Business Transactions Solutions § 259:165

Business Transactions Solutions
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Part XI. Going Global: Building an International Business
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§ 259:165. Business Counselor's Guide to Globalization

Business Counselor's Guide to Globalization

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§ 1 Introduction

For the past several centuries, companies wishing to do business internationally were faced with two major problems: distance and time. Fortunately, with the emergence of virtually instantaneous communication methods, including telephones, computers, videoconferences and mobile communications devices, and the ability to be in almost any other part of the world within 24 hours, distance and time are no longer major concerns for operating on a global playing field. In fact, today all businesses, from start-up firms to large mature companies, must operate and compete in a rapidly changing international environment that includes both opportunities and challenges. For example, firms cannot afford to pass up foreign markets that can offer supplies, technology, low cost manufacturing, human resources and, most importantly, potential customers for their goods and services. However, going global is not always easy and firms can expect stiff competition from local companies with access to emerging capital and credit markets. In addition, foreign countries are joining together to form regional trading systems and US companies must invest time and effort in understanding these systems in order to successfully penetrate markets in these countries. Many foreign governments are also aggressively supporting their own industries and firms through comprehensive industrial policies. Finally, each new market has its own unique requirements with respect to product characteristics and distribution. As a result, US firms must develop the capability to differentiate existing products to meet the needs of foreign markets and must understand the distribution channels in those markets.

§ 2 Reasons for "Going Global"

Companies, both large and small, consider "going global" for a variety of different reasons. Some of the more tangible benefits include opportunities to reduce costs and risks, secure additional access to necessary supplies, improve customer service and relations and, of course, gain access to new markets for the company's goods and services. For example, for most companies, one of the primary reasons for establishing a facility or function in a foreign market is to take advantage of perceived opportunities to reduce the costs of operations and production. As for risk reduction, this will hopefully occur through diversification of the company's market opportunities that comes from tapping into the interests of foreign customers.

Companies may also look at global operations as a way to learn about new ways to improve operations throughout the company and to gain access to attract talented managers, engineers and scientists from foreign countries who can make a contribution to the entire organization. For example, a US company seeking to decrease the costs associated with its manufacturing activities can partner with firms in foreign countries that specialize in "lean" production techniques. This allows the company to immediately lower its production costs and gain access to know-how and technology that can be deployed in the US and in other foreign countries. In addition, companies are establishing offices and research centers in foreign countries to expand their knowledge network and improve the quality and breadth of their core competencies. For example, a company can literally globalize its innovation processes by establishing multiple R&D laboratories around the world and connecting scientists and engineers from different countries through networks that allow them to collaborate on continuous development of new technologies and product concepts.

§ 3 Ways of Doing Business in Foreign Markets

The prospect of foreign sales revenues generally draw companies into the global business arena and one of the most important decisions for a company exporting products into a new foreign market is determining the best method or methods for distributing the products to local customers. There are a wide variety of strategies that the company can use to export its goods and the alternatives are generally classified by reference to the level of direct involvement of the exporter in the sales and marketing process:

- Companies may passively collect and fulfill orders from US buyers who then export the goods for their own account into foreign markets. In this case, the company actually has little or no pro-active export strategy and often is unaware that its products are being distributed overseas.

- Companies may passively collect and fulfill orders from customers or end users located in foreign countries. This is often the way that US companies first become aware of new opportunities for sales of their products in foreign markets.

- Companies may elect to actively solicit orders from US buyers who act on behalf on customers or end users located in foreign countries. This allows US companies to begin generating foreign sales without incurring substantial expense to establish an exporting infrastructure.

- A common strategy is to sell into foreign markets through the services of US and foreign intermediaries. Probably the most common method of offering products directly to foreign customers in their home country, this method allows US companies to tap into the expertise and contacts of experienced intermediaries.

- Companies may also sell into foreign markets through local manufacturers or joint ventures. Foreign sales in tandem with local partners typically require a higher level of investment of cash, technical resources and management attention.

- Ambitious exporters may decide to sell directly to customers or end users located in foreign countries. Direct sales, either through company employees in the US or employees of a local subsidiary established in the target country, offer the higher potential return yet are accompanied by substantial risks.

§ 4 Evolution of a Global Business

While there are numerous exceptions, in general the evolutionary cycle by which most businesses become international traders is reminiscent of the cautious swimmer who eases into the water (i.e., toes first, then the ankles, the knees, the waist, the chest and finally total immersion). In the beginning, a US company may receive an order or two from overseas customers. Such orders might have been met, but by means designed to carefully protect the US party—probably FOB ("free on board") against confirmed irrevocable letters of credit. This stage may continue indefinitely; however, the company should use the interest of foreign customers as an opportunity to consider one or more of the alternative methods that might be used to actively locate and encourage business with other foreign customers or expand trading with some of the initial customers by providing favorable terms of sale, including credit.

Once the threshold decision to expand globally has been made, the company might decide to cautiously move overseas by an indirect investment, that is one of the methods listed above that requires little or no direct involvement by the company in the foreign market. Rather the company engages an individual or company in the foreign market to assist the US firm in exporting its products into that market, typically relying on a local agent such as a sales representative or distributor. Proper selection and management of indirect investment partners should lead to greater foreign sales and a higher level of comfort with the operational activities necessary in order for products to be prepared for shipment to foreign markets. Moreover, the US company will begin to liberalize its shipment terms to something like C&F ("cost and freight") or CIF ("cost, insurance and freight"), port of entry, shipping documents D/A (documents against acceptance), 90 or 120 days sight. As the company builds up its reserves, and its confidence, it may decide to extend the terms of sale and provide credit terms to its distributors and selected customers identified through its network of foreign sales representatives.

Successful indirect investment will often be followed by some form of direct investment, which means that the company elects to participate directly in the production or sale of goods in the foreign market. There are essentially two means—participation and involvement. Participation is through an economic interest owned wholly or in part by the company. The economic interest can be a permanent establishment, central enterprise or joint venture. A permanent establishment is a part of a company. It can be anything from a department such as a financial office to a single plant. A central enterprise is a complete entity. It includes corporations, partnerships, and the limited liability company. The third type of participation is a joint venture agreement between two independent parties whereby the two parties agree to joint together to achieve a common purpose. To acquire an economic interest for participation in a foreign market, the company might establish a new interest, purchase the assets or stock of an existing one, or merge two existing interests. The extent of participation can be complete ownership (subsidiary), a majority interest less than 100%, or a minority interest.

The other method of direct investment is involvement by agreement or contract. By this we mean the company is involved in foreign manufacturing, and marketing by providing technology, technicians or managers. There are a wide range of strategies that might be used in this type of approach, including licensing agreements, industrial cooperation arrangements, turnkey agreements and employment contracts. Under a licensing agreement, the company permits a foreign company to use its technology in return for a royalty fee. In an industrial cooperation agreement, the company licenses its technology and is paid off by being entitled to a percentage of the products manufactured under the license. A turnkey agreement means that the company agrees to build an entire plant in a foreign country in return for a fee. Under an employment contract, the company provides a foreign enterprise with technicians (i.e., a technical assistance agreement) or managers (i.e., a management contract) in exchange for fees and, in most cases, royalties based on output of products by the foreign enterprise realized through the support that has been provided by the company.

The optimal strategy for entering a new foreign market or maintaining a presence in the market following entry depends on a variety of factors, including the nature of the goods and competitive conditions in the target foreign market. Companies may use a single export strategy or two or more strategies in combination and different strategies may be used in each of foreign countries that are of interest to the company. Many US companies adopt fairly aggressive direct sales strategies in Canada and Mexico while relying on intermediaries to prospect more distant markets until the company is ready to focus on, and invest greater resources in, pursuing market opportunities outside of North America. Changes in strategy are also common as the company learns more about a particular foreign market. For example, initial sales may be pursued through intermediaries, which can provide the company with an opportunity to get its goods known in foreign markets with minimal risk and learn more about how to operate an export business. In fact, commentators have advised that companies entering a foreign market for the first time should test the field by through intermediaries and other indirect sales efforts for at least two years. However, as the volume of business grows and the company develops its own relationships with major customers, consideration may be given to funding the investment necessary to launch a local branch or subsidiary that would engage in direct sales activities.

On balance, a direct approach offers the greatest potential return for the company in most cases; however, it is generally the most difficult of the various alternatives to implement unless and until the company has substantial experience and resources to deal with market research and planning, logistics and collections in foreign markets. However, many small- and medium-sized companies have used direct export strategies with the assistance of governmental agencies and outside consultants and specialists such as international banks and freight forwarders. If the company is unable or unwilling to make the necessary commitment required for direct exporting, serious consideration should be given to engaging qualified intermediaries in the US and/or in the target foreign markets. In that case, the key task is to locate an intermediary that understands the company's needs and is able to effectively and efficiently manage all of the details associated with exporting the company's goods.

§ 5 Export Sales through Foreign Intermediaries

Companies that have a serious long-term interest in export sales activities in a specific foreign market often elect to test the water by working with one or more local partners ("intermediaries") to promote, sell and sometimes even manufacture its products in the target country. Intermediaries serve a number of valuable functions in the distribution process for US companies engaging in export activities:

• By using intermediaries to increase the number of parties contacting potential customers, the company can reduce the number of contacts that it must make to penetrate the market.

• Intermediaries can be used to break large batches of goods up into smaller units that are more suited to the purchasing habits of consumers.

• The use of intermediaries can shift the risk and expense of transportation, storage, and inventory to another party.

• The desire of intermediaries to make a profit will be an incentive for them to generate and maintain market demand for the products, often through their own advertising and promotional activities. This can be particularly important when the exporter has a limited budget for advertising and personal selling activities.

• Intermediaries should be able to provide the company with market information, also a valuable contribution for exporters without their own market research unit or internal sales personnel that could otherwise collect that information.

• Intermediaries can advise the company regarding modifications or enhancements that might kindle interest in the company's products in the country.

Various compensation structures are available, including commissions based on generated sales and discounts to local distributors that actually purchase the products for their own account and earn their compensation based on their ability to resell the products locally at a higher price. While the ability to use intermediaries can greatly expand the market scope for producers, a long distribution channel will increase the difficulty in understanding the needs of consumers and trends in the ultimate marketplace. Accordingly, reliance on intermediaries is often a temporary measure until the company is comfortable enough with the local market to consider more direct sales methods, including formation of a fully operational local subsidiary.

§ 6 Formation of New Foreign Entity

Companies always have the option, subject to local government regulations pertaining to foreign investment, to form a new entity, such as a branch or a local subsidiary, to conduct direct sales and other activities in a foreign market. A new entity may be used to launch sales activities or may be formed after the company has used a local sales representative or distributor to determine whether its products are marketable in the foreign market. While this strategy allows the company to exercise full management authority without the need to negotiate with other parties, it can be extremely risky unless the company has substantial familiarity with the market or is able to recruit qualified personnel to assist in the venture. In addition, formation of a new entity is an expensive proposition, since the company cannot rely on existing assets contributed by a local partner. Finally, a "go-it-alone" strategy exposes the company to political risks that might be avoided if a local partner was involved in the activity.

Once a company has established a local sales subsidiary in a foreign country, consideration is sometimes given to launching other functions in the same facility or elsewhere in the country. The most likely candidates are areas closely related to the sales activities, such as service and warehousing. In some cases, the company may explore opportunities for engaging in product design, manufacturing and research and development activities in the foreign country; however, each of these activities would require substantial investments and management time that may be beyond the resources of the company at that time. For example, while local manufacturing to meet product requirements in the local market can carry certain advantages, including compliance with local content requirements, circumvention of tariffs on imported goods and more effective adaptation of products to satisfy local preferences, many companies lack the resources to effective manage a foreign manufacturing operation. In addition, establishing a manufacturing facility creates additional fixed overhead costs that increases the break-even point for the product on a global basis and reduces funding available for other, and more serious, needs such as new product development and marketing of the products in the foreign market.

§ 7 Joint Ventures

An equity joint venture, involving the formation of a separate business entity jointly controlled by a US company and a local partner, is a commonly used foreign market entry strategy and may be used to sell and promote the products of the US party in the local partner's home market. For example, the company may contribute the right to sell specified products to a new joint venture while the local partner contributes cash, facilities and equipment to establish stores and other distribution centers for the products. A joint venture structure might also be used when the company is willing to license technology needed to manufacture the products and the local partner elects to provide the manufacturing skills and resources. In that scenario, the joint venture may distribute the finished products on its own and/or license the partners to distribute the products in specified markets in exchange for payment of royalties back to the joint venture. For example, the US party may be designated as the exclusive licensee of the joint venture's products in the US.

A joint venture has several advantages for foreign business activities, including the opportunity to directly observe the activities of the foreign partner and insulation from some of the risks associated with independently launching activities in a new market. In fact, some governments will not approve foreign investment in certain sectors unless the foreign party is willing to enter into a joint venture with the government or an approved local partner; however, these restrictions are gradually disappearing as developing countries continue to liberalize their foreign investment regimes. On the other hand, however, operation of a joint venture can be time-consuming and the possibility of miscommunication and dispute is very high, particularly if foreign personnel are not totally committed to the joint venture. In addition, the company should be mindful of the risks associated with licensing technology to a joint venture since the foreign partner might use the technology for competitive purposes once the arrangement is terminated.

§ 8 Planning for Global Expansion

While companies are often heavily involved in a specific transaction or activity involving a foreign partner or assets and resources located outside of the US, it is always important to remember that the goals and objectives of the transaction or activity should be consistent with the company's overall international business plan and strategy. While companies, particularly small ones, can globalize their businesses without a formal plan, it is recommended that management invest the time and effort necessary to develop an international business plan. While all plans will differ depending on the company, its products and services, and the key purposes for conducting business outside of the US, an international business plan will typically include a comprehensive analysis of global competitive conditions and the current status of the company and then set out strategies for using foreign markets and resources as a way to improve performance across all the company's business functions and activities. The guiding principle in preparing an international business plan is recognizing that the markets and resources that the company needs in order for its business to be successful can be found, and must be pursued, all over the world. The planning process also has other important byproducts, including identification of potential export markets and customers and overseas investment opportunities and organization and presentation of information necessary to obtain capital from outside sources to expand foreign operations.

The structure and focus of the international business plan will be influenced by the type of business engaged in by the company and its stage of development in its traditional US markets. For example, for an established company, the international business plan will focus on identifying and penetrating foreign markets that are most likely to be quick adapters of the company's existing products and services. The plan for these companies is also more likely to include a search for opportunities in foreign countries to reduce costs of manufacturing and raw materials, while still concentrating sales activities on their home market. The international business plan for product-driven companies, such as consumer goods companies or software and computer manufacturers, will focus on identification and exploitation of new foreign markets for their products and sources of labor and materials. For these companies, effective competition will be based on rapid innovation, brand identity and development of local distribution capabilities. For a service-based business, the planning process should be used to determine whether there is sufficient potential demand for the services in the target foreign market and what changes will need to be made to the company's domestic service offerings in order to accommodate local conditions and cultural attitudes.

While there are a large number of books and articles available on how to write an effective business plan, relatively little is available on the preparation of a business plan that is global-focused, or international. An international business plan is quite challenging to prepare and maintain because the following key differences always need to be carefully considered:

• While a domestic plan must acknowledge the need for market segmentation based on demographic differences within a single country, an international plan must account for the unique cultural and language differences in each of the countries designated as targets for products and services.

• Since countries have different regulatory policies with respect to foreign participation in the local economy, the plan must include entry strategies for each of the new target markets that will satisfy applicable local law requirements.

• An international business plan is inherently more risky due to problems in obtaining and analyzing information on local markets. As such, the company must explore different scenarios and attempt to anticipate a broader range of problems than if the company was active only in its local market.

• While a domestic-only business plan tends to be product and sales oriented (i.e., what products should be developed and how should they be sold within the domestic market), an international business plan should be broad enough to include acquisition of resources that can be exploited back in the domestic market. For example, a company's "business plan" with respect to a given country might be limited to acquiring low-cost manufacturing capacity or raw materials, as opposed to actually selling products in the country.

§ 9 Designing and Managing Global Organizations

As companies expand their activities outside of the US and look to take advantage of available customers and resources in foreign markets they must carefully consider the best way to realign their overall organizational structures and modify their management processes to efficiently coordinate activities that are taking place in different time zones by persons speaking different languages and acting under diverse cultural norms. Each of the organizational structures suggested below for a global company illustrates a different strategy for combining and coordinating the activities of three essential parts—functional units, product divisions, and geographic or territorial entities. Functional units are well-known are require little additional description. There focus is on specific functional activities such as research and development, manufacturing and sourcing, sales, marketing, finance, human resources, and government relations. The later three activities—finance, human resources, and government relations—are sometimes separated from the other product-related activities and referred to management resource and support services. Product divisions, which are sometimes organized and designated as business units, groups, sectors or subsidiaries, have responsibility for development, commercialization and overall management of groups of products that are related by technology and/or by the customers or markets to which the products are promoted. Geographic or territorial entities, often organized as subsidiaries, are responsible for local operations in a particular national, regional or continental area. In some cases, the scope of the activities of these entities is referred to as a "market" or "business". Among the organizational structuring options that are available are the following:

• A function-focused approach, which includes a division and general manager for manufacturing, sales and marketing and research and development. The manufacturing division would have a business unit for the US and each major foreign market that would be responsible for manufacturing activities in that territory and the sales and marketing division would have a similar structure for geographic-specific sales and marketing activities.

• The international division approach, which includes a division and general manager for each of the company's products and a separate international division with its own general manager that would be selling all of the company's products outside of the US. The product divisions would have their own functional resources for marketing and manufacturing and would presumably be focusing exclusively on the US market and the activities of the international division would be divided up into geographical territories with their own managers reporting to the general manager of the division.

• The mixed international division approach, which includes a division and general manager for products A and B and a separate international division with its own general manager that would only be selling product A. In this case, international sales of product B would be handled in the product B division under the oversight of one or more country managers that report to the general manager of that division.

• A geography-focused approach, which includes a division and general manager for the US and a division and general manager for each major foreign market. Each division would have its own full complement of functional resources.

• A product-focused approach, which includes a division and general manager for each product line. Each product division would then be organized along the lines of the geography-focused approach (i.e., a business unit for the US and for each foreign market, each of which has its own full set of marketing and manufacturing resources).

• A matrix approach, which includes a division and general manager for products A and B and a division and general manager for areas A and B, and which is designed to coordinate the sales of product A in area A. Product division A would have a manager for the US and a manager for international activities, each of which would report to the general manager of the product division. Area division A would have general managers for each country in the area that would have managers for product A reporting to them. Management of country-specific sales efforts for product A would be a joint effort between the product manager in that country and the international manager in the product A division.

The options described above are confusing enough; however, the challenges for senior management of an international business are becoming even more daunting as competitive pressures begin to dictate that responsibility for key functional activities, such as research and development and/or manufacturing, be moved completely outside of the US to geographic locations in other parts of the world that have become recognized as the centers of excellence and innovation with respect to those activities and sources of competitive advantage.

§ 10 Legal Issues in Operating in Foreign Markets

Identifying applicable laws and regulations relating to the conduct of a particular business and establishing policies and procedures to ensure compliance with those laws and regulations is an important and challenging objective for any company even when it is operating in just one jurisdiction. However, since commencement of activities in at least one foreign market has now become a natural milestone for almost all growing businesses in the US, regardless of their size in terms of employees, products, or revenues, compliance has become an even more complex activity as companies must learn how to cope with "international law" and the compliance standards and business ethics expectations of many countries. Unfortunately, this is no easy task since there are a number of US laws and regulations that must be taken into account and the variety of laws and customs found around the world often make generalizations very difficult in this area. Any company venturing into cross-border business activities must be prepared to invest the time and resources necessary to establish and maintain an effective global law and compliance program that fits the company's specific cross-border business activities, such as exporting or importing products, licensing of software or technology to or from foreign parties, and/or operating foreign subsidiaries, branches and joint ventures.

International commercial transactions create significant challenges for the parties and their counsel that extend beyond the normal domestic transaction in which both parties are from the same country and performance is to occur within shared borders. Cross-border arrangements involve performance in more than one jurisdiction by parties from two or more nationalities. In the event a dispute arises, it may be necessary for courts from more than one country to exercise jurisdiction or for international arbitration panels to assume responsibility for adjudicating the rights of the parties. It is obvious, therefore, that the parties run the risk that their affairs may be governed by unfamiliar laws and regulations that would not otherwise apply when contracting with a partner in the same country. In order to assist companies in identifying the legal framework that is likely to apply to a particular transaction, as well as the strategies that may be used to establish the most advantageous ground rules, counsel must be aware of the following:

- US domestic laws, typically federal statutes and related regulations, that specifically apply to cross-border transactions and disputes between US and foreign parties;

- Foreign laws and regulations that may apply to a US party doing business in a foreign country or otherwise with a foreign party, including laws relating to relationships with local agents or distributors, including laws regulating the duration and termination of the arrangement; intellectual property laws in the foreign country that determine the protection available for the company's patents, trademarks and other intellectual property once its products have been sold into the market; local product liability laws that may expose the company to substantial financial risk or require modifications to the company's basic product; local antitrust or competition laws that might treat an agency or distribution arrangement as creating a restriction on competition; local contract laws applicable to common business transactions; and laws applicable to activities of branches and subsidiaries including health and safety laws, consumer protection laws, environmental laws and employment/labor laws;

- Public international law, which includes treaties, multilateral agreements struck in the context of the work of recognized international organizations and the customary "law of nations" that has developed through scholarship and practice over decades; and

- Private international law, which governs legal relationships between private parties and includes conventions, uniform laws, guidelines and principles developed by courts and private organizations to interpret, enforce and resolve disputes arising out of private contracts between parties in different countries.

In addition, many types of international commercial agreements will incorporate special rules that have been developed by widely recognized nongovernmental international organizations such as the International Chamber of Commerce (e.g., INCOTERMS). These rules are based on careful study and consideration of customary international practice and can be used as a means for clarifying the intent of the parties and establishing a common framework for interpreting and administering cross-border contractual relationships.

§ 11 Global Law and Compliance Programs

Any company venturing into cross-border business activities must be prepared to invest the time and resources necessary to establish and maintain an effective global law and compliance program that fits the company's specific cross-border business activities, such as exporting or importing products, licensing technology to or from foreign parties, and/or operating foreign subsidiaries, branches and joint ventures.

While some companies build global compliance procedures into their business operations from the very beginning, the more common situation is that the decision to implement a formal global compliance program is not made until the company already has some level of international activities. At that point, the first action that should be taken is to conduct a comprehensive audit of the company's international operations to identify the business and legal risks that will arise in connection with existing and proposed cross-border activities and transactions. The goal of the audit process is to ensure that the company establishes adequate policies and procedures for complying with domestic and foreign laws, including US export control, anti-boycott, and foreign corrupt practices laws. In addition, the audit of international business activities can be used to determine whether the company has adequate resources dedicated to global compliance issues. Once the initial audit has been performed, plans should be made to revisit the questions and issues on a regular basis to determine whether there have been any significant changes in the challenges that may be confronting the company in its international operations.

In general, a compliance program can be understood to be an internal management system that educates the officers and employees and employees of an organization about laws and regulations relevant to the activities of the organization and establishes processes and procedures to guide and monitor the behavior of those persons. There are no legally mandated standards for compliance programs; however, numerous attempts have been made to identify and define the essential elements of an effective compliance program. Each global compliance program should be tailored to the unique circumstances of the company including the size of the firm, the foreign countries in which it operates, the level of regulation applicable to the firm's business activities and its past compliance history. In any case, however, the program should be broad in its scope of application and extend beyond all officers and employees of the company and its subsidiaries and branches to include outside consultants, advisors, independent contractors and foreign business partners such as distributors, agents, sales representatives, licensees and joint venture partners.

There is no recognized standard template for an effective global compliance program; however, the programs should include each of the following elements:

- Regular and continuous compliance audits of international operational activities;

- Procedures applicable "across the board" to all officers, employees and business partners around the world;

- Codes of conduct and supporting policies and procedures;

- Education and training programs;

- Procedures for reporting violations;

- Demonstrated commitment to enforcing policies against violators;

- Specialized compliance programs in "high risk" areas such as exporting, importing and compliance with domestic and foreign anti-bribery laws;

- Establishment of a network of relationships with reputable and competent local counsel; and

- Continuous scanning for changes in regulatory environment and risk profile association with activities in particular foreign markets.

In addition, attention should be paid to establishing and maintaining a formal compliance organizational structure, including a senior compliance officer overseeing an independent staff. Global compliance programs should also include communications with foreign governments and foreign counsel relationships.

With respect to international compliance areas, the scope of the programs to be implemented by a specific company will generally be determined by the particular international laws that are most relevant in its industry as well as the specific foreign countries in which the company has material business activities. For most companies this means that formal global compliance should begin with programs covering Export Administration Regulations, including export controls and licenses and anti-boycott regulations; the Foreign Corrupt Practices Act; sanctions programs approved by Congressional action and resolutions of the United Nations and administered by the Office of Foreign Assets Control; and import laws under Customs statutes and regulations. Beyond that, regional and local compliance units should be established to deal with the local laws of each relevant foreign jurisdiction. As the company's global activities continue to expand the law and compliance function can implement procedures, and allocate specific resources, for other risk areas including employment and labor laws, protection of intellectual property rights and compliance with foreign laws regulating inbound investment.

§ 12 Overcoming the Challenges of "Going Global"

Globalization and building and maintaining profitable and valuable cross-border business relationships present unique challenges for the American businessperson. In addition to the usual strategic considerations that enter into any transaction or business project, US firms must respect and honor cultural differences and approaches to conducting business that are often very different than those typically encountered in the US. Adding to the complexity is inability to make generalizations regarding negotiations and operations in foreign markets since, in reality, each country is unique. In fact, it is often necessary to learn and practice different languages and communication strategies as one moves from region to region within a single country. A great deal has been written regarding cross-border business arrangements; however, experience has shown that the following simple advice has been particularly useful:

- Patience and a commitment to investing the time and attention necessary to make the deal work are keys to success in foreign markets. Managers should not expect that the contracts will do all of the work. Remember, in many foreign countries, the "relationship" is the most important thing to the people involved. In addition, companies must be prepared to conduct ongoing reviews of the cross-border arrangement after the deal has been signed. In fact, no contract should be signed without provided for frequent, well-documented updates and status reports from responsible persons closing involved in negotiations and in the development of the company's strategic plans.

- Every situation is unique and a solution that worked in one case may not work the next time around. Finding the right way to construct the relationship is seldom easy in the international context. For example, even the best business structure must be tested against the legal and regulatory principles that will apply in a particular country.

• Even in situations where the company is looking for relatively "short-term" results, such as an expeditious way to lower your manufacturing costs for products to be sold in the US, consideration should be given to long-term benefits of being present in the foreign market. For example, while the first contact with a foreign market may be focused on manufacturing, the company should consider the possibility that the market might ultimately become an important source of local sales revenues.

• Companies must always to their own homework before finalizing a cross-border transaction. The importance of due diligence, and the need to conduct a thorough country analysis, cannot be overemphasized. Companies must develop a reliable and consistent procedure for evaluating all the information collected and identifying as many possible scenarios as they can think of to structure any cross-border relationship. Seek objective sources of information on a country, such as materials developed by the Chamber of Commerce or the US Commercial Service. The people who have put this information together have spent a good deal of time studying the country and offer a viewpoint that is very different from that of persons who have an immediate interest in having the company enter the market.

• It's easy to get caught up in analyzing a particular market entry decision; however, managers should not forget that the decision to go global must make sense in the context of the rest of the company's resources and requirements. For example, if possible, every new foreign relationship should add value to the company's efforts in related markets. This means that a distribution relationship with an Asian firm should not only open market opportunities in the partner's own country, but also in one or more related regions.

• While legal due diligence is an important element of any going global decision, the ultimate evaluation should be made by an interdisciplinary team of experts with skills in a number of different disciplines, including accounting, finance, personnel, sales, marketing, and manufacturing. Each expert can provide a unique perspective on data collected during the information gathering process.

• While local contacts and resources are important, it should not be assumed that they guarantee success of the relationship. Every effort should be made to identify all the skills necessary to make the arrangement work and recruit the personnel who can best run the business or administer the contract. It is important to remember that finding the "right" people to work with in the foreign country is the key to penetrating the market. In many cases, the best candidates are not necessarily the most experienced or expensive people available.

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NOTE TO WEST EDITORS: Re-letter and renumber the titles below; however, no changes to content of renumbered § 259:166.

Footnotes

* Alan S. Gutterman is the founder and director of the Business Counselor Institute (www.businesscounselorinstitute.org) and the Growth-Oriented Entrepreneurship Project (www.growthentrepreneurship.org). He received his A.B., M.B.A., and J.D. from the University of California at Berkeley, a D.B.A. from Golden Gate University and a Ph.D. in Law from the University of Cambridge in the United Kingdom. For more information about Alan, see https://www.linkedin.com/in/alangutterman and/or contact him at aguttterman@alangutterman.com.

The **Business Counselor Institute** creates, maintains and distributes a comprehensive portfolio of practical and timely legal and business information for legal professionals and their clients in a variety of formats including books; online infobases, such as the Business Counselor page on Westlaw Next; in-person and online programs and seminars; and newsletters, guides and working papers. In addition, training services are available to businesses of all sizes around the world through relationships with affiliated parties such as West LegalEd Center and news and updated practical information of interest to business counselors and their clients is regularly distributed through the Business Counselor Blog, blogs and e-magazines published by Thomson Reuters Legal Solutions and various social media outlets.

The Founding Director of the Institute is Alan Gutterman, who is the developer and author of Business Transactions Solution, a Thomson Reuters Legal Solution available through Westlaw Next. Alan is a well-known and widely respected legal and business counselor to entrepreneurs, emerging companies and investors. He received his law degree from Boalt Hall at the University of California in Berkeley and has also earned a PhD from the Faculty of Law at the University of Cambridge, where he was affiliated with the ESRC Centre for Business Research. He has been a partner and senior counsel at internationally recognized law firms where he has specialized in general corporate and securities matters, venture capital, mergers and acquisitions, international law and transactions, strategic business alliances, technology transfers and intellectual property. He has also served as the chief legal officer of a leading international wholesaler in the information technology industry headquartered in Silicon Valley. In addition to his work with the Institute, he is the Founding Director of the Growth-Oriented Sustainable Entrepreneurship Project (gseproject.org), which engages in and promotes research, education and training activities relating to entrepreneurial ventures launched with the aspiration to create sustainable enterprises that achieve significant growth in scale and value creation through the development and commercialization of innovative products or services which form the basis for a successful international business. More information about Alan is available here.

Information on the Institute's publications is available through the Institute's website (businesscounselorinstitute.org) and currently include the popular and innovative online Business Transactions Solution, available exclusively on Westlaw Next; Business Counselor Practice Guides covering legal and regulatory compliance, law firm management, technology management and transactions and strategic alliances; California Transactions Forms for Business Entities and Business Transactions; and Going Global: A Guide to Building an International Business.

