



# **Key Legal Issues to Consider in International Agreements**

*4th Negotiating & Drafting International Business Agreements Course*

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- 1. What is special about international deals?**
- 2. Selection and role of local counsel**
- 3. Structuring issues**
- 4. Governing law and dispute resolution**
- 5. Regulatory approvals**
- 6. Anti-bribery/corruption**

# 1. *What is special about international deals?*

- **Intersection of different cultures and legal systems**
  - > Different cultures and business practices
  - > Different legal systems, laws and regulatory requirements
  - > Need to be sensitive to these differences, manage their impact and be creative in coming up with solutions
  - > Each jurisdiction and transaction is unique
- **What tools are available to manage these challenges?**
  - > Experience of client and primary counsel in dealing with the jurisdiction and/or counterparty in question
  - > Local counsel in the applicable jurisdiction - understanding of local law, business practices and connections
  - > Other agents, partners or representatives in the foreign jurisdiction
  - > Critical to have strong local language capability or support

## 2. *Selection and role of local counsel*

- **Selection of local counsel**
  - > Focus on process of selection given the key role they should be playing
  - > Prior relationship or first hand referrals from a trusted source are best
  - > Seek expertise in local law and experience with international transactions
  - > What contacts do they have?
    - regulators, business and political leaders
  - > What approach to conflicts do they have?
    - some jurisdictions have a very different approach
  - > Need to be comfortable that they will give your matter the attention it requires

## 2. Selection and role of local counsel (cont'd)

- **Role of local counsel**
  - > Determine nature of role and clearly delineate responsibilities
    - direct negotiating role or principally supporting advice?
    - expectations of responsibilities can be very different in other jurisdictions
  - > Effective and regular ongoing communication is key
    - need to have full capabilities in both local language and English
    - make sure local counsel understands business and transaction objectives
      - allows them to ask the right questions
    - different levels of importance may be attached to different issues in other legal systems and business cultures
  - > Consider what value added services local counsel can provide
    - local business practices and norms
    - political and cultural sensitivities
    - relationships with regulators, business and political leaders

### 3. *Structuring issues*

- **Multiple jurisdictions involved in international transactions provide both challenges and opportunities**
- **Tax and corporate structure considerations**
  - > General
    - what form should an acquired entity be held in?
    - what form should a joint venture take?
    - consider how structure affects the rights and liabilities of the parties, as well as future flexibility
  - > Tax planning
    - determine how best to achieve overall tax efficiency in respect of
      - financing the acquisition or joint venture
      - ongoing cash flows of the business
    - flow-through treatment; interest deductibility; withholding taxes

### 3. Structuring issues (cont'd)

- **Currency, inflation and interest rates**
  - > differences and fluctuations in these rates need to be addressed and managed both to conclude the initial transaction and often on an ongoing basis thereafter
    - US\$ as a default/reference currency is becoming less popular
    - inflation and interest rates can vary widely between countries
  - > consider impact on purchase price and ongoing capital contributions and distributions
    - also for the purposes of baskets, thresholds and caps in a purchase agreement
  - > consider impact of exchange controls on ability to make payments and receive distributions
    - consider inserting contractual provision in agreements with governments or state owned entities that allows for the repatriation of cash flows/profits, including in desired currency

### 3. *Structuring issues (cont'd)*

- **Investment protection considerations**
  - > bilateral investment treaties can provide important protections from seizure of assets or other unfair treatment in foreign jurisdictions
    - consider case of Crystallex vs. Venezuela
  - > do the countries in question have in place a bilateral investment treaty or similar protective mechanism?
  - > if not, can the transaction be structured through a third country that has such a mechanism with the target jurisdiction?

## 4. *Governing law and dispute resolution*

- **Key inter-related questions are how an agreement will be interpreted in the future, how disputes will be resolved and how rights can be enforced**
  - > considerations are highly jurisdiction and situation specific
  - > how well developed is the legal system of the jurisdiction?
  - > how well entrenched is the rule of law, is there a culture of compliance?
  - > is the court system biased in favour of the government or local parties?
- **Governing law sets the rules under which a contract will be interpreted and rights and obligations will be determined**
  - > parties often seek New York or English law as an international standard
  - > Hong Kong law is becoming popular for international transactions involving Chinese entities
  - > choice may depend on relative bargaining power of the parties
  - > will chosen law be accepted by dispute resolution forum?

## 4. *Governing law and dispute resolution (cont'd)*

- **Dispute resolution: process and venue for resolving disputes**
  - > Consider discussions between parties as a first step - mid level operations people and then escalation to senior management
    - focus on reaching a mutually acceptable solution and preserving relationship
- **If external adjudication is necessary consider whether court, arbitration or technical expert is appropriate**
  - focus on speed, reliability and ability to enforce decision
  - are local courts efficient?
  - will foreign courts take jurisdiction?
  - what relief is likely to be required (damages, specific performance, etc.) and who can grant it?
  - would an independent technical expert be most efficient for certain issues?
- > If arbitration, what venue, who will be the arbitrators and what will the rules be?
  - ensure agreement to arbitrate is enforceable under law of contract

## 4. *Governing law and dispute resolution (cont'd)*

- **Enforcement: how can a party enforce a determination in its favour?**
  - > what if the jurisdiction of the target company or joint venture or where the assets are located is different from the jurisdiction where the dispute was adjudicated?
    - can the award be enforced in the desired jurisdiction and what steps are required?
  - > protective contractual arrangements and self help remedies
    - escrowed funds in a friendly jurisdiction
    - set off of against contractual obligations
    - option to terminate JV or not to perform certain obligations

## 5. *Regulatory approvals*

- **International transactions often require the parties to obtain special regulatory approvals in addition to those required for domestic transactions**
  - > key is to identify early on in the transaction planning process which regulatory approvals will be required and plan a strategy for obtaining them
  - > categories of approvals (a) administrative; (b) substantive and objective criteria; and (c) substantive and subjective/political criteria
    - foreign investment review, competition, sector specific, etc.
  - > seek assistance from local counsel and other local representatives/contacts to determine the true nature of and the best way to obtain the approvals
  - > for subjective/political approvals, consider lobbying or other direct or indirect contact with decision-makers (in compliance with applicable law)

## 5. *Regulatory approvals (cont'd)*

- **Example #1: Foreign investment and national security review**
  - > can be the most challenging type of approval to obtain
  - > often has explicit or implicit political component and may involve primarily subjective decision-making
    - especially perceived to be that way in the US with the CFIUS process after the introduction of the FINSA legislation
    - recently most sensitive in the case of Chinese, Middle Eastern and Russian investments
  - > some jurisdictions, like Canada, have special rules that apply to state-owned enterprises and sovereign wealth funds which mandate enhanced scrutiny

## 5. *Regulatory approvals (cont'd)*

- **Example #1 cont'd**

- > *U.S. Foreign Investment and National Security Act of 2007 (FINSA)*

- The President has the authority to suspend, prohibit or divest any foreign acquisition of a U.S. business that is determined to be a threat to the national security of the U.S.
    - FINSA broadens the scope of the pre-existing national security transaction review regime
      - national security mandate is broadened to include “homeland security” matters, “critical infrastructure” including “major energy assets”, and “critical technologies”, in addition to the traditional defense sectors

- > *Investment Canada Act*

- traditional “net benefit” test
      - rejection of the acquisition of the space division of McDonald Detwiler
      - rejection of BHP Billiton’s bid to acquire Potash Corp.
    - special rules for state-owned enterprises
    - broad national security review power

## 5. *Regulatory approvals (cont'd)*

- **Example #1 cont'd**

- > proactive strategies for successfully obtaining such approvals include
  - identify key political and other sensitivities early in the transaction process and consider ways of addressing or mitigating them
  - consider early consultation with government decision-makers
  - establish a coherent PR strategy in order to “shape the message” to the public

- **Example #2: Chinese regulatory approvals for overseas investments and acquisitions**
  - > Significant overseas investments and acquisitions by SOEs generally require approval by numerous Chinese national or provincial level regulators
    - review is substantive and subjective
      - is the transaction consistent with government economic policies and objectives?
      - what are the major risks relating to the transaction and the target entity?
      - is the price reasonable?
      - is the transaction appropriate for the SOE?
  - > Formal applications for the approvals are generally made only after a definitive transaction agreement is signed

## 5. *Regulatory approvals (cont'd)*

- **Example #2 cont'd**
  - > Need to coordinate the Chinese regulatory process the Canadian/US M&A process
    - preliminary consultations with the regulators
    - coordination by the NDRC (Chinese principal regulator)
    - obtain preliminary soft approval
    - sign and announce transaction
    - obtain final approvals in China and elsewhere
    - closing

## 6. *Anti-bribery/corruption*

- **There has been a significant increase in focus on anti-bribery/corruption measures in recent years**
  - > US - *Foreign Corrupt Practices Act*
  - > Canada - *Corruption of Foreign Public Officials Act*
  - > UK - *Bribery Act* (new)
  - > OECD and UN conventions
- **Legal and reputational risk**
  - > in many jurisdictions “facility payments” are seen as an acceptable way of doing business
  - > corrupt acts expose investors, acquirors and joint venturers to potentially significant legal risks and reputational damage

## 6. *Anti-bribery/corruption (cont'd)*

- **Mitigating and managing the risk**
  - > effective diligence is key
    - should cover partners, agents and indirect sources
    - is there a culture of compliance (or the opposite)?
    - look for warning signs such as unusual payments, government imposed “partners”, lack of disclosure of owners of partners, partners without any relevant experience
  - > establish written policies, provide ongoing employee training, undergo periodic audits and impose strict enforcement in cases of wrongdoing
  - > include appropriate representations and warranties in transaction agreements, including as to the matters described above
- **Other similar issues - economic sanctions regimes, export controls, moneylaundering/anti-terrorism requirements, etc.**

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