franchise laws (these are discussed in more detail in the Franchise Law chapter of this guide).

Most US states have specific laws that protect commercial agents or sales representatives, regardless of the products they represent. These laws mainly address and impose certain protections regarding the payment of commissions, but some of them also provide protection from unjustified termination.

For example, the California Civil Code requires manufacturers doing business in California to enter into a written contract containing certain mandatory information when using the services of a wholesale sales representative (defined as “any person who contracts with a manufacturer… for the purpose of soliciting wholesale orders [and] is compensated… by commission”).

If the principal willfully fails to pay commissions as provided in the written contract, the principal is liable for triple the damages proved by the sales representative and, even in the absence of willfulness, must bear the sales representative’s attorneys’ fees and costs if the sales representative prevails in a civil action against the principal.

Minnesota has a sales representatives act that requires a 90-day advance notice of and a “good reason” (e.g., a material breach of the agreement) for termination, which the sales representative has 60 days to correct. Under this act, a sales representative terminated without good reason can file a claim for lost commission or profits, reinstatement of the agreement and attorney’s fees.

In addition, a number of US states (e.g., California, Florida, Illinois, New York and Texas) have enacted dealer protection laws precluding termination without good cause and/or requiring inventory repurchases for manufacturers or suppliers of certain types of products, including agricultural equipment, industrial equipment, motor vehicles, alcoholic beverages, lawn maintenance equipment or construction equipment or any combination thereof depending on the state.

Under US federal laws and the laws of many US states, including California and New York, buy-sell distributors are protected under franchise laws if they receive the right to distribute goods or services under the manufacturer’s trademark and if the supplier has significant control of the franchisee’s method of operation, and the distributor is required to pay a franchise fee under the applicable agreement. Please refer to the chapter in this guide about franchising for more details regarding franchising laws.

Europe

In Europe, the two largest groups of commercial intermediaries are so-called “commercial agents” on the one hand and distributors on the other.

Commercial agents include many subtypes, including a “true agent” as defined above, commission agent, referral agent, promotion agent and sales representative. With a few exceptions, any intermediary who negotiates and/or concludes contracts, either for the sale of goods or services, on behalf of a principal and on a permanent basis (this is the difference with a one-time broker) is considered a commercial agent. The European Agency Directive provides Pan-European guidance on the minimum protections that should be afforded to commercial agents.

Most of these provisions concern termination issues, but the European Agency Directive also gives guidance on commission payments, right to “open-book” verification of commission calculations, noncompete covenants and the right to a written agreement. To avoid liability for violations or unenforceable contract terms, foreign manufacturers should adjust their sales representative agreement templates to mandatory contract requirements. The fact that the EU has enacted a directive on this subject matter ensures that the relevant legal regimes in all 31 members states of the EEA are relatively “harmonized” (Eurospeak for similar, but not identical). Companies and corporate counsel can refer to the text of the European Agency Directive to orient themselves about the general legal landscape, but they will ultimately have to look to national laws to confirm the precise legal requirements.

The termination protection that applies to these commercial agents is relatively straightforward. The agent is entitled to a notice period of one month per year that the relationship has lasted, with a maximum of three months (in some countries, six months) of notice. In addition, the agent has a claim for payment of a goodwill indemnity, which is their compensation for the fact that they have built up a sizable customer portfolio that the principal, following the termination, would otherwise take back for free. There are no formulas for the calculation of that goodwill indemnity, but its maximum amount is capped to one-year averaged commission income (in some countries, other maxima apply). Under some specific conditions, the agent is also entitled to payment of “pipeline commissions” and post-termination commissions. In exceptional circumstances, additional compensation may be available.

A final important note on commercial agents in Europe is that the European Court of Justice has ruled that provisions of the agency directive relating to termination are super-mandatory when the agent is active anywhere in the EU. This means that, although parties to a commercial agency contract are free to choose the law that will govern their contract, including a non-EU law (such as a state law of the US), such choice of law will not abrogate the agent’s rights to a notice period and goodwill indemnity upon termination. The courts of some member states, such as Germany, have gone even further and ruled that even when parties validly agreed on an arbitration clause, it is overruled if the effect of that clause is to apply a non-EU law to a contract and deprive the European commercial agent of its rights to a notice period and goodwill compensation.

A second group of intermediaries may be called “distributors.” Distributors, too, include subtypes such as importer-distributors, resellers and “dealers.” The term “dealers” is not used in Europe as a general term that covers all types of commercial intermediaries (as the term is used throughout this chapter), but refers only to a (usually smaller) variation of distributor.

Contrary to what applies to commercial agents, there is no European directive on distributors and, as a result, the legal regimes in the different member states vary widely. Still, it is possible to divide them roughly into three categories.

First are those countries that strictly adhere to the general principle that parties are free to establish the terms and conditions that govern the termination of their contractual relationship. In that category, which represents the majority of European countries, would sit, for instance, the UK and Denmark. Second are those countries that have no specific legislation addressing distribution contracts but that, under a given set of factual conditions, apply the termination protection rules that come into play for a commercial agent by analogy to the termination of a distributor relationship. Germany is the well-known example, but other countries, such as France, have also sought to extend a similar

protection to terminated distributors as that enjoyed by commercial agents. Third are those countries that have enacted specific legislation for the protection of distributors in case of termination. That is the case only in Belgium, where a specific distribution act, enacted in 1961, obliges manufacturers to grant their distributors, upon termination, a reasonable notice period and an equitable customer portfolio (or goodwill) compensation payment. As it happens, there are multiple strategies to avoid the application of this act, but they must be deployed at the beginning of the contractual relationship, not at the end, when it is terminated.

Latin America

Latin America has some of the most protectionist dealer laws in the world. These laws began appearing in various Latin American countries in the late 1960s and grew in scope throughout the 1970s. Paraguay was the last country in the region to enact a dealer law and by the early 1990s there were a dozen countries in the region with dealer laws in effect. Eventually, some countries repealed their dealer laws for constitutional reasons, like Panama, Ecuador and Nicaragua, or amended them to remove most of their protective provisions to comply with free trade agreement obligations, like most Central American countries and the Dominican Republic under the CAFTA-DR free trade agreement. Today, the countries in Latin America that still have dealer laws in effect are Brazil, Colombia, Paraguay, Puerto Rico (a US territory), and, to a certain extent, Guatemala, Honduras, El Salvador, Costa Rica and the Dominican Republic.

In general, dealer laws in Latin America share many similarities. Essentially, these dealer laws provide for the award of extra-contractual indemnification to a covered sales intermediary in the event of unilateral termination, modification or nonrenewal of the relationship by the principal without "just cause," even when the termination, modification or nonrenewal is done strictly in accordance with the terms of the agreement between the parties. These dealer laws are of mandatory application as a matter of local public policy and cannot be waived contractually or as a result of a choice of foreign law. In general, any disputes under these dealer laws must be resolved by local courts. In some of these countries, courts have recently been more willing to enforce international arbitration provisions in the agreement despite the mandatory nature of the local dealer law, mainly as a result of the country's treaty obligations. However, a risk remains of a local court refusing to enforce a resulting arbitral award that did not comply with the local dealer law.

The Latin American dealer laws generally apply to all types of sales intermediaries, including commission sales agents and buy-sell distributors. The Brazilian and Colombian commercial agency laws are an exception and generally only apply to commission sales representatives and not to true buy-sell distributors. In addition, the Puerto Rican dealer law only applies to buy-sell distributors, although Puerto Rico has a separate law providing essentially the same protection to exclusive sales representatives.

As mentioned above, many of these dealer laws protect covered sales intermediaries not only from unjustified termination but also from unjustified refusal to renew an expired relationship. Although some countries like Brazil and Guatemala do not go so far and provide that the expiration of a definitive term agreement is in fact a just cause for termination, this typically only works for the initial term of a definitive term agreement, as successive renewals of this term often result in the agreement being deemed to be of "indefinite duration."

To avoid liability for statutory indemnification under these dealer laws, a principal who terminates a distributor must show "just cause" for termination (or nonrenewal). Just cause is usually defined as lack of due care by the dealer or a breach in performance of its contractual obligations. A principal's breach of its obligations can also give the dealer the right to terminate the relationship with just cause and claim the statutory indemnification. Just cause for terminating a dealer is usually difficult to prove, and local courts tend to favor the local dealer when in doubt regarding facts presented as just cause for termination.

Probably the most severe consequence of dealer laws in Latin America, and what distinguishes them most from dealer laws in other regions of the world, is the potential statutory indemnification to which a dealer is entitled upon termination or nonrenewal of the relationship without just cause. In most Latin American countries with a dealer law, this indemnification is typically calculated based on a formula prescribed in the law that takes the average gross profits or revenue earned by the dealer and multiplies it by a factor based on the duration of the relationship. For example, under the Paraguayan dealer law, the applicable formula provides that if the agreement has been in effect for less than two years, the indemnification is equal to the average annual profits earned by the dealer during the duration of the relationship. This factor can rise to six times the average annual profits of the dealer, depending on the duration of the relationship. These formulas can result in a terminated dealer with entitlement to a significant amount in compensation, and this amount may have no connection to the actual damages incurred by the dealer. However, please note that courts in some of these countries, such as Honduras and Guatemala, have been willing to enforce provisions whereby the parties agree in advance to the statutory indemnification or to a termination liability cap.

On a more positive note for the principal, dealer laws in Latin America do not typically grant exclusivity rights to the dealer. This is generally a contractual matter, although it is not uncommon for a local dealer to claim implied exclusivity rights if they have been the only dealer in a territory and the contract is silent on the matter. The Brazilian dealer law is the only dealer law in the region that addresses exclusivity by presuming it in the absence of a provision to the contrary in the agreement. Maintaining non-exclusivity is important in the countries with dealer laws, as it allows the principal to appoint another dealer in case there is a potential dispute with an existing dealer or the dealer is under performing.

It is clear from the above that terminating a sales intermediary in a Latin American country with a dealer law can be difficult and expensive. However, other countries that do not have dealer laws can still present a risk of potential liability. In general, if a country does not have a dealer law, the termination of the relationship is governed by agreement between the parties and any provisions in the contract allowing unilateral termination by the principal (or either party), even with a relatively short period of notice (e.g., 30 days), will be enforceable.

However, in some countries, the courts have applied the civil law concept of “abuse of rights” to impose an obligation on a principal to provide a longer “reasonable” notice of termination depending on the circumstances. Examples of such countries include Argentina, which also has certain provisions requiring a minimum notice for termination of buy-sell distributors in its civil and commercial code, and Uruguay. Any breach of this obligation generally entitles the dealer to proven damages, which are normally based on profits that the dealer would have made had the principal given the reasonable period of notice of termination. In addition, in the absence of a written agreement with provisions addressing notice of termination, most countries in Latin America require a reasonable notice of termination, the length of which depends on the circumstances, including the duration of the relationship.

There are two main recommendations that can be made in the Latin American region to mitigate the impact of the region’s dealer laws.

First is to always enter into a written agreement with a local distributor or other sales intermediaries with detailed provisions and require the distributor to comply with specific obligations, including performance requirements such as minimum sales quotas, any breach of which could be used as a basis for just cause for termination. Preferably, the agreement should expressly provide for non-exclusivity. In addition, in some countries it is possible to mitigate the impact of the local dealer law by expressly disclaiming the application of the law altogether (e.g., El Salvador) or including provisions that limit or set in advance the amount of liability under the local dealer law (e.g., Honduras and Guatemala). There is no advantage in not having a detailed written agreement with a local

distributor since, under most local laws, a written agreement is not required to create a binding relationship and one can be created simply by the course of conduct between the parties.

The second recommendation is to include in the contract a choice of US or another more favorable law as well as an arbitration clause providing for arbitration in the US or another favorable jurisdiction and administered pursuant to the rules of a recognized international arbitration organization like the ICC or the ICDR of the American Arbitration Association. Under most of the dealer laws in Latin America, the choice of US law and an arbitration clause will likely be unenforceable (but see the note above regarding enforceability of arbitration clauses). However, these provisions can serve a defensive purpose in the US in the event the dealer is able to obtain a local judgment against the principal under the local dealer law, as US courts will generally refuse to enforce a foreign judgment obtained in breach of a valid arbitration clause.

Middle East

Most countries in the Middle East have some type of commercial agency law. Notable examples include Saudi Arabia, Kuwait, the UAE, Qatar, Oman, Egypt and, more recently, Israel. Like the dealer laws in Latin America, the Middle East’s commercial agency laws are generally of mandatory application as a matter of local public policy, so they cannot be waived contractually or avoided as a result of a choice of foreign law. In addition, local courts generally have mandatory jurisdiction over any disputes under these laws. The definition of a “commercial agent” under these laws is actually broader than the term may suggest and covers not only commission agents but also buy-sell distributors or any other type of independent sales intermediaries. An exception to this is the commercial agency law of Israel, which, based on the definition of a commercial agent, should apply only to commission agents and not to true buy-sell distributors.

The basic protection under these laws is that a principal cannot terminate or refuse to renew a local commercial agent without “just cause.” Just cause is usually defined as a serious breach by the commercial agent of its contractual obligation and is often difficult to prove. A commercial agent terminated without just cause is entitled to damages from the principal, but the commercial agency laws generally do not provide a specific formula for calculating these damages. Damages, which can include lost profits, must be proven by the commercial agent, based on the general rules on damages for breach of contract applicable under local law.

Registration and exclusivity (these two issues usually go hand in hand) are normally the most significant issues under the commercial agency laws in the Middle East. Most of the commercial agency laws in the Middle East require some form of registration of a commercial agency agreement. Generally, it is only possible to register one commercial agent for a certain product in the same territory or express exclusivity is required to obtain the registration of an agreement, so in effect a commercial agent will have exclusivity rights as a result of the registration. In the event of termination, it would be difficult and time consuming to cancel a registered agent and register a new one. This gives a registered commercial agent significant bargaining power in the event of a dispute because it may prevent the principal from being able to continue selling products into the country through another commercial agent.

Despite the above registration requirement and resulting exclusivity, it is still possible to appoint a local commercial agent on a nonexclusive basis. This will normally prevent registration of the agreement, which will in turn prevent the relationship being subject to the commercial agency law. In addition, this generally does not affect the enforceability of the agreement. However, registration does give a local commercial agent a certain status that it would not otherwise have in dealing with local ministries and other government agencies, particularly in sales to the government. For this reason, local commercial agents usually prefer registration and insist on exclusivity. Registration will also assist the distributor in blocking parallel or gray market imports. Nevertheless, because registration does make it more difficult for a principal to terminate the relationship, it would normally be advisable

to appoint commercial agents in the Middle East on a nonexclusive basis so as to prevent registration of the agreement where the registration applies.

Asia Pacific

Asia Pacific jurisdictions vary in their treatment of distribution agreements and other similar relationships. Civil law jurisdictions tend to favor the distributor/dealer, while common law jurisdictions place more emphasis on contracting parties' right to terminate or not renew a distribution agreement or similar arrangement in accordance with the terms of the agreed contract.

In Hong Kong, Malaysia and Singapore, for example, parties to a distribution agreement are generally free to agree on the terms of the relationship, including a procedure for termination or nonrenewal. Provided the parties terminate or choose not to renew in accordance with the terms of the contract, the court is unlikely to intervene. The ordinary rules of contract will apply, so that in cases where the contract is silent on the issue of a notice period for termination, the court will generally imply a term for "reasonable notice." Similarly, under Chinese law distribution agreements do not trigger any particular regulation, but are instead governed by the principles of contract law.

In contrast, distribution and agency agreements are highly regulated in Indonesia, where distributor claims for unlawful termination by manufacturers are relatively common. In Indonesia, all distribution agreements and agency agreements must be registered and receive a registration certificate valid for two years or any shorter period specified in the agreement. If a supplier wishes to terminate a distribution agreement and appoint a new distributor before the registration certificate has expired, it must include evidence from the existing distributor that it does not object to the new distributor. Even in cases where the distributor is in default, the supplier cannot usually terminate a distribution agreement without judicial consent.

Japanese law, while generally respecting freedom of contract, contains certain protections for the distributor where the agreement is terminated or not renewed. As a result, even where the termination or nonrenewal occurs in accordance with the terms of the contract, the distributor may be able to claim for unlawful termination or nonrenewal. Various factors are considered in these cases, including the notice period given, the duration of the agreement and the distributor's opportunity to recover its investment.

Some Asia Pacific jurisdictions, such as Australia, have franchising laws that may apply to distributors under certain circumstances. Please refer to the chapter in this guide about franchising for more details regarding franchising laws.

Practical recommendations

As takeaways, companies should consider the following measures to seize opportunities and protect against risks associated with engaging foreign dealers:

- Sign written agreements with clear provisions on key terms such as (non-)exclusivity, sales goals, company names, territories, choice of law and forum, term, termination, termination notice periods, material breaches of agreement and follow-up products (such as newer models and newer versions). Have the agreement reviewed by local counsel, in particular in the countries with dealer laws, as there may be provisions that can be included in the agreement to mitigate the impact of the dealer law or avoid its application altogether.
- Live by the contract from the beginning to avoid establishing different terms through a course of dealing. Typical examples of this would be implied exclusivity (where parties agree on a "nonexclusive" relationship in the contract, but no other dealer is ever appointed) or indefinite duration (where the contract had a fixed term that has expired, but the parties continued working together, or the fixed term has been renewed automatically multiple times upon its expiration).

- Don't mix models — if you entered into a buy-sell contract with a dealer, do not start occasionally paying commissions, as this could change the overall character of the relationship, create difficulty with respect to compliance with competition laws, and support the dealer's claim that it should qualify for protection under dealer statutes as a sales agent or reseller, whichever is more favorable for the dealer. If a hybrid model is part of the business relationship, consider having separate agreements for each type of relationship, in particular in countries with dealer laws that only apply to sales representatives (e.g., Brazil and Colombia).
- Carefully consider in which legal "forum" a possible dispute will need to be argued. In Europe for instance, the so-called Brussels Regulation makes it possible for contract parties to choose any mutually agreed-on court of the EU, and any other court within the EU must, and will, respect that choice. Thus, for example, there is no reason a Hungarian agency contract dispute should be settled in Hungarian courts. In other words, if carefully planned, there is significant potential to select courts of a "more liberal" country in Europe than the country that happens to be the home jurisdiction of the principal's foreign dealer. This relates closely to choice of law. Although, again particularly in Europe, it is an established legal principle that contract parties are free to choose any applicable law they like, it makes little sense to choose a law that is unknown to the chosen court. So, a choice of court and a choice of law are, practically speaking, one and the same thing. As mentioned above, choosing a non-EU law will not work to exclude termination protection in a commercial agency relationship and may, in some circumstances, not work in distributor relationships either.
- The choice of alternative dispute resolution arrangements must be carefully considered depending on the jurisdiction. As discussed above, a number of European jurisdictions are taking the view that disputes regarding the termination of commercial agency contracts are not "arbitrable," at least not when arbiters are free to apply a legal regime that is less favorable to the terminated agent than what the Agency Directive would provide. If that happens, an arbitration clause in combination with a US law could be considered invalid and, as a result, the principal would be worse off (because all default protections would apply) than if it had chosen the law and court of a more liberal European jurisdiction from the beginning. Courts in the US, Latin America and many Asian jurisdictions, on the other hand, do tend to uphold arbitration clauses and recognize and enforce arbitral awards in dealer matters, regardless of which law was chosen by the parties as the governing law. In these jurisdictions, including an international arbitration clause in the agreement (with a choice of nonlocal law) may help avoid the application of the local dealer law, or at least provide a more impartial and expeditious forum for resolving a dealer dispute.
- Don't assume you are fine as long as there is no written document, or there is one but it is not formally signed. Outside common law jurisdictions, the formal signature of a written document is not a moment of import. In civil law jurisdictions, unsigned written contracts that have been lived by in practice are considered "executed." The existence of a document is not even required. If it can be demonstrated through other means, such as through email, or even simply the parties' behavior, that there was an agreement to set up a certain type of relationship, that will suffice, as certain facts can create evidence of binding agreements. Even in common law jurisdictions, a binding contractual relationship can be created or implied in fact by course of conduct without the need of a written agreement. This would be the worst of both worlds, as the legal relationship would be governed by all default provisions in the law in the absence of an agreed document that stipulates otherwise.
- Don't "shoot first and ask questions/talk later." There is almost never a good reason to terminate the relationship first and then take legal advice. There are lots of mitigating actions to take just before the actual termination in order to ensure that possible severance payments are minimized. Almost none of these actions can be taken when the termination notice is already out of the door.

10 Franchise law

Going global: Franchise

One widely adopted strategy for brands to expand across borders is through franchising. At its core, franchising can be defined by three fundamental elements: (i) the granting of a license by one party (the franchisor) to another (the franchisee), allowing it to access proprietary business knowledge, processes and trademarks; (ii) the payment of some sort of fee or other consideration by the franchisee; and (iii) the franchisor exerting a certain degree of control over the franchisee or providing the franchisee ongoing support.

This chapter explores the importance of leveraging franchising as a conduit for international expansion, and provides a high-level analysis of franchise laws and related considerations for brands thinking about international franchising.

Assessing readiness for international expansion through franchising and choosing the right markets

Embarking on international franchise expansion is a promising yet complex venture. Success demands a thorough understanding of legal, cultural and economic nuances in diverse markets. For a franchisor eyeing global success, replicating its domestic system is crucial, and will require navigating through legal intricacies, cultural disparities and supply chain variations.

Regardless of a brand's experience, as an initial step, each franchisor should carefully assess whether expansion through franchising is feasible and confirm it has adequate resources to establish an expansion plan, without compromising the performance of domestic franchise efforts. As a practical matter, franchisors should also build in buffers for regulatory approval timelines, translation requirements and local adaptation costs, which can materially impact timing and deal economics in certain jurisdictions. Factors to consider include the following:

- **Alignment with corporate goals**: Assess if international franchising aligns with short-term corporate goals. Consider the initial fee in light of due diligence, contract negotiation, trademark protection, training and support costs. Ensure that pursuing an "international brand" aligns with strategic objectives.

- **Trademark availability and registration**: Verify the availability and registration of key trademarks. Evaluate if key trademarks can be used and registered in the target territory to maintain control over these crucial brand elements.

- **Resource commitment**: Recognize the substantial financial commitment required for international franchise endeavors. Factor in costs such as travel, legal expenses, market research, finding local franchisees, due diligence and other essential tasks to gauge the availability of necessary resources.

- **International team capability**: Ensure the franchisor has a dedicated team with international skills, avoiding resource cannibalization. Address staffing needs by identifying essential support services for entering international markets, acknowledging the importance of a specialized team.

Once a brand decides to pursue international expansion through franchising, it's essential to gain a deep understanding of the chosen market country. For example:

- **Market knowledge**: A franchisor should conduct both internal and external investigations to gain a perspective on potential market opportunities. Understanding the local "climate" involves

considering factors such as regulatory requirements, local attitudes toward franchising, middle-class size and the success of other franchisors in the market.

- **Franchisee recruiting**: Outlining the characteristics of a qualified international franchisee is equally or more important than the process of identifying the territory itself. Qualifying franchisees based on net worth, willingness to champion the brand, business acumen and a sound vision for developing the concept in the target jurisdiction ensures a strong foundation for international expansion.
- **Due diligence on foreign franchisees**: Conducting thorough due diligence on potential franchisees is an imperative step prior to entering into the franchise relationship. Due diligence of the franchisee through financial qualifications, background and credit checks, in-person meetings and validating ownership structures is an essential step in evaluating prospective franchisees and ensuring a successful and enduring franchise relationship.

In practice, international franchise expansion is rarely linear. Franchisors should expect to sequence key steps - including partner identification, trademark filings, document localization, disclosure preparation and regulatory registration - in parallel. Misalignment in sequencing (e.g., finalizing documents before confirming trademark rights or regulatory feasibility) can drive delay, rework and incremental cost.

Structural models for international development through franchising

Several franchise development models are available for franchisors considering international growth.

When choosing the right model for a specific region or country, it’s crucial for franchisors to consider local laws, customs, brand control, business costs, and cultural and language barriers. Each market demands a unique approach to franchise expansion. The most common international franchise models include the following:

1. **Unit franchise model**: The single unit franchise model essentially mirrors the conventional unit approach adopted by franchisors within their domestic markets. Under this model, a franchisor and franchisee enter into a franchise agreement for the establishment and operation of a single unit, without the provision of greater territorial exclusivity in the broader region (e.g., countrywide or regionwide) where the unit is situated. The franchisor remains obligated to perform the duties of the franchisor under the franchise agreement, such as training, support services, and inspections and quality control. In an international unit franchise model, the franchisor must either establish a local presence in the country or region of the unit franchise or navigate the challenges of fulfilling its obligations remotely.
2. **Area development model**: Under this model, a franchisor enters into a development agreement with a third-party franchisee (often referred to as an “area developer” or “developer”) to develop and operate a specified number of outlets within a defined territory, each pursuant to a separate unit-level franchise agreement. The developer is typically granted exclusive rights within the territory, subject to compliance with the development agreement (and unit-level franchise agreements), while adhering to a predetermined development schedule.
3. **Master franchise model**: In a master franchise model, the franchisor grants a franchisee (referred to as a “master franchisee”) the right to open and operate franchised outlets within a defined territory as well as the right to grant franchises to other third parties (often referred as “subfranchisees”) to open and operate franchised outlets in the territory. The factor in the master franchise model distinguishing it from the rest of the international expansion models is that the franchisor has no direct contractual relationship with the subfranchisees. Rather, the subfranchisees enter into subfranchise agreements directly with the master franchisee. Short of retaining the right to approve or reject subfranchisee candidates proffered by the master franchisee (which can create potential liability for the franchisor in certain jurisdictions), specifying

the form of subfranchise agreement that the master franchisee must use with its subfranchisees and reserving the ability to enforce the master franchisee's rights under the subfranchise agreement should the master franchisee fail to do so, the franchisor delegates all franchise activities in the territory to the master franchisee, who effectively steps into the shoes of the franchisor in the territory.

Master franchise arrangements are popular in international expansion efforts where the franchisor is either unable or is unwilling to invest the necessary resources to support franchise operations in an international market.

4. **Area representative model**: Under an area representative model, the franchisor delegates specific pre-sale and post-sale obligations to the area representative franchisee, often known as a "development agent" or "area representative." The area representative is responsible for marketing franchises, screening potential franchisees in a defined territory and, particularly in international arrangements, assisting with post-sale obligations such as site selection, construction supervision, training, inspections and support. The area representative engages in soliciting, recruiting and screening potential franchisees, offering pre-sale services to the franchisor. Additionally, the area representative, as per the area representative agreement, is obligated to comply with all of the relevant franchise laws in the territory.

   Specifically, under this model, the franchisor enters two distinct contractual arrangements: an area representative agreement with the area representative and either a unit franchise agreement or area development agreement with the franchisee responsible for developing the franchised outlet(s). Importantly, there is no direct contractual relationship between the area representative and the unit franchisees.

5. **Franchise joint ventures**: The franchise joint venture model is usually used when two companies have valuable contributions beyond financial resources (e.g., experience, local management, etc.) or when the franchisor wants to share in potential franchisee-level profits. The common structure involves the brand owner/franchisor and a local party entering into a contractual relationship, usually through a shareholders' agreement or partnership agreement. The joint venture entity acts as the local franchisee, gaining the right to develop outlets either directly or by granting subfranchises to third parties. Generally, the joint venture franchisee would also sign a franchise agreement with the franchisor and pay fees and royalties, giving the franchisor the opportunity to generate returns both as brand owner/franchisor and as the franchised business owner.

It is also important to note that in many jurisdictions, labels are not determinative — arrangements structured as licenses, distribution or service agreements may still be characterized as franchises where the underlying elements (particularly brand use, fees, and operational control) are present.

Key business terms and negotiations

When selecting a local franchisee and deciding on the franchise structure, reaching an agreement on the contract is the next important step. Negotiating an international franchise contract is similar to domestic negotiations, in that it often involves meetings, follow-ups and document exchanges to finalize the deal. However, cultural differences in negotiation styles, especially in emerging markets, require sensitivity and adaptation. Face-to-face meetings may be preferred over remote communications. It's crucial to understand and respect local customs, communication styles and legal requirements. Working with local counsel or advisers can help navigate these differences, and clearly explaining the franchise agreement's key provisions can bridge cultural gaps. Understanding the target country's laws about contract formation and enforceability is also essential for successful negotiations.

Among other things, key points of negotiation may turn on topics like fees, scope of territory/exclusivity, transfer restrictions, termination rights, noncompetition covenant, and territory and development schedules.

US franchise laws

Enacted in 1979, the FTC Rule on Franchising, 16 C.F.R. Part 436 ("**Franchise Rule**"), was instituted with the primary objective of combating instances of fraud and misrepresentation associated with the offer and sale of franchises. The legislation mandates pre-sale disclosure and prohibits unfair or deceptive practices to ensure transparency in franchise transactions. According to the FTC, the pre-sale disclosure serves to furnish franchisees with "at least the minimum information needed to make an informed decision whether to enter into the franchise relationship." The Franchise Rule refrains from dictating specific business terms, operating under the premise that informed investors can autonomously evaluate the deal's alignment with their best interests.

The Franchise Rule specifies the information and format that a franchisor must disclose, commonly referred to as the "Franchise Disclosure Document" (FDD). The FDD comprises 23 "items," covering disclosures mandated by the FTC. Furthermore, franchisors must attach copies of all material contracts related to the franchise offering. The responsibility for ensuring the accuracy and completeness of information in the FDD rests solely with the franchisors.

Currently, there are 15 state laws also imposing disclosure obligations on franchisors, surpassing the stipulations of the Franchise Rule. Of the 15, 14 states impose registration requirements in their respective jurisdictions (California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Rhode Island, South Dakota, Virginia, Washington and Wisconsin). These states require a franchisor to secure registration with the state administrator prior to engaging in the offer and sale of franchises.

Understanding disclosure and registration under US laws will help franchisors comply with franchise laws outside of the US

Foreign franchise laws

Since the introduction of the Franchise Rule in the US, numerous countries outside the US have introduced franchise laws and regulations. These legal frameworks are crucial for navigating foreign markets, influencing necessary modifications to franchise documents. Notably, franchisors must be aware of, among other things, franchise disclosure and registration requirements relevant to potential deals in specific countries. Additionally, awareness of franchise relationship laws impacting ongoing rights, such as termination restrictions or mandatory terms in franchise agreements, is crucial.

This awareness allows franchisors to consider increased compliance costs or legal risks and extended timelines when determining initial franchise fees for territorial rights. In many jurisdictions, compliance is not purely procedural - failure to comply with disclosure or registration requirements can result in unenforceability of agreements, termination rights in favor of the franchisee, or financial penalties, underscoring the importance of front-end structuring. Given the global variation in franchise laws and the continuous introduction of new regulations, staying updated is imperative.

Below is a high-level (non-exhaustive) chart that captures franchise disclosure and relationship laws around the world as of June 2026.

Country/Jurisdiction	Disclosure laws	Relationship laws
Albania	✓	✓
Angola		✓
Argentina	✓	✓
Australia	✓	✓

Country/Jurisdiction	Disclosure laws	Relationship laws
Azerbaijan	√	√
Belarus		√
Belgium	√	
Brazil	√	
Canada (Provinces of Alberta, British Columbia, Manitoba, New Brunswick, Ontario, Prince Edward Island, Saskatchewan)	√	√
Mainland China	√	√
Costa Rica	√	√
Ecuador		√
Estonia		√
France	√	
Georgia	√	√
Indonesia	√	√
Italy	√	√
Japan	√	√
Kazakhstan		√
Kyrgyzstan		√
Latvia	√	√
Lithuania		√
Macau SAR	√	√
Malaysia	√	√
Mexico	√	√
Moldova	√	√
Mongolia	√	√
Netherlands	√	√
Philippines		√
Romania	√	√
Russia		√
Saudi Arabia	√	√
South Africa	√	√
South Korea	√	√
Spain	√	
Sweden	√	
Taiwan	√	
Thailand	√	√

Country/Jurisdiction	Disclosure laws	Relationship laws
Tunisia	✓	✓
Turkmenistan	✓	✓
Ukraine		✓
Vietnam	✓	✓

In addition to the countries with franchise disclosure laws set forth in the chart above, certain countries have civil codes that effectively impose a pre-contractual disclosure requirement with respect to “material” information.

Franchisors already adhering to franchise disclosure and registration laws in their home country might find it somewhat easier to start a franchise program in a foreign jurisdiction with similar laws. Their prior experience with the disclosure process and existing franchise documents can serve as a valuable starting point. However, due to notable differences between jurisdictions, franchisors should anticipate facing extra challenges. In countries that mandate disclosure or registration, the procedures, costs and specific requirements can differ significantly.

Other laws and considerations

Franchisors need to consider not only the legal aspects of franchise sales and ongoing relationships but also the practical challenges and costs of setting up a franchise system in a foreign country. Other notable considerations include the following:

- **Trademarks**: The crux of most franchise systems lies in the value derived from its IP, which includes it trademarks, brand identity, proprietary technology, know-how, confidential information and the overall system. The process of safeguarding a franchisor’s IP will be influenced by the IP regulations of foreign markets. Therefore, franchisors must carefully plan when and how to register trademarks in foreign markets.
- **Import, exports, duties and customs and exchange controls**: Creating a supply chain is crucial, ensuring franchisees obtain necessary products and equipment locally to avoid import/export issues.
- **Foreign investment laws**: Countries may vary in their openness to foreign expansion, with some welcoming it for economic growth while others enact laws to limit foreign ownership, like China, Saudi Arabia and the UAE. Restrictions can include requirements for local involvement, limits on foreign investment and restrictions in culturally sensitive industries, impacting potential costs that franchisors must weigh before entering a new market.
- **Competition and antitrust laws**: Countries like those in the EU have stricter competition and antitrust laws, which can touch upon collusion, price fixing, resale price control, internet sales control, price discrimination, tying arrangements, false advertising, exclusive agreements and restrictions on challenging trademarks.
- **Dispute resolution, governing law and venue**: Internationally, local laws may limit these dispute resolution options, e.g., in Canada, franchise agreements are generally subject to local laws and venue, and in Islamic countries, Sharia law may factor in to the enforcement of franchise agreements. For international disputes, arbitration is often recommended because it’s easier to enforce using the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a treaty to which most commercialized countries are party. Local legal advice is crucial in navigating these complexities.
- **Privacy regulations**: When doing business abroad, local privacy laws can impact the franchisor-franchisee relationship and data flow with customers. It’s essential to consider both

local and international privacy laws, like the GDPR, which may apply even if the business is outside Europe. Consulting with local privacy counsel is crucial to understand and comply with data protection obligations when expanding to a new country or region.

- **Application of US laws**: US franchisors expanding internationally must check if US franchise laws apply to their global ventures. For example:
  - Federal rules, like the FTC Rule, focus on US territories, and state laws, like New York's, might apply to international deals. Franchisors need to comply with these laws or seek exemptions.
  - The US Department of Commerce monitors export regulations through the BIS. Therefore, franchisors must avoid dealings with parties on the "List of Parties of Concern" to prevent legal issues and criminal liability.
  - The Foreign Corrupt Practices Act (FCPA) makes it illegal to bribe foreign officials, so franchisors need to be vigilant, conduct due diligence and implement controls to prevent FCPA violations by local franchisees or joint venture partners.
  - OFAC enforces economic sanctions with which, among other things, franchisors must comply to avoid legal consequences, especially when dealing with sanctioned countries.
  - US companies, including franchisors, must steer clear of participating in foreign-initiated boycotts, with a focus on the Arab League boycott of Israel.
  - Franchisors must also be aware of money laundering regulations and must implement compliance programs, educate personnel and conduct internal audits to prevent inadvertent involvement in money laundering activities.

Expanding a franchise internationally offers significant brand opportunities, but it's crucial to start by understanding the market and local laws.

11 Competition law

Over 150 countries worldwide have adopted antitrust/competition and/or merger control laws. The consequences for violating the competition laws can be severe—not only for companies but also for individuals. Antitrust and competition authorities can impose large civil and criminal fines; agreements may be rendered void and unenforceable; executives may be disqualified; companies may be barred from doing business; and private parties may take legal action for damages if they're negatively affected by anticompetitive behavior (and this could occur in multiple jurisdictions simultaneously). Individuals could also be sentenced to prison and incur criminal fines for engaging in certain types of anticompetitive conduct. Moreover, investigations into potential competition violations can be costly and disruptive, requiring substantial time and resources, and potentially causing significant reputational harm.

While the specific objectives of competition law vary across jurisdictions, the core principle is consistent: to promote fair competition and prevent unfair business practices that could harm consumers. Global competition laws require us to compete fairly with our competitors, and vice versa. These laws generally seek to prohibit three primary types of conduct: (1) anti-competitive arrangements or agreements with competitors; (2) abuse of power by dominant firms; and (3) mergers and acquisitions that substantially lessen competition.

Dealing with competitors

Competition law prohibits practices, agreements and arrangements between competitors that distort competition. Certain types of agreements or practices between competitors are presumed to be serious violations of law because the conduct is inherently unlawful, and no justification or defense is considered. This type of conduct is often designated as a "hard-core" offense. When this conduct involves an agreement between a group of competitors, it is called a "cartel" in most jurisdictions. Cartels are among the most serious violations of competition laws and are punished severely by competition authorities globally, including through criminal prosecutions in some jurisdictions.

Companies should make commercial decisions independently and avoid entering into agreements with competitors to do any of the following:

- Fix sale or purchase prices (or other terms of sale or purchase), including through pricing algorithms
- Fix sale or purchase prices (or other terms of sale or purchase), including through pricing algorithms
- Divide markets or customers
- Restrict capacity or output
- Refrain from supplying a product or service
- Rig bids
- Exclude competing businesses from the market
- Jointly boycott
- Fix employee wages or other compensation
- Refrain from recruiting or hiring one another's employees

- Exchange competitively sensitive information

It is important to note that "agreement" is a broad concept. An agreement could be expressly written, orally communicated, an implied understanding, or inferred from circumstantial evidence (for example, if two competitors meet and later engage in parallel conduct). Even a single exchange of competitively sensitive information can amount to an agreement that infringes competition laws in certain jurisdictions. In some countries, it can even extend to conduct that does not reflect a complete understanding, such as the unilateral communication of information to a competitor with the aim of influencing that competitor's behavior.

Although not all conduct or agreements that restrain trade are anticompetitive, whether conduct is likely to have anticompetitive effects and garner attention with the competition authorities requires an evaluation of the specific facts and circumstances surrounding the behavior. Therefore, business and commercial decisions should be made independently. To the extent companies desire to collaborate, competition counsel should evaluate any collaboration agreement.

Communications with competitors

When communicating with competitors, companies should avoid certain types of communications. Competitively sensitive information such as current and future prices, costs, discounts, and volumes of sales or production, business plans, suppliers, capacity, territories, customers, employee compensation, formulae, code, data or any other confidential commercially sensitive information should not be shared. If the competitor is also a supplier or a customer, communications on pricing should focus strictly on what is needed for the particular transaction.

In addition, when communicating with competitors, companies must ensure that their statements and actions are as clear as possible. If an improper discussion arises when attending a meeting, conference or event, or in any other interaction with a competitor, including informal or social interactions, staying silent could run afoul of competition laws.

In many jurisdictions, there is increased competition scrutiny around conduct that restricts, impedes or harms labor markets and employee mobility. Companies must not discuss, share information on, agree on or fix salaries or any element of compensation, including the terms and conditions of their employees' employment. It is also illegal in many jurisdictions to agree with competitors not to "poach" individuals that they may employ.

Interactions with customers or suppliers

Agreements between companies that operate at different levels of the supply chain (for example between suppliers and distributors) are considered vertical agreements. Vertical agreements and restrictions are usually permitted as long as there is a legitimate business justification for the restriction, and the restriction does not unreasonably limit competition. However, certain restraints between companies operating at different levels of the supply chain that may still raise concerns under competition laws. The rules in this area are complex, vary by jurisdiction and usually require a careful case-by-case analysis of the facts surrounding the restriction.

Though jurisdictions vary in how they analyze vertical restraints under local competition laws, there are certain business arrangements that present competition risks in most jurisdictions. These arrangements include any of the following restrictions on suppliers or customers (in vertical business relationships):

- **Resale price restrictions**: Agreements between a supplier and a distributor to set the price at which a distributor may resell goods can violate antitrust laws in multiple jurisdictions, particularly if the agreement lacks pro-competitive justifications. It is similarly unlawful to threaten to refuse

supply, delay deliveries or withhold rebates or other benefits to distributors if they do not observe a fixed or minimum price.

- **Recommend resale price**: While it may be unlawful for a supplier and a distributor to agree on a resale price, it is typically lawful for a supplier to recommend resale prices, so long as the distributor remains free to deviate from the recommendation. Though suggested resale prices are permitted, suppliers must make it clear to the reseller that they are free to accept or reject the suggested resale price, and that there will not be any penalty if the suggested resale price is rejected.
- **Geographic or customer restrictions**: Agreements that restrict a supplier or customer to selling only in certain territories or to certain types of end customers. These restrictions are generally allowed within the US, absent strong evidence of competitive harm, but they are strictly prohibited in the Common Market jurisdictions in the EEA as “hardcore restraints on trade.”
- **Exclusivity restrictions**: Exclusive agreements that designate a distributor as the only seller or carrier of a supplier’s products to the exclusion of other brands or competitors. These restrictions are generally allowed absent strong evidence of competitive harm.
- **Tying or bundling restrictions**: An arrangement in which a company offers to sell a supplier or customer one product, only, if they also agree to buy a second, distinct product. These restrictions are generally allowed, absent evidence of market power for at least one of the products.

Rules in this area are complex and vary by jurisdiction. It is important that companies understand local competition laws to ensure that they are not risking an antitrust violation for conduct that is permissible in one jurisdiction in which a company does business but impermissible in another jurisdiction. Further, before entering into any agreement that contains restrictions along the distribution chain, the proposed agreement should be reviewed carefully to ensure that the restrictions are permissible under local competition laws.

Monopolization/Abuse of dominance

Most competition laws include provisions that prohibit abuse of market power. Although market power may be measured in different ways, many competition authorities rely on market share to prove the existence of market power. To determine market share, competition authorities first define the “market.” Identifying the relevant market for competition law purposes is a complex exercise that varies by jurisdiction. As there is no international consensus on how to define a market, there is similarly no international consensus on the market share at which concerns of market power or dominance may arise.

Market power or dominance is not prohibited in itself. However, it is unlawful for a company with substantial market power to abuse that position. As a result, so-called “dominant” companies may be subject to stricter standards of competitive behavior than other companies. Dominant companies are subject to an additional set of competition rules because their strength means that certain commercial practices, which may normally be acceptable, might improperly exclude competitors from the market and result in competitive harm.

Conduct that may constitute an abuse of dominance includes the following:

- Charging excessively high prices or discriminatory pricing
- Reducing prices to very low “predatory” levels, usually far below cost in order to exclude a generic competitor
- Exclusive dealing arrangements or unjustified refusals to deal
- Granting loyalty rebates, discounts or bundling

- Margin squeeze, which is a form of exclusionary conduct that occurs when a firm that is present in both upstream and downstream markets is dominant in the supply of an essential input to its rivals and prices that input at a level that does not allow those rivals to effectively compete downstream

Mergers and acquisitions

When a company is considering any M&A activity—mergers, acquisitions or joint ventures—it should consider whether there are any merger control requirements in the US or outside the US. As over 130 jurisdictions globally have merger control regimes requiring companies to file notifications of combinations if they hit certain thresholds (regardless of the competitive effect of the transaction), it is imperative to consider where a transaction may need to be notified to prevent delays. Most jurisdictions with merger control regimes require that notifiable transactions receive approval from the antitrust authority before the transaction is implemented.

If a transaction must be notified to a competition law authority, businesses should consider preparation of filings and authority review times in creating their transaction timeline. Each jurisdiction has different rules regarding submission and timing of merger reviews. Therefore, filing in a particular jurisdiction may significantly alter deal timing.

If there are substantive issues with a transaction, it may also delay clearance of the transaction. Engaging counsel to conduct a preliminary assessment of the antitrust risks of the proposed transaction will allow businesses to allocate antitrust risk more appropriately (and potentially minimize) antitrust risk between the transacting parties. It will also help the business in determine whether to proceed with the transaction.

Mitigating antitrust risks

Compliance

Every company should adopt an antitrust compliance program as part of its legal compliance strategy. Instituting an effective antitrust compliance policy has a number of company benefits, including the following:

- Detecting potential antitrust violations before they occur
- Avoiding monetary costs associated with an antitrust investigation
- Avoiding private enforcement and follow-up civil suits
- Mitigating regulatory fines and potential liability
- Mitigating the amount of a penalty or the decision to prosecute in a criminal investigation
- Preventing disruption to the business, loss of internal management time and harm to the company’s reputation

Training

Companies should educate the board and senior management on antitrust policy and trends. Similarly, all employees should receive antitrust compliance training, with a special focus on employees in high-risk areas, such as those who work with suppliers, distributors, customers and competitors.

Monitor trade associations/industry meetings

Trade association or industry group meetings and events are particularly sensitive environments for potential competition law violations and discussions. While many activities and exchanges of

information within trade associations are pro-competitive and serve important functions, members of trade associations are often competitors, thus creating a risk that competitively sensitive information will be exchanged between competitors. Trade associations can also be an area of antitrust risk by facilitating cartel behavior or agreements with competitors in violation of antitrust laws. As many trade associations' members and events are international, an investigation into potential antitrust violations stemming from an industry meeting could result in investigations by multiple jurisdictions simultaneously.

To mitigate company risks with trade association attendance, it is important that organizations are aware of each trade association of which the business (via employees) is a member, who at the company attends trade association events and what events are being attended. Before approving attendance at trade association meetings, companies should review the agenda and, if it raises any competition issues, companies should avoid attending these meetings. Companies should also ensure that the attending employee understands the dos and don'ts — e.g., do not share competitively sensitive company information and do not agree with competitors to take actions that would violate antitrust laws, including price fixing, market allocation, wage-fixing, bid rigging or engaging in boycotts — these actions are always prohibited, even within trade associations.

Conclusion

Competition law rules vary by jurisdiction and often require fact-specific analyses. Doing business globally means that companies are subject to the antitrust laws in every jurisdiction in which a company does business. Even if a company has no physical presence in a particular jurisdiction, engaging in any commercial activity that affects that jurisdiction — for example selling to a customer located in the jurisdiction — usually subjects a business to the competition laws of that jurisdiction. Maintaining a general understanding of competition law rules, understanding your company's antitrust risk profile and market shares, and developing an effective antitrust compliance program will help to mitigate antitrust risks globally.

Boots-on-the ground phase: Incorporating subsidiaries and hiring employees

12 Foreign incorporations

When companies expand globally, they establish subsidiaries or register branches for a number of reasons. Customers tend to be more comfortable dealing with a locally incorporated company. Business partners take the manager of a locally incorporated entity more seriously; in Japan, for example, country managers often recommend an incorporation of a K.K. subsidiary, because of its perceived cachet. Under local laws, locally incorporated companies may benefit from jurisdictional or other privileges; for example, companies incorporated in an EU member state can rely on the "country of origin principle" according to which it should largely suffice to comply with the laws in the state where it is established, whereas a U.S. company may be fully subject to the laws and jurisdiction of authorities and courts in every EU member state where its customers reside. In some countries, foreign businesses must formally register a branch to do business. In some jurisdictions, only a locally incorporated company or formally registered branch can hire local employees. Even where a foreign entity can hire local employees, this is often not advisable, because it could complicate tax planning and compliance if the local employees are considered a "permanent establishment," which subjects the foreign entity to local tax reporting and payment obligations.

If a business decides to incorporate or formally register a presence in another country, for the reasons above or for other reasons, it should consider the following common issues:

Corporation vs. LLC vs. branch vs. RO

In most jurisdictions, four types of registered presence are available: (i) a corporation; (ii) a limited liability company (LLC); (iii) a branch; and (iv) a representative office (RO). The main differences are as follows:

- A subsidiary (e.g., a corporation or an LLC) is a legal entity separate from its parent company. The parent is generally not liable for the debts or obligations of its subsidiary. The subsidiary can enter into contracts and engage in a wide range of business activities allowed under local law and its scope of business.
- A branch is not a separate legal entity. It is an extension of its head office and, as a result, the head office will be liable for all of the debts and obligations of the branch. Although a branch can engage in profit-generating activities, the types of activities may be limited depending on the jurisdiction. For example, a branch office in India may not engage in retail trading activities.
- An RO is not a separate legal entity either. As such, it does not afford any protection from its local liabilities/obligations to its head office. Unlike branches, ROs cannot engage in profit-generating activities. In most jurisdictions, the activities of ROs are limited to marketing, liaising with customers, gathering information and other non-income-generating activities. Registering an RO in countries like China, Indonesia or Thailand can be burdensome and time intensive.

Foreign Direct Investment Review

Companies operating in regulated sectors should conduct foreign direct investment (FDI) review of their contemplated activities to determine whether it will be necessary to apply for approval as part of the incorporation process. For example, in Australia, the starting of a "national security business" requires approval by the Foreign Investment Review Board. The review process can take up to 4 months. Similar regimes exist in a number of key jurisdictions. Accordingly, it is important to assess at an early stage whether the contemplated activities or investments may trigger FDI approval requirements in order to develop a realistic timeline of the overall incorporation and market entry process. Failure to do so may result in delays in setting up an entity and starting business operations.

Business purpose

In many foreign jurisdictions, the business purpose of the entity has to be described with great specificity (e.g., in Argentina, China, India, Indonesia, Japan, Malaysia, Peru, Poland, Singapore, Türkiye and Venezuela — to name just a few).

In addition, if a new entity is formed as part of a larger transaction, such as an acquisition or a spin-off during which the main (initial) purpose of the new company is to acquire assets, special rules may apply to the incorporation process. In Switzerland, for example, if a GmbH is formed for the purpose of acquiring assets, its articles of association must generally disclose (i) the assets that will be acquired soon after the incorporation, (ii) the name of the seller and (iii) the consideration to be paid by the company (unless the assets are "insignificant"), which can be practically difficult because some of that information may not be available at the time of incorporation.

In other cases where the new company is formed with a generic business purpose to speed up the incorporation process, local law may require an amendment to the business purpose to specify the activities of the new company before it becomes operational, which could put pressure on the expansion timeline.

Name requirements

Most foreign jurisdictions have specific requirements governing corporate names. In China, for instance, only the Chinese name (and not the English name) of a wholly foreign-owned enterprise (WFOE) will be registered and it must contain the trade name (e.g., "ABC"), a geographic descriptor (typically the city in which the WFOE is established, e.g., "Shanghai"), an industry descriptor (e.g., "Business Consulting") and the type of company (Ltd.). If the WFOE uses the word "China" in its name, it will typically be required to have a much higher minimum capital. In Indonesia, a foreign-invested LLC must use the designator "PT" ("Perusahaan Terbatas," limited liability) at the **beginning** of its name.

The use of continent, country or certain industry names may be restricted, or it may trigger additional capital requirements. In Türkiye, the use of the words "Türkiye" or "Türk" in the trade name requires a Council of Ministers' decision from the Turkish Parliament, which could take several months to obtain and which will generally only be issued for significant investments in Türkiye. The use of the word "Asia" in a private limited company in India triggers a higher capital.

The meaning of any name chosen should be verified in the local jurisdiction to ensure that it is not offensive or otherwise potentially detrimental to the business operations.

Overlapping regulatory requirements should also be checked, as it may not be possible to go to market in some countries if the company's legal name doesn't match the name on its operating licenses. In such case, it may be necessary to urgently amend the company's legal name or have the relevant operating licenses re-issued, so as to minimize business disruption.

It is common practice to reserve the proposed name of the new company with the local registrar at the beginning of the incorporation process to ensure that the desired name is available at the time of the company's registration, especially if the expansion is on a strict timeline or if there is concern about a potential competitor trying to claim the name.

Shareholder requirements

Many jurisdictions have specific requirements pertaining to the number of shareholders, allocation of ownership interests and special qualifications of shareholders. For example, Argentina requires two shareholders for a Srl and a SA; foreign corporate shareholders must first register with the Public Registry of Commerce to be able to act in a shareholder capacity and, to be so registered, they must (i) show that they have significant economic business activities outside of Argentina (e.g., foreign

assets or ownership of other foreign entities) and (ii) generally not be restricted from pursuing their business activities in their places of incorporation. In Thailand, an LLC must have at least three shareholders at all times.

It is generally not recommended to have individuals as minority shareholders, to avoid difficulties in the future (e.g., individual refuses to assign the shares and/or disappears).

Tax considerations should also be taken into account where there is divided ownership, as it may be advisable for the minority shareholders to assign their beneficial ownership (including voting rights) to the majority shareholder.

Director and officer requirements

Many foreign jurisdictions have specific requirements regarding the number of directors/officers to be appointed and their residency or nationality. In addition, the following jurisdictions, among others, require that directors/officers be registered with local tax or administrative authorities, which can be a burdensome and lengthy process. Some examples:

- In Argentina, the majority of the board of managers (of an Srl) or of the board of directors (of an SA) must be domiciled in Argentina.
- In Australia, at least one of the directors of a proprietary limited (Pty Ltd) company must be a resident (this person typically also serves as the “public officer” of the company — see below).
- Portugal and Spain do not impose residency or citizenship requirements on directors of local subsidiaries but US individuals acting in that capacity must obtain a taxpayer ID (Portugal) or a foreigner ID (Spain) prior to incorporation, which can delay the incorporation process.

In addition, some jurisdictions require the appointment of other personnel (e.g., statutory auditor, company secretary or public officer). For instance, in Australia, a resident public officer must be appointed within three months after an Australian Pty Ltd company commences its business; a Hong Kong Limited must appoint a resident company secretary.

If compliance with certain local registration or other requirements could jeopardize the incorporation timeline, then a possible workaround is to appoint local residents or citizens as directors or officers, at least on a temporary basis.

Capitalization requirements

Capitalization requirements for a foreign entity vary significantly among the jurisdictions. The minimum capital necessary to form an entity may be prescribed as a specific amount (this is the case in most European jurisdictions), in terms of operating costs needed going forward (e.g., in China and Vietnam), or may be tied to a “reasonableness” standard or not be specified at all, in which cases the amount is often determined based on practical experience (e.g., in Brazil, Chile, Colombia).

Some countries have a burdensome and time-consuming capitalization process (e.g., new bank account, bank certificate, registration procedures), which could impact the expansion timeline.

Registered address vs. physical office

It is important to determine at the outset of the incorporation process what, if any, requirements the local jurisdiction has established regarding the “registered address” and whether these are pre- or post-incorporation requirements. If they are preincorporation requirements, their completion may lead to a delay in establishing the foreign entity.

For example, China, Dubai, Greece, Poland and Vietnam require some type of real estate document (typically a lease agreement) to be provided during the preincorporation phase, and without having

that document in place the foreign entity cannot be incorporated. In addition, in some jurisdictions (e.g., China), ancillary documents such as building ownership or land use rights certificates may have to be provided during the preincorporation process. In the case of a Dubai branch, a lease agreement is required (a sublease agreement is generally not acceptable), which must be valid for at least 12 months, the premises must be approved by the local authorities as being suitable for the activities to be carried out, and the office space must be sufficient for the number of employees to be employed.

Meaning of “in formation”

Depending on the jurisdiction, the point in time at which the foreign entity may enter into contracts or otherwise engage in business operations may vary significantly. In some jurisdictions (most civil law jurisdictions, e.g., Germany), a subsidiary can validly conclude contracts after the notarial deed of establishment has been executed (but before the entity has been registered in the local commercial register), provided that it indicates that it is still “in formation.” In other jurisdictions, a subsidiary may not engage in business operations until it has actually been incorporated, and some jurisdictions even require the post-incorporation process to be completed before the entity is considered fully operational.

Post-incorporation requirements

Even after a foreign entity has been incorporated, the establishment process is typically not over yet. In many jurisdictions, the incorporated entity now has to go through the post-incorporation (or “operationalization”) phase, which can vary significantly in scope and duration.

Post-incorporation action items may include the application for (additional) licenses, obtaining tax, payroll and customs ID numbers, registering for VAT or GST, opening a permanent bank account or obtaining corporate seals and chops.

Proper planning is one of the keys to accomplishing a smooth and timely entity formation abroad. Familiarizing oneself with the corporate formation requirements and spotting time-consuming issues early on is only one piece of the puzzle. “Tax” and “employment” are usually the other big pieces that any company should carefully consider prior to starting the “going abroad” process.

Ongoing corporate maintenance & ultimate beneficial ownership

When the new entity is fully operational and conducting business, it will have ongoing corporate maintenance obligations under the laws where it was established and wherever else it may be registered to do business. This typically requires the filing of annual accounts, to be prepared by an auditor and approved by the company’s board and/or shareholders. Specific requirements and timing will vary by country. It is important to maintain an annual compliance calendar to track deadlines and plan well in advance, as the preparation of accounts may take a long time in some cases. Failure to meet deadlines could result in fines, dormancy, revocation of operational licenses, and other consequences.

Additionally, over the last 5-10 years, ultimate beneficial ownership (UBO) requirements have expanded globally from fragmented local rules to near-universal adoption across the world. Today, nearly all jurisdictions require UBO identification and maintain some type of register or disclosure system. The reporting requirements are focused on persons exercising ultimate control and require mandatory filings and ongoing updates. UBO regimes are regularly associated with anti-money laundering (AML) and know-your-client (KYC) regimes. Stronger enforcement has also become a reality, including fines and even deregistration. Today, most companies incorporate UBO compliance into their general corporate maintenance compliance frameworks. It is critical to track ownership chains across jurisdictions, monitor transactions, and adhere to a strict reporting calendar.

13 Employment

A company expanding its global footprint in a competitive marketplace almost always requires engaging workers on the ground. The legal risks and opportunities in structuring these relationships differ significantly around the world, and the complexity is further compounded by the intersection with other areas of law, including tax, corporate, immigration, data privacy and equity compensation. In recent years, companies have also had to navigate a more dynamic employment-law landscape shaped by remote and hybrid work, employer-of-record and other third-party engagement models, increased scrutiny of worker classification, growing regulation of AI and automated decision-making in HR, pay transparency obligations and heightened enforcement around payroll, social insurance and mandatory benefits compliance. All of these issues must be considered holistically along with the company's business model and objectives in order to develop a sound — and hopefully successful — market-entry strategy.

Threshold questions: defining the scope of activities

When considering whether to engage a worker in a new country, the main areas of consideration are employment, tax and corporate doing-business requirements.

From an employment perspective, the threshold question is: How can a company engage workers in the jurisdiction? The choices vary between direct employment (either through a local presence or a nonlocal entity), indirect employment (through a third-party local entity or provider) or engagement as an independent contractor (directly or through a third-party entity). Whether some or all of these options are available depends on the local employment and employee benefits laws, including mandatory benefits requirements imposed on employers, such as social insurance contributions, as well as potential immigration requirements where the worker is not a local national or lacks the independent ability to work in the jurisdiction. In addition, there may be practical impediments to engaging various vendors and, importantly, impact on the ability to attract and retain talent, that must be considered. With that said, these issues cannot be evaluated in a silo from tax and corporate considerations, which hinge largely on the nature of the employee's activities. Therefore, carefully scoping and defining the intended activities is key to strategizing market entry.

From a tax perspective, an important question is: Would the new activities in the country constitute a PE or other taxable presence? If yes, the business should decide whether to incorporate a subsidiary or formally register the local presence (i.e., in the form of a branch or subsidiary that can address tax compliance requirements). If the planned activities do not create a taxable presence on their own, the company may consider engaging workers or hiring employees in the local country directly through one of the entities in the group of companies, such as the parent company, or, more typically, a holding company or another subsidiary of the parent company, which could provide a "corporate shield" for potential liabilities arising from the local activities.

Not to be outdone, there are several threshold questions from a corporate perspective:

- Is a foreign corporation permitted to conduct the planned activities in the targeted jurisdiction?
- Do the planned activities rise to the level of "doing business" in that jurisdiction?
- What are the local law requirements for qualifying to do business?
- Are there commercial, legal or other reasons why it might be desirable to conduct the planned activities from a locally incorporated entity?

In this chapter, we focus on the employment and equity considerations when hiring globally.

Engaging without a local entity

Determining whether a local entity is required to engage workers and the appropriate type of local presence is driven by employment, tax and corporate considerations. However, if it is determined that no local presence is required, the next consideration is what options are available for a nonlocal or "foreign" company to engage workers in-country. There are typically three alternatives: direct hires, third-party outsourcing and independent contractors.

Direct hires

In some jurisdictions, the ability of a foreign employer to directly engage local nationals as employees is limited by law, such as in China and Mexico. In others, a practical obstacle exists, because a foreign entity is not able to comply with mandatory employee benefits laws to enroll employees in Social Security or equivalent programs without a local employer taxpayer ID or equivalent (e.g., Brazil, Egypt, Russia and Türkiye). Another gating item in some countries, such as Saudi Arabia and the UAE, is the fact that a large portion of the local workforce is composed of foreigners who must be sponsored by a local entity to be able to lawfully work in the jurisdiction. In all of these countries, employment law challenges may therefore prompt the company to establish a local presence or explore other options for engaging workers.

Even in those jurisdictions where it is possible to employ individuals from an employment law perspective without a local presence (e.g., France, Germany, Italy and the UK), procedural challenges remain. For instance, it will be necessary to engage a local payroll provider to ensure proper payment in compliance with local labor laws and tax laws governing employer contributions, salary withholding and reporting. Engaging a reputable payroll vendor and setting up payroll can often take more time than expected. Further, in other countries, such as Japan and Korea, attracting and retaining talent can be a challenge, where a foreign company is practically unable to contribute to all mandatory insurances, forcing employees to contribute on their own or join a fund. Finally, all local hires will need to be engaged under employment agreements that comply with local laws, which in some cases will require translation to comply with local laws and be enforceable against the employee, such as in France and Poland.

Furthermore, when hiring employees directly in-country, it is important to thoroughly monitor employee activities to manage tax liability and comply with corporate maintenance requirements, as described above. From a corporate perspective, in most jurisdictions any level of activity by employees beyond mere market research will constitute "doing business" and will therefore in principle require the employer entity to register itself with the commercial and/or tax authorities. Compliance might take the form of a branch registration which, as explained above, will likely result in a fully taxable presence of the employer. Alternatively, compliance could require establishment of a liaison or RO, which typically conducts limited functions such as market research, advertising, trade show attendance and non-sales-related customer or supplier liaison functions, and is not a taxable presence under local law. In a minority of cases, no form of commercial registration may be required for this type of presence, provided the activities are limited in scope and/or duration.

Third-party hiring

At the outset, there are multiple forms of utilizing a third party to hire workers. The most common is contracting with a local entity — typically a partner or distributor — to engage workers to service the foreign company's account. Provided that the third party engages the employees as its employees, on its payroll and in compliance with local law, this is a generally acceptable approach. Compliance issues arise, however, in those jurisdictions where this arrangement is viewed as unlawful employee lending under local laws and/or where the third party is viewed to be acting as a service provider without an appropriate business license. For the foreign contracting company, this can be problematic to the extent that liability inures to the foreign company. While indemnification agreements may

mitigate the risk, as a practical matter, it may hamper the foreign company's ability to do business in the jurisdiction in the future.

Another option is the use of licensed service providers, sometimes referred to as staffing agencies or labor dispatch companies. Typically, where these types of entities are recognized under local laws, they must be properly licensed to act as such, and, again, the local workers are hired as employees of the agency and paid by the agency. In many countries, such as in Poland, there are limitations on the types of services that can be provided and the duration of the assignment. In others, the foreign company itself may still be required to register with the local Social Security and tax authorities, such as in Spain. Further, in Italy and the Netherlands, there are national collective bargaining agreements that apply to outsourcing agency workers of which the foreign entity will need to be cognizant. Under this model, the primary legal risk for the foreign company is the potential for dual employer liability to the extent that it is directing and controlling the workers. Again, indemnification provisions in the vendor contract can mitigate the risk, but to the extent that a claim is filed against the foreign company, failure to resolve the dispute can impact the foreign company's ability to operate in the country in the future.

The final variation on third-party hiring is the professional employer organization (PEO), which began in the US but is increasingly common as a way to engage workers quickly in countries where the company does not yet have a local entity. In the US, a PEO acts as the employer of record for payroll and benefits purposes, allowing a small company to provide health and welfare benefits at lower prices than if they attempted to source the benefits individually, and thus making the company more competitive in the recruiting market. Under this model, the employee has dual employment — that is, both with the PEO for payroll and benefits, and with the company as the direct common law employer. This model, like many employment matters, does not perfectly translate outside of the US. In many jurisdictions, the concept is simply not recognized whereas in others the PEO is treated like a regulated labor supplier or staffing provider, so specific licenses, use limitations or employee-protection rules apply. Even where an EOR model is available in principle, local regulators may still view the end user company as sharing employer-like responsibilities if it directs and controls the workers in practice, and the arrangement may not eliminate tax, PE, corporate registration or co-employment risk. In other words, an EOR may be a practical bridge solution, but it is not a universal substitute or a long-term operating model in every jurisdiction.

Independent contractors

As an alternative to directly hiring employees or engaging through a third party, a company may also consider engaging individuals as independent contractors. Directly engaging a local independent contractor who does not have or exercise the authority to conclude contracts will likely not create a taxable presence. Similarly, corporate issues are generally not gating items for this alternative solution. Rather, the application of employment laws to the contractor relationship is often determinative.

At the outset, the potential for liability created by misclassifying an individual as a contractor when in fact the individual is treated and acting as an employee is a "universal" concept among countries all over the world. In the US, like in most countries, if a contractor is acting like and being treated like an employee under the local employment laws, they will be deemed misclassified. Similar liability arises outside of the US, where potential liability for a misclassification claim could include any benefits provided to similarly situated employees (including equity awards), overtime payments (if non-exempt), and withholdings and contributions. The main difference, however, is that outside of the US, employees may have additional statutory entitlements to benefits such as 13th month bonuses, holiday bonuses, allowances, mandatory profit sharing, notice and severance, so the cost of misclassification is higher. Further, the social charges on compensation and percentage of employer contributions are higher in many countries. In some instances, misclassification and the failure to make certain mandatory contributions can give rise to criminal sanctions (e.g., in Germany).

Even if properly classified, in many jurisdictions (e.g., Brazil, Canada, Egypt, Malaysia, Russia and the UAE), contractors have specific registration obligations with local government agencies. In addition, contractors are typically required to pay personal income tax and make social insurance contributions, and the foreign entity could be liable for the contractor's failure to do so. Further, some jurisdictions have gone so far as to effectively require that the contracting entity make payments to certain types of contractors similar to those provided to employees, for benefits, etc. (e.g., in Spain) in order to address the perceived drain on local economies by an influx of contractors. Finally, in many jurisdictions, there are different types of independent contractors, depending on their activities. For instance, individuals engaged in sales activities in Brazil and Colombia will fall under local sales agent laws, and the contract that they enter into would be a sales agency agreement, which provides for additional protections and entitlements for the contractor as opposed to a standard commercial contractor agreement.

Companies should also keep in mind that local tests for contractor status are evolving. In many jurisdictions, authorities and courts increasingly focus not only on formal contractual language, but also on economic dependence, integration into the business, exclusivity, platform-style management, and the degree of practical control exercised over how, when and where the work is performed. This means that a contractor model that appears workable on paper may still be vulnerable if the individual is effectively operating as part of the company's workforce, particularly in sales, customer-facing, technology and other core business roles.

Hiring through a local entity

Where a company decides to set up a local presence, the hiring options above exist as well, with some variation. For instance, where there is a local entity in a country, additional laws with regard to third-party employers, or "labor dispatch" laws in China and Japan, will dictate the types of employees that can be hired through such entities, the duration of the engagement and (in China) the relative percentage of the workforce that can be engaged as compared to direct hires by the local entity. With that said, in most countries, if a decision is made to set up a local presence, workers are typically hired as direct employees of the entity (unless companies are legally required to use a different structure, such as in China, where local Chinese nationals must be hired through third-party providers and seconded to ROs if the only local presence is an RO).

In the case of direct hires and local employment, as in the US, local employment laws will apply. This means that from the outset of the potential employment relationship, the applications, pre-hire background checks, medical checks and screenings must comply with local laws. Then, the employment agreement, often inclusive of confidentiality and IP assignment provisions, must comply with local laws and must be translated in many cases, as mentioned previously. Data privacy compliance with regard to the collection and processing of employee personal data must be addressed at the outset. Further, a clear understanding of applicable collective bargaining agreements and other industrial instruments (e.g., modern awards in Australia) is imperative to ensure full compliance with wage and hour and benefits entitlements, for instance. Finally, implementing the US parent company's code of conduct and business ethics is crucial to both comply with US laws and not unwittingly create untenable situations where compliance with the US codes means violating local employment laws. Companies will need to carefully review all of these issues to ensure compliance locally.

In addition, companies should now expect a broader set of modern workplace compliance issues to arise at an earlier stage than in prior years. These include restrictions on employee monitoring, surveillance and works council consultation; legal requirements affecting the use of AI-assisted recruiting, screening and automated HR decision-making; and expanding pay transparency, pay reporting and equal pay obligations in a growing number of jurisdictions. Even where these topics are governed by different legal regimes, they often intersect directly with employment law because they affect hiring, compensation, performance management, internal mobility and termination decisions. As

a result, companies should coordinate employment, privacy, compliance and technology stakeholders before rolling out global HR tools or importing home-country practices into a new market.

Special compensation considerations

Aside from salary and bonus payments, most US companies will want to incentivize their service providers with stock option or other equity award grants that enable the individuals to acquire company stock at preferential prices (or even free of charge), provided they provide services to the company group for a certain period of time and/or as the company meets certain performance criteria. As these awards are made by the US parent company, rather than by the local employing entity (if one exists), different considerations apply, and these awards can offer both additional challenges and benefits.

First, it is important to determine the status of the service provider. If the individual is an employee or consultant, the company can typically grant awards under its equity incentive plan. The situation can get more complicated if the individual is employed by a third-party agency because the individual is not technically an employee or consultant of the company or any of its subsidiaries, and the equity incentive plan would normally not allow grants to third-party employees (for US securities law reasons). Therefore, unless the company can get comfortable that these individuals actually qualify as common law employees for the purposes of the plan, or if the company is willing to grant awards outside of the plan, grants to third-party employees may not be possible.

Furthermore, although grants to consultants are typically permitted under the plan, they can raise issues under local law. In many countries, regulatory restrictions (e.g., securities prospectus requirements) apply to granting equity awards to local residents. However, exemptions will often exist for grants to employees of the company or one of its subsidiaries because the regulator has recognized that these grants are limited in scope and made for compensatory purposes, rather than for the purpose of selling securities. In some jurisdictions, the exemptions extend to both employees and consultants. However, in other jurisdictions, the exemptions are limited to employees, which means that grants to consultants can trigger onerous filing or other regulatory requirements. Companies need to review these issues on a country-by-country basis.

In general, companies will need to carefully review the applicable tax treatment and regulatory restrictions before making equity grants in any jurisdiction. Even grants to employees can raise significant compliance issues in some countries that will make such grants prohibitive for the company (e.g., China).

Similarly, the tax treatment of certain award types can be unfavorable to the employee or the company, for example because tax is due before the employee can realize any actual gain from the award (e.g., for options in Australia) or because of very high employer social insurance contributions due on the award income (e.g., in France and Sweden). In many cases, structuring the awards in a certain way can avoid issues, but this means that companies will need to review the applicable rules before committing to making awards to employees and be willing to tailor their awards depending on the country.

Another important point for US companies to keep in mind as they are granting awards to employees in other countries is to ensure that the awards (and the related income) be kept separate from the employment compensation (i.e., salary/bonus) and that the discretionary nature of the awards be reinforced. This should be done mainly to mitigate the risk of vested right/entitlement issues and to avoid a situation where the award income has to be included for the purposes of calculating employment-related benefits. Vested right/entitlement issues refer to the risk that employees could claim to be entitled to receive equity awards (or equivalent benefits) on an ongoing basis because the awards have been provided in the context of the employment relationship and employees have come to rely on them as part of their compensation. Obviously, how frequently and regularly awards are granted is also relevant, but the threshold question is whether the awards are part of the employment

relationship; if they are not, employees do not usually have a claim, even if awards are granted regularly.

The issue of having to include award income when calculating employment-related benefits generally comes up in a termination situation where the terminated employee will claim that their severance payment should be increased because it should not be calculated only based on their salary (and other employment income) but also based on the value of any equity award income. If employees have received significant grants, this can increase the severance payment quite a bit and may catch the company by surprise. Although this issue will mostly come up in a termination situation, it can also arise for other employment-related benefits calculated based on the employee's total compensation.

Again, to mitigate these issues, it is important to show that the awards are provided solely by the foreign parent company, not the employer (unless the employees are directly employed by the parent company). To this end, companies should not include any reference to awards in the employee's employment documents, including in the employment offer letter and agreement. If the company wishes to communicate an equity grant to a new hire (as an incentive to accept the employment offer), it should do so in a separate letter provided by the parent company.

Finally, because the rules around equity awards can change quickly, it is important for companies to stay abreast of the legal and tax developments affecting equity awards in the countries in which they have employees and to adjust their grant practices accordingly, if necessary.

Conclusion

Taken together, local market requirements can appear overwhelming to companies engaging workers abroad for the first time. However, through an integrated analysis of employment, tax and corporate issues relevant to entering a new jurisdiction, as well as a little bit of planning, US companies can help ensure a hospitable environment for their businesses in foreign markets.

14 Share-based compensation

In this chapter,[1] we will provide a basic primer on the legal, regulatory and tax-related issues that companies must navigate when considering whether to provide stock-based compensation internationally.

Employee and employer tax considerations

A very important consideration associated with the use of equity compensation internationally is to correctly assess the tax treatment of the awards, in particular the following:

- The tax treatment of the awards in the hands of award recipients
- The corresponding tax withholding and reporting obligations that are imposed on either of the following:
  - The parent corporation that grants the award
  - The local subsidiary of the granting company that employs the award recipients

In recent years, taxing bodies around the world have enacted local tax laws and devoted significant resources to ensure that they receive significant tax revenues from the compensation that local employees receive from stock-based awards. Moreover, most countries have enacted broad and significant civil and criminal penalties, fines and interest for companies that fail to properly comply with local tax withholding and reporting requirements applicable to stock-based compensation.

Noncompliance can therefore present serious financial exposure and potential reputational damage for companies that fail to comply with local rules, even if noncompliance is unknowing and unintentional. For these reasons, perhaps the most important issue that multinational companies must address when considering whether to use equity compensation globally is the tax treatment of awards from the perspective of both the award recipients and the granting and employing companies.

Employee taxation

Most countries tax equity compensation awards granted by foreign parent corporations to local employees in a similar fashion from the perspective of the following:

- The timing of the taxable event
- The amount of taxable income derived from the award
- The types of taxes that are payable on the awards

This reduces some of the complexities that would otherwise exist. Employees receiving stock options or participating in an employee stock purchase plan (ESPP) generally are subject to taxation at the time of exercise (in the case of an option) or purchase (in the case of a stock purchase right granted under an ESPP) on the excess of the fair market value of the shares being purchased over the exercise price or purchase price paid for the shares (the spread or, in the case of an ESPP, the discount).

[1] Previously published by: Wydajewski, Brian. “Global Equity Compensation: A Primer on Key Legal, Regulatory and Tax Considerations.” Thomson Reuters, 2020, Resource ID: w -024 -2880.

Caution: In some countries, such as India and Italy, "fair market value" is defined differently under local tax laws for the purposes of computing the taxable income realized from stock awards.

Employees receiving restricted stock units (RSUs) or performance-based awards that do not require award recipients to pay any cash purchase price typically are subject to taxation when the shares are issued in settlement of the awards on the fair market value of the issued shares. In the case of restricted stock, where award recipients receive all or a portion of the ownership rights associated with the shares (such as voting rights and dividend rights) at the time of grant, the tax treatment varies, with some countries treating restricted stock as taxable at the time of grant (most European countries) and others delaying taxation until vesting when the award recipient acquires a non-forfeitable interest and can sell or otherwise transfer the shares.

Multinational companies typically avoid granting restricted stock globally to avoid creating situations in certain countries where award recipients are taxed on awards at a time when they cannot convert the award to cash to fund the tax liability.

In most instances, employees realizing taxable income from equity compensation awards are subject to both of the following:

- Income taxes
- Local social insurance taxes (the equivalent of US social security contributions)

Tax preferential equity compensation awards

In some instances, companies may be able to structure the grant of equity compensation awards to provide award recipients and/or the local subsidiary that legally employs the award recipients (as distinguished from the granting company itself) with preferential tax treatment of the awards, in the form of any of the following:

- Reduced taxable amounts
- Preferential income tax or capital gains tax rates
- The avoidance of local social insurance taxes on equity income

Therefore, like the US, where award recipients who are granted incentive stock options (ISOs) can receive preferential tax treatment, some countries around the world (for example, Denmark, France, Ireland, Israel and the UK) have enacted local tax legislation that provides favorable treatment if the equity awards or the underlying equity compensation plan satisfies specific requirements under local tax laws.

In most instances, the terms and conditions of the equity compensation awards must be adjusted to reflect local law requirements. In some cases, the local law requirements must be embodied in the underlying equity compensation plan of the company granting the awards (which is typically done by establishing a sub-plan of the equity compensation plan that is adopted and approved by the granting company's board of directors or compensation committee of the board).

Whether a company chooses to structure its equity compensation awards to satisfy these requirements to achieve the favorable tax benefits is typically a function of the following:

- The particular requirements under local law (which can be substantial and time-consuming)
- The number of affected award recipients
- The aggregate value of the contemplated awards

- The required level of administration for the awards (which, in some circumstances, can be substantial)
- The level of tax savings that may be achieved versus the costs associated with granting the awards

Tax withholding and reporting obligations

The timing of taxation and the amount of taxable income realized from stock-based awards by award recipients is generally predictable and consistent among many developed countries. However, the corresponding tax withholding and reporting obligations that are imposed on companies granting stock-based awards and/or the local subsidiaries that directly employ the award recipients vary greatly and require a great deal of diligence, consideration, and coordination between the parent corporation granting the awards and the local subsidiaries that employ the award recipients.

In some countries, the taxable income realized from stock-based awards is characterized as additional employment or labor income, and is subject to both income taxes and local social insurance taxes that are payable by both the award recipient and the local subsidiary that employs the award recipient, and the corresponding tax withholding and reporting obligations are the same that otherwise apply to regular salary and wages. In a very small number of countries, companies can contractually require award recipients to bear responsibility for the employer's portion of local social insurance taxes (e.g., United Kingdom).

Caution: Local social insurance taxes can represent a significant additional cost to companies, as a number of countries have high social insurance tax rates. For example, in Belgium, the employee portion is 13.07% uncapped and the employer portion is approximately 25% uncapped. In France, the employee portion is approximately 46% on annual income up to EUR 329,088.

In other countries, the characterization of the taxable income realized from equity compensation awards can depend on a variety of factors, including whether the local subsidiary:

- Bears the economic cost of the awards that are granted by its parent corporation (see the section on equity compensation reimbursement arrangements)
- Is otherwise involved in the operation or administration of the equity compensation award program

In these instances, the corresponding income tax and social insurance tax withholding and reporting obligations can vary depending on these structuring types of issues, and companies can, with proper due diligence, generally structure awards to minimize or avoid these burdensome tax obligations.

The method of tax withholding must also be thoughtfully addressed. In prior years, companies often required award recipients to pay back to the company the amount of the income taxes and social insurance taxes that were required to be paid to the local taxing bodies as a condition precedent to the issuance of shares at the time of award settlement. However, more recently, most multinational companies granting stock-based awards internationally have chosen to effectuate tax withholding using either of the following:

- A **"sell-to-cover" method**, where the company sells a sufficient number of shares issuable to an award recipient on the open market to cover the required tax withholding, pays the proceeds from the sale of these shares to the local tax authorities and provides the award recipient with the remaining number of shares
- A **"net share issuance" method**, where the company calculates the amount of required tax withholding, makes a cash payment to the applicable tax authorities for that amount and provides

the award recipient with the net number of shares having a value equal to the taxable amount less the amount of the cash payment made to the tax authorities

Under both approaches, award recipients end up receiving the same number of shares at the time of settlement of the underlying equity compensation award. However, from the company's perspective, the sell-to-cover method results in the open market effectively funding the required tax withholding while the net share issuance method results in the company itself funding the required tax withholding. Although less frequently used, companies can also withhold the required withholding taxes from the award recipient's regular salary or wages or from other cash amounts payable to the award recipient (such as cash bonuses).

Companies that use equity compensation internationally must ensure that they devote the appropriate level of care and resources to satisfying their tax withholding and reporting obligations in all of the countries in which awards are granted; to do otherwise creates perhaps the single greatest compliance exposure and the most significant financial risks to both the companies themselves and the award recipients.

Equity compensation reimbursement arrangements

One of the factors that can impact the tax implications of equity compensation awards is whether the local subsidiary that employs the award recipient bears the economic cost of the awards that are granted by its parent corporation. In the case of a US parent corporation that grants stock-based awards to employees of its foreign subsidiaries, the following conditions apply:

- The US parent corporation is unable to claim a US income tax deduction in connection with the awards because the award recipients are not legally employed by the US parent corporation (rather, the award recipients are legally employed by the local subsidiary in the particular country).
- The local subsidiary in most countries is unable to claim a local tax deduction for the awards because it does not incur any costs associated with the awards (but would otherwise be able to claim a local tax deduction to the extent that it did bear the costs of the awards).

To secure the deduction, US parent corporations often enter into equity compensation reimbursement agreements with their foreign subsidiaries, whereby the foreign subsidiary agrees to reimburse the US parent corporation for the costs associated with equity compensation awards granted to the foreign subsidiary's employees. Under these agreements, in many countries, the local subsidiary can claim a local tax deduction for the reimbursement payments made to the US parent corporation (because the local subsidiary is incurring the cost of the awards), while the US parent corporation can receive the reimbursement payment from the local subsidiary on a tax-free basis for US income tax purposes.

The rules governing equity compensation reimbursement arrangements vary by country and depend on a variety of factors, including the following:

- The type of shares (newly issued shares or treasury shares) that are issued on settlement of the equity compensation award. For example, in France, a local tax deduction is only allowed where treasury shares are issued. The same use to be true in Singapore until changes adopted in 2025 expanded the availability of a local tax deduction for equity awards settled in newly issued shares.
- The position of the award recipient (for instance, a director versus a rank-and-file employee). For example, in Japan, a local tax deduction cannot be claimed for equity compensation reimbursements attributable to awards granted to directors of the local subsidiary.
- The timing of the grant of the equity compensation award for which reimbursement is being sought (that is, awards granted before the execution of the equity compensation reimbursement agreement versus awards granted after the agreement is concluded). For example, in Germany, a

local tax deduction is only available for awards granted after the equity compensation reimbursement arrangement has been executed.

Securities registration and prospectus requirements

Companies seeking to grant stock-based awards globally also need to give significant attention to securities law considerations. In general, company stock is viewed as an ownership interest or security, and an offering of securities in most countries typically requires the granting company to do the following:

- Register the offering with the local securities regulatory body (in the US, the US SEC is the governing body at the federal level)
- Produce a prospectus (in the local language) for potential investors that provides key business, financial and tax information about the offering so that investors can make an informed investment decision

Alternatively, depending on the nature, size and value of the offering, or the nature of the potential investors to whom the offering is directed, the offeror may be able to avail itself of an exemption under local laws if certain requirements are satisfied, which may allow the offeror to completely avoid the local registration and/or prospectus requirements (or allow the offeror to proceed with the offering subject to more simplified registration and disclosure obligations). For example, under the EU Prospectus Regulation, companies making equity grants to employees in Europe can avoid the prospectus obligations pursuant to an employee share scheme exemption if an information document is provided to award recipients in conjunction with the grants.

The grant of stock options, RSUs or other stock-based awards, or the offer of participation in an ESPP, may be viewed as a securities offering (or the offering of financial products). Companies seeking to grant equity awards to employees in other countries must consider and address the local law requirements in each country in which award recipients reside well in advance of the particular grant.

Broadly speaking, awards that require award recipients to pay monetary consideration for the underlying shares (for example, stock options and stock purchase rights under an ESPP) are generally viewed as an offering of securities from a legal and regulatory perspective, requiring compliance with local registration and/or prospectus requirements, because the award recipients must make an affirmative investment decision to purchase company shares through the outlay of personal funds.

Conversely, awards that do not require award recipients to pay monetary consideration for the underlying shares (for example, RSUs and performance share awards) are often not treated as a securities offering under local rules and regulations because the award recipients are not:

- Required to make an investment decision
- At risk of losing personal funds through the payment of any purchase price

In the US, the grant of equity compensation awards is treated as a securities offering, and publicly traded corporations granting stock-based awards to US employees must register the offering with the US SEC via a simplified registration statement on Form S-8 that is specifically geared toward employee compensation and benefit arrangements.

As part of the simplified registration requirements, the company must deliver a prospectus to award recipients, providing them with basic information about the following:

- The company
- The equity awards being granted
- The underlying equity compensation plan
- The tax treatment of the equity awards

Outside of the US, local securities law requirements can vary significantly from country to country and generally depend on a variety of factors, including the following:

- The type of equity compensation award that is being granted
- The number of award recipients in the particular country
- The aggregate value of the offering
- The nature of the award recipient (that is, whether the award recipient is an employee versus a non-employee independent contractor)

In some countries (for example, Indonesia, Japan, Malaysia and the Philippines), the local requirements can be particularly extensive, burdensome, costly and time-sensitive, while in many other countries (for example, Brazil, Mexico and Singapore), the grant of stock-based awards to employees of the local subsidiary of the granting company does not trigger any local law requirements.

In some instances, companies may be able to avoid local securities law requirements by taking either of the following actions:

- Settling awards in cash rather than company shares
- Limiting award recipients of stock options to a mandatory cashless exercise (either a sell-all exercise or a net exercise) (for example, in Italy)

Labor and employment-related considerations

As equity compensation awards are typically granted to award recipients in the context of their employment and as partial consideration for the performance of services, multinational companies granting stock-based awards to employees of their subsidiaries and affiliates in other countries must be cognizant of local employment and labor laws. Without oversimplifying a broad and complex issue, it is fair to say that the employment of individuals in the US — where employers and employees enjoy substantial freedom to mutually establish the terms and conditions governing the employment relationship and individuals are typically employed at will without any guaranteed rights of employment — is substantially different from the employment of individuals in most other regions of the world, where the following rules generally apply:

- The employment relationship is highly regulated and contract based.
- Employees tend to enjoy substantial protections that place greater restrictions on what employers can do and what changes they can seek in the employment relationship.

For example, concepts such as “acquired rights” and “termination indemnities” generally do not exist in the US, but they are commonplace in many other countries around the world.

Regarding acquired rights, in many countries outside of the US, once an employer provides a component of compensation (for example, the grant of stock awards) to an employee on a recurring or semi-recurring basis, the employee arguably acquires a vested right to receive that compensation in perpetuity (for example, annual grants of stock options).

Further, on termination of employment, a terminated employee is legally entitled to receive mandatory severance payments that are based on the terminated employee's compensation as in effect prior to termination (potentially including compensation realized from equity compensation awards). These termination indemnities often exist regardless of whether the employee's rights are set out in a formal employment agreement.

Companies must carefully structure equity compensation awards to award recipients in other countries to avoid or minimize these employment-based risks as much as possible. This risk mitigation exercise can typically be accomplished through thoughtfully drafting award agreements, equity compensation plan documents and other employee communication materials with a view toward the various issues that are presented in the affected countries. Too often, multinational companies use the same grant materials prepared for award recipients in their home country when granting stock-based awards to employees in other countries. Inevitably, these grant materials are inherently inadequate simply by virtue of the differences between the various employment and labor laws, rules and regulations.

Companies should take the following specific actions to mitigate employment related risks, among others:

- Draft award agreements to distinguish between the company that is actually granting the equity compensation award and issuing the underlying shares of common stock on settlement of the award (the parent corporation) and the local subsidiary of the granting company that is actually the legal employer of the award recipient
- Include express contractual provisions in grant materials addressing the various employment-related issues, coupled with appropriate governing law, jurisdiction and venue provisions, which can provide substantial protections in favor of the company
- Have the laws and courts of the country in which the issuer is located govern the plan and awards granted under the plan and related disputes rather than the local laws and courts of the country in which the award recipient is employed

Although these actions are not foolproof and do not entirely preclude a local court from applying local employment laws to a dispute between a parent company and an award recipient in another country, they represent the best approach for global companies to manage these risks consistently and effectively from country to country.

Currency restrictions and exchange controls

For many years, various countries around the world either expressly precluded or maintained substantial restrictions on the ability of local citizens to do the following:

- Acquire and hold ownership interests in foreign companies
- Convert local currency into other currencies to purchase foreign goods and services (including shares of foreign corporations)
- Hold foreign currencies abroad for extended periods of time

However, as the economies of countries around the world have increasingly become global and interdependent, many countries have substantially loosened these rules so that it is now fairly common and relatively easy for employees in countries outside of the US to be able to acquire shares of common stock of a US corporation pursuant to an equity compensation award. However, some countries continue to maintain extensive oversight and control over local foreign currency transactions (for example, China (the SAFE approval regime) and Vietnam (the SBV approval regime)). As a result, companies that grant equity compensation awards to employees in other countries must

evaluate and address local foreign exchange rules in conjunction with the grants, particularly when award recipients must pay a purchase price for the underlying shares that will be acquired under the award (such as in the case of stock options or stock purchase rights under an ESPP).

In some instances, companies may be able to structure their stock-based awards in a manner that avoids implicating the local exchange control requirements while still delivering the same economic value to the award recipients (for example, granting stock options subject to mandatory cashless exercise so that award recipients are not required to remit funds out of their home country to acquire shares).

Even today, some countries (for example, India) continue to prohibit local citizens from holding foreign currency outside of their home country and require these amounts to be repatriated to the home country and converted back to local currency within a specified period. In most instances, the legal obligation to comply with these requirements falls on the individual award recipient, but in some circumstances, the company granting the award may:

- Bear some responsibility for satisfying the local law requirements
- Have a duty to notify award recipients of their personal obligations to comply with these rules

Best practices for granting equity awards globally

In addition to identifying, understanding and formulating an action plan to address the legal, regulatory and tax considerations associated with the use of equity compensation globally, multinational companies wanting to grant stock-based awards to their employees in various countries should adopt the following time-tested best practices to minimize legal risks and administrative burdens, enhance the value proposition and understanding of equity compensation awards by award recipients, and ultimately ensure the success of the company’s global long-term incentive compensation program:

- **Create an oversight team**. Due to the multidisciplined nature of global equity compensation, companies should assemble a team of professionals with soup-to-nuts responsibility for the company’s use of equity compensation internationally composed of representatives from legal, tax, treasury, human resources and compensation, accounting and stock plan administration, supplemented with outside legal and tax advisers (including local country experts that are centrally orchestrated).
- **Centralize stock plan administration with the parent corporation**. To ensure a consistent approach from country to country, avoid possible compliance violations for the parent corporation granting the awards and issuing the shares of common stock on award settlement. To reduce the risk of local labor and employment law issues (such as vested rights and termination indemnity risks), stock plan administration should be centralized at the parent corporation level with minimal involvement from the local subsidiaries in the various countries that employ the award recipients (as opposed to a de-centralized approach where the local subsidiaries bear substantial oversight and administration responsibilities).
- **Prepare award agreements and grant materials with a global mindset**. Stock award materials should be drafted with a view toward addressing the many legal, regulatory and tax issues and risks that arise when granting awards internationally.
- **Grant equity awards “smartly.”** By understanding the local legal, regulatory and tax landscape **prior** to granting stock-based awards to employees in other countries (ideally, companies should start the review process three to four months before the actual grant date), multinational companies can structure the awards to avoid local legal and regulatory requirements, reduce various risks and, in some instances, secure preferential tax treatment for the award recipient, the employing company, or both.

- **Ensure compliance with local tax withholding and reporting obligations**. Failure to properly execute income tax and social insurance tax withholding and reporting obligations stands as the most significant compliance risk for companies granting equity awards internationally. If faced with limited resources, companies are best served by placing a premium on addressing this issue above all others.
- **Assess the benefits and costs of local tax-qualified awards**. In determining whether to structure equity awards to take advantage of preferential tax regimes, companies should consider not only the tax savings that will be realized, but also the legal and regulatory costs associated with establishing the tax-qualified awards and the administrative burdens that may be created by the awards, and should conduct a cost-benefit analysis.
- **Develop a grant checklist for each applicable country**. As local law requirements applicable to equity compensation awards are susceptible to frequent change, companies should establish a mechanism for tracking and updating the governing rules that apply to grants made to award recipients in each applicable country.
- **Provide sufficient information addressing local tax consequences to award recipients**. Local country tax supplements ensure that award recipients understand and treat their awards properly from a local tax perspective.
- **Consider the potential benefits and impact of equity compensation reimbursement arrangements**. In many instances, an equity compensation reimbursement arrangement between the parent corporation granting the awards and the local subsidiary that employs the award recipients can be beneficial from a tax perspective. However, a company should assess the feasibility of the arrangement and the potential impact on tax consequences on a country-by-country basis.
- **Do not neglect ongoing oversight and compliance activities**. Legal, regulatory and tax compliance for global stock awards is not static. Each grant of stock-based awards to employees around the world (whether annually or more frequently) should be evaluated independently, and companies should develop and regularly update tools (for example, grant checklists, and legal, regulatory and tax compliance charts) to manage compliance activities in a systematic manner.

Always to consider: Tax planning and corporate development

15 Tax

An in-house tax department for a global enterprise has a wide range of roles and responsibilities. Among the most important are managing risk and fulfilling compliance obligations on myriad fronts, with new compliance regimes, both purely domestic and multilateral, proliferating at an astonishing rate. The tax group is also responsible for effective tax rate management (ETR) (of course), and it assists treasury with strategies to facilitate the movement of funds for optimal deployment of cash within the group structure. In addition, reputational risk may arise from tax controversies, tax exposures and "uncertain tax positions." For some companies, tax is a component of their Environmental/Social/Governance (ESG) value system. All of these things may be important considerations for the in-house tax group when it considers issues related to "going global" or simply maintaining a global group of companies.

The structural framework of international tax has undergone a foundational shift in the past few years, spearheaded by the OECD's "Inclusive Framework" and the "two pillar solution" that resulted from that process.[2] Other significant changes have come about through reforms to domestic tax laws in many countries (in some cases, rather dramatic changes), as well as a steady flow of new EU directives. Among the many lasting effects of these changes are the myriad of new compliance regimes mentioned above, but also a narrowing of the range of headline tax rates (or ETRs) from country to country. Admittedly, the combination of these developments has reduced the **ETR** benefits (that is, reduced tax expense as compared to the expected expense based on headline rates) available from carefully planning an IP holding structure or transfer pricing strategy. However, that is not to suggest that a multinational group derives no benefit from careful and thoughtful tax planning. Broadly speaking, the focus of the in-house tax group has shifted away from ETR "benefits" and toward taking measures to prevent disputes and reduce risk, increasing certainty and enhancing compliance. Additionally, financial benefits can still be obtained by taking measures to prevent ETR inefficiencies in a Pillar Two world, avoid double taxation, and optimize transfer pricing outcomes.

For the purposes of the high-level summary presented below, it is helpful to identify some of the primary areas of focus for the in-house tax department, and then to explain the impact of an expansion or cross-border transaction. This discussion will consider the following: (i) taxable nexus, in line with the group's business model and sales and distribution strategy (i.e., local selling entities or a remote sales model); (ii) cross-border flow of goods and services and the related payments for those supplies; and (iii) the group's global transfer pricing model and strategy (including IP structure and in-group licensing flows), as well as its cash management strategy. All of these considerations may also become elements of complying with Pillar Two or other minimum tax regimes.

Taxable nexus

A key consideration in going global or, specifically, expanding into a new territory is whether the proposed expansion might create a taxable nexus for the group in a country where a nexus did not exist before. Where the multinational group creates a taxable nexus in a new country for the first time, it becomes subject to tax reporting and compliance there, and it will be liable for any tax that may be due. These obligations likely include obtaining a taxpayer ID, registering for local VAT or GST, and perhaps registering for payroll taxes.

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[2] "Pillar One" created a new taxing right that permits "market" jurisdictions to tax a portion of the global system profit of an enterprise, even in circumstances where a traditional "nexus" might not exist (Amount A) and further introduced a simplified arm's length method for baseline distributors (Amount B). "Pillar Two" permits jurisdictions where the global group has an entity or PE to impose tax on low -taxed profits (with 15% as the baseline threshold) that arise in another jurisdiction. The intended outcome is that a minimum 15% rate will apply to the profits that arise in any jurisdiction where the group has a presence. As a result, Pillar Two is sometimes described as a global minimum tax.

Once the business objectives for the expansion have been clarified, the tax group is able to present the list of structuring options (subsidiary branch, representative office, subsidiary or no formal presence at all) and identify the tax issues related to each of them. Quite often, it is not the tax department that has a strong preference for any specific form of local presence, but rather other divisions within the company. To list a few examples, the sales group might need a local entity capable of contracting with local customers due to requirements under local commercial law or simply the business preferences of the local customers. The technology division might want to engage local software engineers, and the employment group might prefer to use a professional employment organization or to engage independent contractors (called “private entrepreneurs” in some countries), meaning that a local entity is not required. The corporate group might prefer using a subsidiary rather than a branch, if the focus is to shield the parent company from liability relating to in-country activities, or alternatively, a branch rather than an entity. A representative office might make sense if the activities are limited in scope and of auxiliary nature. Any of these choices can be accommodated by the tax department, and tax cost is unlikely to be a driving factor in deciding on the form of the local presence. That said, the tax group will want to evaluate risks related to some key exposures, including whether some form of “gross-basis” taxation may apply (see discussion below), and take protective measures.

Incorporating a local entity will generally create a nexus for that entity in countries where domestic tax rules tie “tax residence” to the place of incorporation. Alternatively, or in addition, local rules might base tax residence on the place of effective management or a similar concept. However, for purposes of this discussion, we will accept that forming an entity in-country per se creates a taxable nexus for that entity. Creating a nexus by registering a branch simply shifts the compliance and reporting obligation to the head office, i.e., the nonresident head office entity is now required to file a local income tax return, and either the head office or the branch will have to register to pay indirect taxes and will be required to file indirect tax returns.

If the group decides not to form an entity (or to formally register a branch), a more nuanced approach would be required to evaluate whether there is a taxable presence, because a nexus for nonresident taxpayers (known as a permanent establishment (PE) in the treaty context and, oftentimes, domestic law) might arise due to “attribution” of in-country activities and facilities. Under traditional rules, a PE might exist if either (i) the nonresident has a fixed place of business in-country through which it conducts its business or (ii) an in-country person (other than an independent agent) has and habitually exercises the authority to conclude contracts in the name of the nonresident. We will refer to these, respectively, as a fixed place of business PE (FPOB PE) and a dependent agent PE (DAPE). The OECD Model Tax Treaty now also includes a new DAPE standard, which asks whether the in-country person “plays a principal role” leading to the conclusion of contracts binding on the nonresident where the contracts are routinely concluded without material modification. This newer standard has been adopted in certain bilateral treaties, and also has effectively become (or has been) a touchstone for the nexus standard under the domestic law in many countries. Finally, under the domestic law of some countries, a taxable presence can arise as a result of performing services for even one day, and some bilateral treaties provide for the possibility of a “services PE” — which generally would require presence of a longer duration, e.g., 90 days. However, some double tax treaties provide for a much lower threshold and deem a taxable presence to exist on the first day services are rendered in-country.

Activities of independent contractors, by and large, should not be attributed to the nonresident enterprise absent compelling circumstances that would indicate a contrary result. However, in the case of employees, if those individuals are deployed to work locally but the nonresident is the statutory employer, the in-country activities are likely to be attributed to the nonresident. Even so, an FPOB PE should not arise unless the nonresident has premises at its disposal, i.e., a fixed place. For this purpose, it is not necessary for the nonresident to own or rent the premises. If the individuals will work from home offices, all facts and circumstances need to be evaluated and the updated guidance of the OECD published in November 2025 be taken into account. Based on this updated guidance, a

home office creates a FPOB PE for the nonresident if two conditions are cumulatively met: (i) the employee works for 50% or more of their working time from home and (ii) there is a commercial for the activities to be undertaken by that individual from home. The latter usually requires a link between the individual's presence at home and the carrying on of the business of the nonresident and therefore, is generally present where the physical presence of the employee is required to, for example, visit customers. Merely obtaining the individual's services or allowing them to work from home for their convenience is not considered a commercial reason. Of course, if the nonlocal employer were to make available an alternative in-country location, **those** premises would likely be at the disposal of the nonresident, and attribution of the home office would be unnecessary to find a local taxable presence.

No PE should arise if the activities (or the subject matter of the contracting, in the case of a DAPE) are "preparatory or auxiliary" to the business of the foreign enterprise. Acknowledging the practical difficulty in making this determination, the Commentary states the following:

> [the] decisive criterion is whether or not the activity of the fixed place of business in itself forms an essential and significant part of the activity of the enterprise as a whole. Each individual case will have to be examined on its own merits. In any case, a fixed place of business whose general purpose is one which is identical to the general purpose of the whole enterprise does not exercise a preparatory or auxiliary activity.

The preparatory or auxiliary exceptions include use of facilities solely to store, display or deliver goods or merchandise, or the maintenance of inventory solely for the purpose of storage, delivery or display, or for the purpose of processing by another enterprise. However, all of the individual exceptions are subject to an aggregation rule that examines the "overall activity" that results from the combination of all the separate activities.

Regardless of whether a local taxable presence exists, the group then needs to identify and characterize the cross-border supply of goods and services, and to evaluate the tax consequences of any consideration paid for that supply. This is the topic discussed in the next section.

Cross-border flows of goods and services, and payments for the same

Cross-border supplies of goods and services create a variety of tax considerations and compliance and reporting obligations. In many cases, the tax consequences will depend on the nature of the supply or, stated otherwise, the "character" of the income derived by the supplier.

If the group does not have an in-country taxable presence, but instead is using a non-local entity to transact with local customers (i.e., a "remote supply"), the income tax considerations are effectively nil. However, depending on the commercial terms agreed between the parties (e.g., the INCOTERMS governing the transaction), the nonresident supplier may have to evaluate indirect tax consequences and, in the case of tangible-goods supplies, manage issues around the importation, including potential tariffs and duties, import VAT/GST, and storage and warehousing.

If the group does have a taxable presence in the form of a local entity, generally speaking the "arm's-length principle" applies, meaning that each party to the transaction needs to be compensated as though it were dealing with an unrelated party. (In this case, we strongly recommend that the customs group and the tax group communicate with the aim of identifying any differences in the strategic approaches to valuations for customs purposes versus the approach used for transfer pricing purposes.) In addition, it is always recommended, and in some countries required, to execute an "intercompany contract" to memorialize the terms of the transaction and the rights and obligations of the parties. By and large, the expectation is that each entity will be liable for income tax in its country of residence, and the tax would be imposed on net income (that is gross income reduced by deductible expenses). Solely in this respect, the focus of the tax department is likely to be on the consideration derived by the new in-country entity and its deductible expenses. In most cases, it is

reasonable to expect that the entity will derive a cost-plus return or a limited distribution return on its routine activities. The limited distribution return result would occur where the in-country entity contracts with customers, i.e., a "local supply." Provided that the entity does not assume or manage the significant risks inherent in the business, the transfer pricing result typically would be that the entity derives a limited return, which is achieved by way of making a payment to the nonresident supplier for cost of goods or services. (As a side note, broadly speaking, it is not inconsistent with this model for the local distribution entity to take on all of the responsibilities related to importation of tangible goods.) On the other hand, the cost-plus result is likely to occur in cases where the local entity is a service provider to the nonresident enterprise. For example, the local entity might provide marketing support services to the nonresident, which enters into contracts with local customers (raising the considerations described in the prior paragraph on remote supplies). Notably, there is a trend in recent years for local taxing authorities to prefer to measure taxable profits of a sales or marketing support entity based on a return on sales rather than a return based on costs.

If the nonresident has a local taxable presence (a PE), then, instead of the local entity filing an income tax return to report its net income, the nonresident will file a tax return to report the "profits attributable" to the PE. While a variety of methods may apply to determine the PE's reportable profits, the OECD approach is generally to hypothesize that the PE is dealing with a separate enterprise on arm's-length terms. This can result in (hypothetical) flows of goods and services between the PE and the nonresident. In many cases, the tax results would be quite similar to the results under the separately incorporated subsidiary model described above, but there may be important differences. One of the most significant is that some countries will take the position that payments by the nonresident head office (for example, royalties or interest) have their "source" in the PE's country, with the result that the local taxing authorities might assert that withholding tax is due on payments made from the head office jurisdiction. Another is that if the nonresident entity fails to declare and report a PE, extremely harsh consequences can arise, including in some cases criminal liability for the directors.

As discussed above, regardless of the form of the local taxable presence, one area of focus for the tax group undoubtedly will be the liability due under the local corporate income tax regime. Income tax is generally imposed on a **net basis** (gross income less expenses), with taxable income being determined under the arm's-length standard. However, the tax department also needs to be very careful to spot possible exposures to taxes that would be imposed on a **gross** basis. Consider the following four scenarios as illustrative examples:

- The local entity is a "cost-plus service provider" and therefore issues invoices to the nonresident for services provided. The group needs to ensure that local indirect tax does not apply on the basis that, for example, this is a nontaxable supply, or that the supply is taxable but qualifies as a "zero-rated" export supply. Otherwise, the invoiced amount attracts a 16% VAT (or higher) to be paid by the service recipient, say the US entity, which is an unrecoverable cost.
- The new territory has implemented a "digital services tax" or DST, and sales to local customers will be subject to a 2-3% levy imposed on the amount of external revenue recognized from transactions with local customers involving certain types of digital goods and services.
- The local entity is a distributor of digital goods and services provided by the nonresident. The tax group believes that it is appropriate to characterize the cross-border "cost of service" payment as a payment for services performed outside the local country that is accordingly not subject to withholding tax under domestic law. However, there is reason to believe that the local taxing authority will not agree with this characterization, instead asserting that the payment is partly or wholly a royalty, and will seek to impose withholding tax on some portion (or all) of the outbound payment.
- The local entity makes payments characterized as royalties under domestic law. There is a "base erosion" provision in domestic law that denies a tax deduction for payments made to certain

low-tax jurisdictions, including Ireland and the US. If the expense is not deductible, the taxable income of the local entity is increased by that amount, effectively subjecting the amount of the payment to local tax on a gross basis.

This is just a partial list. Many other examples of "gross-basis" taxes exist. It is important for the tax group to consider carefully all the possibilities.

Global transfer pricing model and strategy

The multinational group's global transfer pricing policy and strategy should be able to accommodate expansion into new territories. Generally speaking, it is expected that any new transfer pricing flows will be consistent with this global policy. The group will need to understand and comply with transfer pricing documentation thresholds and requirements in the new territory. Any deviations from the global position of the group should be carefully examined and explained in the relevant documentation.

Special attention may be warranted if the expansion involves a function that had previously been centralized such that a single entity (or certain designated entities) had been compensated for performing that function on a regional or global basis. Examples might include strategic management for the business or "DEMPE" control functions for IP (that is, development, enhancement, management, protection and exploitation of the IP). If those functions had been previously performed only in certain designated locations and had already been subjected to a separate transfer pricing analysis, there could be some duplication unless the group were to separately evaluate and compensate the new entities performing those functions. For example, if the expansion involves locating a high-level executive(s) in-country, but the group's policy already compensates a different entity in a different country for similar strategic management functions, the group might need to recalibrate the "management fee" paid by other entities. If the expansion involves research and development functions, or more broadly "DEMPE control functions" (for example, a chief technology officer will be based in Spain, rather than in Ireland, as an employee of the Irish IP company), the group might need to adjust how it compensates the group entities that own the IP and consider whether new or different entities are entitled to an IP-related return.

16 Mergers and acquisitions in a cross-border context

Savvy technology firms employ a range of methods for expanding into foreign markets. Tech companies venturing abroad should carefully evaluate the most promising foreign-market entry strategy in each particular country of interest.

The different foreign-market entry strategies are best viewed along a spectrum progressing from lower to higher degrees of commitment, investment, integration and control. At the lower end, one finds contractual arrangements ranging from direct export to more involved scenarios of commercial agency, distributorship, licensing, franchising and various collaboration and resource-sharing arrangements. In the middle are situated more sustained collaborative investment strategies, including acquisitions of minority stakes in existing foreign enterprises and the establishment of ventures jointly owned with a local partner. At the upper end of the spectrum are the most challenging yet potentially rewarding foreign direct investment (FDI) scenarios, which include traditional cross-border mergers and acquisitions and greenfield ventures.

Determining the mode of foreign-market entry that presents the right fit for a technology business is a complex endeavor that warrants careful, and often significant, planning and analysis. This is not the time for a “quick-and-dirty” decision-making process, as there is no “one-size-fits-all” solution available. Chief among the factors influencing the decisions are the company’s long-term strategic goals, its degree of international experience and familiarity with the new market(s), the extent of resources that it can commit, the degree of risk it is willing to incur, its network of existing relationships, the general industry environment in which it operates, and the particular characteristics of its products and services.

This chapter will present a high-level overview of traditional M&A in the cross-border context — i.e., transactions in which a 100% or nearly 100% interest in a foreign enterprise is acquired.

M&A vs. Greenfield investment

It is worthwhile to make a few preliminary observations concerning greenfield investment (i.e., the creation of overseas ventures from the ground up, typically using a wholly owned local subsidiary established by the parent), as tech companies adopting FDI strategies frequently find themselves deliberating between M&A and greenfield (i.e., the “buy” versus “build” decision). Not surprisingly, of the numerous factors that influence these choices, many are fundamental business issues concerning commercial and long-term strategic goals; different companies will thus weigh them differently. Ultimately, the particular capabilities (and the mobility of such capabilities) that the investing company aims to bring to bear in, or conversely to derive from, the new market(s) tend to drive the decision-making process.

A technology business that pursues an M&A strategy is purchasing access not just to the tangible and IP assets of the target, but also to a valuable trove of country-specific information, experience and capabilities (including the collective skillset of the target’s workforce). A technology business that possesses relatively little familiarity with a host country and its economy may shy away from a greenfield investment in favor of M&A options. Similarly, a business whose strategic priority is to take advantage of perceived synergies between its own capabilities and those of a foreign enterprise will ordinarily look to traditional M&A as the preferred local-market entry option.

Conversely, the greenfield investor is essentially bringing its own capabilities to bear in the local market(s), and the extent to which those capabilities are easily portable across borders will influence the success of the investment. For many tech companies, the prospect offered by greenfield investments of avoiding the challenge of integrating an acquired business into the larger parent organization is appealing. Moreover, the extent of potential liabilities of the acquired business (as is

often the case, for example, where a high level of corruption exists in the host country) may drive the expanding technology enterprise to a more rigorous analysis of a greenfield FDI approach.

Bridging the cultural divide

The oft-noted “culture gap” that complicates cross-border M&A transactions goes beyond legal and regulatory variations to encompass all manner of linguistic, relational, values-based and other differences arising from the distinct social and business traditions that participants bring to the table. Divergent language requirements, negotiating styles, nonverbal communication modes and even attitudes toward the legal profession all carry the potential to impede the negotiation, execution and implementation of deals if not proactively anticipated and addressed.

While the myriad cultural frictions in global M&A practice are beyond the scope of this chapter, it should be noted that cultural obstacles are most often effectively addressed through early recognition, communication and planning; close cooperation with local counterparties, partners and advisers; and a pragmatic readiness to “do as the Romans do.” Successful cross-border investors pay close attention to relevant areas of cultural difference at every stage of deal planning, execution and implementation — including post-acquisition — and are prepared to meet the challenges in a spirit of collaboration, flexibility, accommodation and respect.

The cross-border due diligence investigation

Due diligence is the process of obtaining and validating material information about a target’s business and identifying potential liabilities, risks and other significant issues affecting the business and the proposed M&A transaction. Diligence is necessary to determine the exact nature and characteristics of what is purchased, verify the valuation and other key commercial assumptions, identify and allocate risks, and determine optimal transaction structure and process. It is also a key aid in preparing a post-acquisition integration strategy. In addition, for US buyers engaging in outbound M&A, thorough pre-acquisition review is increasingly important to end as of “day 1” activities that are not compliant with US trade sanctions or export control laws and to limit potentially significant successor liability under the federal FCPA.

Buy-side due diligence review, a key part of even purely domestic M&A deals, assumes a heightened importance in the cross-border acquisition context, as the risks posed to foreign investors of an inadequately conducted diligence exercise are magnified. Many challenges are interposed — language and cultural barriers, different systems of law and conventions of legal practice, unfamiliar accounting standards and documentation practices, constraints of local data privacy laws, unfamiliar corporate and management structures — which can impede due diligence investigations. Physical distance and time zone differences can complicate the basic logistics of conducting cross-border diligence and the timely aggregation, analysis and reporting of findings.

A crucial ingredient for a successful and effective cross-border due diligence exercise is a thorough comprehension of the scope and objectives at the outset. All participants across the various diligence workstreams must have a good understanding of the strategic rationale for the acquisition; the deal’s jurisdictional reach; the contemplated structure (merger, share acquisition, or asset deal); the nature of the target’s business, including in relation to the buyer’s business (competing or complementary); the negotiating framework (auction or negotiated); and the desired timeframe. Absent this understanding, even an otherwise well-organized diligence effort may fail to unearth key legal and commercial risks, reduce the likelihood that suitably protective deal terms will be negotiated and hamper successful post-acquisition integration.

A deficient due diligence process is thus one of the greatest deal risk factors from a buyer’s perspective. Prudent precautions to mitigate this risk include the following:

Prioritize the commercially pragmatic diligence exercise and define scope of work with precision

Due diligence priorities should be driven, first and foremost, by the strategic rationale for the transaction — for example, acquisition of IP assets or product lines, new key business relationships or market penetration — but with an eye on commercial pragmatism. The buyer should agree with its outside legal advisers what key legal diligence needs to be carried out to support that strategic rationale, and which nonmaterial risks can be ignored. Appropriate monetary and other quantitative materiality thresholds should be established for items such as contracts, litigation and other liabilities. Key contracts or those that raise significant legal issues should be priorities. However, even small contracts can give rise to significant exposure under FCPA or local anti-corruption statutes and may need to be carved out of monetary materiality thresholds. The same can be true with respect to contracts that trigger the application of trade sanctions or export controls.

Practice good project management and organization

Even a modest-sized international acquisition review may involve a large and diverse cast of participants that includes the buyer's internal teams, outside legal advisers (including both global lead counsel and local counsel), financial and accounting advisers, and consultants with topical expertise in various areas (e.g., environmental, insurance or human resources). Care must be taken to eliminate the risks of duplication of effort or, conversely, inadequate coverage. Well-defined areas of responsibility and clear channels of communication should be established.

Ensure clear, timely and useful reporting

Ensuring prompt sharing of material information with other interested reviewers is key. Diligence reviewers should be mindful of potential "deal stoppers" and report these to the teams responsible for negotiation and documentation as soon as these issues are uncovered, rather than waiting until interim or final diligence reports are delivered. To avoid the common problem of "information overload" for the buyer's decision-makers, the appropriate level of detail and style of presentation of the diligence report to be prepared should also be agreed in advance (the current practice trend increasingly favors streamlined "red flag" or "exceptions only" reports, but if representations and warranties insurance aka warranty and indemnity insurance is being used, summary reports might be required by the underwriters). Where potential problems are identified, the legal team should take a proactive approach and propose possible solutions, rather than passively reporting material findings. Those solutions may include recommended avenues of additional or confirmatory investigation, contractual mitigation strategies through representations, warranties and indemnities for identified risks, or even changes to the proposed transaction structure to exclude certain assets or liabilities (and in some cases, entire problematic business units) from the deal.

Special reporting for compliance issues

As M&A due diligence investigations have expanded in recent years to include efforts aimed at unearthing possible corrupt practices, it has become increasingly common for a buyer to commission a separate FCPA compliance investigation of the target business in parallel with the main due diligence review. FCPA issues, when they are relevant to a particular deal, are increasingly likely to attract attention from the buyer's board of directors. In these cases, the board will appreciate delivery of a stand-alone FCPA due diligence report. Maintaining a separate FCPA diligence workstream also helps avoid unnecessary distributions of sensitive FCPA-related information to the wider acquisition review team. Moreover, the buyer's FCPA counsel will often engage and direct the work of forensic accountants and other specialized nonlawyer advisers, which — at least in the US — offers the advantage of extending the attorney-client privilege to communications with these advisers.

Privilege and privacy concerns

Both in-house and outside counsel should be aware during pre-acquisition review (and indeed throughout the lifecycle of a cross-border M&A transaction) that the rules protecting attorney-client

communications against disclosure to third parties can vary significantly between jurisdictions and do not universally resemble the robust evidentiary privilege familiar to US lawyers. In consultation with qualified local counsel, care should be taken to adopt communication protocols that mitigate the risks of unprotected communications or the inadvertent waiver of confidentiality protections. In addition, counsel and businesspersons alike need to be aware that many jurisdictions severely restrict the cross-border transfer of protected personal information, including that of employees and customers. Accordingly, the diligence exercise needs to be undertaken with those restrictions firmly in mind.

Documenting the transaction

Choice of governing law

A fundamental decision for cross-border M&A deals involves what jurisdiction's law will govern the transaction documents and related disputes between the buyer and the seller. The choice of governing law will have wide-ranging repercussions on deal planning and implementation. The content of the main purchase agreement and ancillary documentation may vary significantly depending on which body of law is selected by the parties (for example, whether the agreement relies on extensively drafted representations and warranties, as tends to be customary in countries with the common law tradition, or relies on statutory law to supply certain substantive terms, as is the case in many civil law countries). Ideally the parties should broach this subject and reach an agreement on the governing law at the outset of the transaction process.

Additionally, it is important to discuss at the term-sheet stage (so that neither side is unpleasantly surprised later) expectations around purchase price adjustments and tax elections. In many jurisdictions, "locked box" transactions are more usual than two-step working capital adjustment transactions. Additionally, US taxpayer shareholders of a target can be affected by tax elections the buyer makes in relation to the acquisition. The natural reflex of a buyer, particularly one in a superior bargaining position, is to seek to impose its home country's law and norms, and its standard domestic transaction form documents on the seller. However, depending on the particular deal in question, following this instinct is not always in the buyer's interest, and the suitability of other bodies of law — with an eye toward the buyer's ability to realize fully its desired remedies — should be the subject of expert evaluation. In this regard, note that court judgments based on US law can be very difficult to enforce in many foreign countries. Nonetheless, as a general rule, situating the parties' contractual relationship within a stable, predictable and well-developed legal environment is an important part of a foreign investor's overall risk-mitigation strategy. In all events, care should be taken in the governing law clause to exclude conflicts of laws principles that could result in the unintended application of a body of law different from that selected by the parties, particularly if a neutral jurisdiction's law is expressly selected (a relatively common compromise between buyers and sellers). The parties and their counsel should also bear in mind that mandatory provisions of local law may supersede the parties' choice of law regarding the specific substantive areas, and, indeed, more general restrictions on the choice of foreign law (as with certain kinds of FDI transactions in China, for example) may also apply.

An invalid choice of law, or the unexpected application of a different body of law, can introduce significant uncertainty over the respective rights and obligations of the parties in the event of a dispute. Both internationally and locally experienced counsel should review the transaction documents to ensure that they adequately factor in differences between the applicable law and the system of contract law with which the buyer may be most familiar.

Finally, the selection of a forum for disputes (including the choice between court jurisdiction and arbitration) should be considered in parallel with choice of law negotiations as part of an overall M&A dispute resolution strategy.

International acquisition agreements

As with domestic M&A transactions, international M&A deals ordinarily involve a principal transaction agreement governing the acquisition of assets or equity interests. However, the cross-border context presents an added degree of complexity for the transaction documentation.

Similar to its domestic analogue, the purchase agreement for a cross-border M&A transaction will typically include a number of structural elements: definitions intended to prevent interpretive problems and elaborate complex deal-specific concepts; mechanical provisions to establish what is changing hands on each side and how the transaction will be consummated; provisions that describe purchase price adjustments, where applicable; various conditions that must be satisfied or waived to achieve closing; representations and warranties offering a baseline picture of the target business and its assets and liabilities at the time of signing (tied to a set of disclosure schedules providing either exceptions to the statements made or a list of information required by such statements); pre-closing affirmative and negative covenants governing the conduct of the target's business and the relations between the parties prior to closing; termination provisions; remedies and indemnification provisions whereby the seller will indemnify the buyer against certain losses; provisions selecting a body of governing law and a forum for the resolution of disputes; and miscellaneous other clauses. The chief aim of the main acquisition agreement is, naturally, to give binding legal effect to the transfer of ownership of the acquired property (generally shares or business assets) and to the other negotiated terms and conditions of the parties' business deal.

The principal acquisition agreement will typically be accompanied by other ancillary agreements and instruments, which may include parent guarantees, releases, employment and consulting agreements, noncompetition agreements, transitional services agreements (generally where the target business is being divested from a larger integrated business) and various specialized instruments of conveyance. While these are generally negotiated in parallel with the main agreement, such ancillary agreements will frequently present similar international complexities to those encountered in the main agreement. Such subordinate documents should be reviewed to ensure compliance with local legal requirements and consistency with the terms of the principal acquisition agreement.

Note that local law will often prescribe documentary requirements and other formalities for the legal conveyance of share or asset ownership, which are often handled in separate instruments. Particular areas of concern and complexity in relation to non-US businesses are often the transfer of employees and benefits plans, and the assignment of contractual rights and duties. Many countries' laws also require transferred assets and assumed liabilities to be enumerated and described in the transaction documents with much greater specificity than is typically the case for domestic US acquisitions.

In addition, in transactions where numerous local subsidiaries of the parties are involved, one best practice is to use shorter subsidiary/local business transfer agreements in each jurisdiction in which business assets are changing hands under the auspices of (and subject to) the master purchase agreement. In addition to facilitating a smoother process to implement and consummate the local transaction, these are also helpful from a compliance and record-keeping perspective going forward.

Regardless of the choice of law, the buyer and its counsel should take care to draft representations and warranties suitable to the target's business, as that business has been revealed and illuminated by pre-acquisition diligence. After the diligence exercise itself, representations and warranties (or their functional local equivalent) are often the chief means by which the buyer will manage its potential liabilities and risk exposure arising from the transaction. Representations and warranties should also reflect jurisdiction- or industry-specific terminology, and be drafted based on a thorough comprehension of applicable provisions of local law. In addition to traditional business risks, the evolving nature of business enterprises and of national legal frameworks have increased buyers' focus on representation and warranty coverage in such areas as anti-corruption, import/export regulation, data privacy, and the integrity and adequacy of IT systems.

Other liability pitfalls in international M&A

Technology firms seeking to make acquisitions abroad should also be aware of various other areas that enjoy well-earned reputations as “liability traps” for unwary investors. The list below is intended to be illustrative rather than exhaustive.

Ownership

The failure to discover in time that a foreign target does not actually own its claimed IP rights can be very costly. Accordingly, the due diligence investigation must verify the existence of a clear chain of title from each and every inventor or prior owner, the proper filing of assignments, and the absence of liens or other encumbrances. The target’s contracts with its employees and contractors must be reviewed to confirm that rights to inventions have been properly assigned. Joint development agreements with universities, government agencies or other partners must be scrutinized to see how the use and ownership of created IP are addressed. If the target’s technologies have been developed in part with public funding (in the form of government grants, loans, tax credits or otherwise), be aware that the associated IP rights may be subject to claims by, or reversionary rights in favor of, public authorities in the foreign country.

Compliance

If not adequately managed, legal and regulatory compliance risks can have enormously costly implications for a buyer. Corporate misconduct by a target company, including activities such as fraud, bribery, collusion, money laundering and data privacy offenses, hold significant potential for loss of deal value, as well as potential civil or criminal sanctions under the FCPA and other domestic and foreign statutes. Compliance risks are often mitigated through means such as specialized forensic diligence, negotiated indemnities for identified risks, the exclusion of high-risk business activities from the transaction, purchase price adjustments, and post-acquisition audit and remediation.

Labor

US businesses venturing abroad should not be surprised when encountering the highly regulated and extremely labor-friendly environment that prevails in many foreign jurisdictions. Other nations’ laws often impose severe constraints on the ability to terminate workers and may grant continued employment rights, or impose substantial severance obligations, even in an asset acquisition. In some jurisdictions, works councils or similar employee bodies enjoy rights of consultation or even approval over certain corporate transactions. The prevalence and legal treatment of organized labor and collective bargaining agreements likewise vary widely from one jurisdiction to another. The majority of these and other employment-related issues can be addressed through early identification, local expert consultation, and adequate document drafting and integration planning strategies.

Pensions

The acquisition of foreign pension plans and their attendant liabilities in a cross-border M&A transaction can represent a substantial portion of the buyer’s overall deal risk. Considerable variation in legal frameworks and valuation methods, as well as the specter of underfunded obligations, make pension issues a major risk-management focus. These concerns are often heightened in the transactional context, as “change of control” events can often trigger funding obligations. Thorough diligence, obtaining clarity concerning applicable accounting standards and actuarial assumptions, and negotiation of representations, warranties and post-acquisition plan administration and funding obligations, are generally key to mitigating the buyer’s risks here.

Competition / antitrust / merger control / foreign direct investment / outbound investment

Many cross-border M&A transactions must be notified to, and in some cases receive specific clearance from, competition and investment authorities in multiple jurisdictions prior to closing.

Coordinating the proper and consistent preparation of these filings can pose a logistical challenge for the parties and their counsel. Compliance can entail significant delays in deal execution or burdensome conditions such as forced divestiture. Noncompliance — including “gun jumping” by completing a transaction without due notification — can invite substantial fines. International merger control issues can affect target valuation, purchase price and post-acquisition conduct of the business. Advance planning, liaising with relevant authorities and (where appropriate) exclusion of problematic countries or business units from the acquisition can aid in addressing potential regulatory issues.

Post-acquisition integration

It is by now widely recognized by sophisticated multinational enterprises that successful post-acquisition integration is crucial to realizing the strategic benefits and anticipated synergies sought by M&A buyers. Yet in practice, failures in integration planning and execution remain among the chief reasons for unsatisfactory acquisition outcomes.

Integration is an ongoing, multistage and evolutive process. Typical integration focus areas include diverse matters such as compensation and title leveling; foreign tax planning opportunities and the preservation of advantageous tax attributes; implementation of compliance frameworks; harmonization of information technology systems; consolidation of accounting, audit and reporting systems; sales and supply channels; customer retention; workforce integration; licensing and business registration formalities; and perfection of the conveyance of various assets.

Well-designed integration plans depend on insights and strategies developed in the pre-acquisition diligence phase. They are generally most effective when deal teams and integration teams work in close collaboration beginning well in advance of closing. While each integration plan is necessarily tailored to a specific target’s business and local environment, successfully executed plans tend to follow a broadly similar approach: early risk identification, design and implementation of practical solutions, and the provision of ongoing support and monitoring.

Contributors and contacts

This book includes combined know-how of over 6,500 Baker McKenzie attorneys and tax professionals collaborating every day on global commerce — and many former colleagues who have contributed to previous editions. Below, we list the Baker McKenzie attorneys who helped write this fifth edition, but you should feel free to reach out to any Baker McKenzie attorney worldwide with any questions you have.

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