

Business Transactions Solutions § 259:166

Business Transactions Solutions

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§ 259:166. Article: Selection and Use of Foreign Counsel (not maintained)

Before too many steps are taken down the road in pursuing a particular “going global” transaction or activity, companies need two important things: an overview of the legal framework that will govern the transaction or activity, both domestic and foreign, and local counsel in each of the foreign countries in which the transaction or activity will take place. Responsibility for making sure that the members of the executive team are well informed and carefully counseled with respect to each of these issues falls on the general counsel and other members of the in-house legal team. While there is no need for the general counsel to become an expert on foreign law—that is the whole point of using local counsel—he or she should have enough understanding of the applicable law and relevant legal issues so as to be able to carry on a useful and efficient conversation with local counsel and manage the costs associated with engaging local counsel.

Local counsel in a foreign country can serve as an invaluable aid on matters relating to local law and procedures, and can also be the primary contact with local officials and regulatory bodies. Local counsel can be particularly helpful in advising on issues of local law and practice; dealing with foreign government officials, courts and regulators; advising on government policies and developments relating to legislation, regulations and case law in the local market; advising on local customs, culture, and business practices; advising on the legality of contracts under local law; assisting in negotiations with other local residents and firms; and resolving any issues arising from language differences between the parties. Given the importance of all these matters, local counsel should be selected carefully and the general counsel needs to make every effort to develop a good working relationship with the foreign lawyer and to establish a clear set of procedures for managing the activities of the foreign lawyer, including clear instructions on the scope of a particular problem or engagement.

The choice of local counsel depends greatly on the particular needs of the company and the company’s objectives and prior experience with the specific transaction or activity and the local market are key factors in this decision. While the choice may be made simpler if the company has a prior relationship with local counsel, this convenience is not available to most outside companies new to a foreign market. When looking to hire local counsel, it is advisable to seek out someone with experience representing companies in similar industries, and experience representing foreign firms would be even better. In some developing countries, there has emerged a split between the old, established law firms (which often have the connections to get certain deals done) and the younger firms (which often have attorneys trained in the West who may have a greater understanding of a U.S. company’s legal, business, and ethical concerns). Depending on the situation, a U.S. party may have to retain both types of firms to handle all of its needs.

There are several good sources of information that a general counsel can use to put together a list of candidates for a foreign counsel relationship. Martindale.com (often referred to as Martindale-Hubbell), which can be accessed online at www.martindale.com, is a frequently used source for information regarding foreign lawyers. Visitors to the site can find listings of major law firms on a country and city basis. Each listing describes the practice areas of the firms and may also include the names of representative clients. Another source is the ABA Guide to Foreign Law Firms published by the American Bar Association. The information in the Guide is based on the suggestions and personal experiences of ABA members, but the ABA is not officially recommending the firms that have been included. The latest edition of the Directory of Members of the International Bar Association should also be consulted.

The general counsel might also turn to one or more of his, her or its outside law firms for assistance since those firms may have multinational clients who have had good experiences with local counsel in the country of interest. Of course, the outside law firm itself may have foreign branch offices or affiliates who can provide recommendations and introductions. Another option is to contact one of several international networks of law firms, such as Lex Mundi or TerraLex. This can be done by getting in touch with a lawyer at a domestic firm that is a member of the network and asking that lawyer for recommendations. Finally, a list of local law firms can often be obtained from the commercial officer of the United States embassy in the foreign country of interest. The establishment of overseas and affiliate offices of major US law firms, as well as some small and mid-sized firms, has aided the search for local counsel somewhat. More foreign attorneys have been coming to US universities to earn LL.M. and J.D. degrees, and more foreign firms have been adding American attorneys to their rosters. This expansion of alternatives available in seeking out local counsel is likely to continue to increase the availability of effective legal assistance for US companies engaged in business overseas through joint ventures or otherwise.

In addition to legal counsel, companies may wish to consider using the services of a global accounting firm, many of which offer both business and legal consulting services in most major foreign cities. The majority of these firms are prepared to offer advice about not only US law, but also the applicable foreign rules and regulations.

In reviewing potential candidates for foreign counsel, consideration should be given to the type of transaction or activity for which assistance is required:

- When foreign counsel needs to draft or review a sales or distribution agreement, inquiries should be made to ensure that the foreign lawyer has experience in commercial transactions, preferably with other American clients.
- If the company needs to obtain local government approvals to introduce a new product or establish a subsidiary or joint venture in the foreign country, the search should focus on lawyers who have good contacts with the local government; however, in that situation it is important to consider issues of agency under the US Foreign Corrupt Practices Act since local counsel could be deemed an “agent” of the US party and thus create exposure to liability for the local counsel’s activities.
- If assistance is needed to resolve a dispute in a foreign country, look for a law firm with a strong litigation practice and all necessary qualifications to practice in the local courts.

It is also important that the attorneys from the foreign law firm be able to communicate effectively with the general counsel and other members of the in-house legal team, and the non-legal company executives and managers involved in the transaction or activity if necessary, in English. Language capabilities within the firm sometimes will be listed in the various directories and/or the firm’s marketing materials. Additional common ground may exist if one or more of the lawyers at the local firm have had experience with the American legal system, either as attorneys or interns with a US firm or perhaps through training at an American law school. Once again, prior experience representing US clients can be helpful in this area.

Once foreign counsel has been identified, the general counsel needs to work hard to establish the scope of the relationship and the mutual expectations of the parties regarding the type of work that is to be done, billing practices, deadlines, and other matters. The following tips may be useful in this regard:

- Try and be very specific about the issues and questions that the foreign lawyer will be expected to address during the engagement. Prepare a detailed summary of the relevant facts and transmit copies of all documents that may be necessary in order for the foreign lawyer to complete the assignment.
- Be sure that all the important terms and concepts are clearly defined from the outset. This is essential, because commercial and legal words and phrases may have very different meanings in a foreign country.
- Obtain an estimate of fees from the foreign law firm, including the names of the attorneys who will be involved in the matters and their billing rates. Staffing is always a concern, and assurances should be obtained that the partner in charge will remain personally involved in supervising the matter. Also, be sure everyone is clear on how and when payment is to be made. Most foreign law firms insist on payment in dollars. When dealing with law firms in developing countries, one may encounter billing practices that are far from systematic, and various ethical and confidentiality practices common to those countries’ legal systems may not reflect applicable norms in the US. Parties entering unfamiliar markets should seek to establish some sort of flat fee or other controllable billing arrangement with local counsel.
- Lawyers in many foreign jurisdictions do not practice under the same conflict of interest rules as US lawyers. This means that domestic counsel will need to probe into the possibility of a real or apparent conflict of interest,

particularly if there is a concern about whether the foreign firm has previously represented one of the client's competitors.

- Make sure that foreign counsel understands, and commits to meeting, the deadlines associated with the assignment. Regular progress reports should be provided for in the engagement letter and the general counsel should ask for an oral report on the results of any legal analysis before foreign counsel takes the time to prepare written answers.

In addition, the general counsel should find out what protections (*i.e.*, privilege) exist for its communications with local counsel. It is worth noting that, in some jurisdictions, communications between a company and corporate counsel do not enjoy the same level of protection as in the US. For example, in the European Union the attorney-client privilege is limited to independent counsel registered to practice law in a Member State of the EU. Counsel should also effectively communicate the sort of ethical practices that should be maintained.

Solid communication between the general counsel and foreign counsel is essential and cultural issues may have a significant impact on this communication. In industrialized, Western countries, cultural mores are not necessarily that significant, since local counsel may have a great deal of experience dealing with US clients. But, in some areas—particularly in Asia—it is not uncommon for local counsel to tell a foreign client what they believe the client wants to hear, rather than the real facts. The concept of “face” may also require some sophistication on the general counsel's part—“face” may result in great loyalty from local counsel, and he or she may take extraordinary efforts on the client's behalf, but it may also lead to great stubbornness that can interfere with effective legal assistance. Suffice it to say that maintaining good communications with local counsel will frequently require flexibility, sensitivity to subtle cues, and the ability to reiterate even the most boring details of a transaction repeatedly.

In most cases, the foreign lawyer should communicate with the general counsel, rather than with non-legal executives and managers of the company. In this way the general counsel can be sure that the foreign law firm is addressing all the issues and can integrate the advice on foreign law with the general counsel's own research to develop an answer that is in a form which is most familiar to the executive/management team.

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Footnotes

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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.