

4 Ways To Reduce Risk In Cross-Border M&A Deals

By **Benjamin Horney**

Law360, New York (May 21, 2015, 5:36 PM ET) -- It has never been easier for clients to strike a deal with a company based in a different country, and as the number of cross-border transactions continues to rise, it's more important than ever for law firms to understand the potential pitfalls of such mergers.

There are a litany of issues that could pop up in cross-border transactions, ranging from subtle differences in the law in different jurisdictions to contrasts in culture, and the ability to handle such matters is the reason attorneys have been hired in the first place.

Here, Law360 takes a look at four ways to reduce client risk when advising on cross-border deals.

Do Your Homework

The adviser's job is to make sure he or she is up to speed on all the various elements of law that could apply to the deal at hand before engaging in talks of any kind, according to Cravath Swaine & Moore LLP partner Andrew R. Thompson, because even one small mistake can cause big headaches.

"It is important to ensure you have an understanding of the key elements of background corporate law and stock exchange requirements applicable to all parties involved in the transaction, because they may introduce risks not typical in U.S.-only transactions," Thompson said.

For instance, Thompson pointed to the fact that a shareholder vote is required in many non-U.S. jurisdictions for deals above a certain pay threshold — a stipulation that does not exist in the majority of U.S. states. The necessity of that shareholder vote "matters in terms of both deal certainty and timing," Thompson said.

During a recent Mayer Brown LLP-hosted teleconference looking at strategies to mitigate risk in cross-border transactions, partner Jens Peter Schmidt explained that one of the first steps attorneys should take is going through the internal documentation of the company he or she is representing, to find any "skeletons in the cupboard."

Schmidt, who is based in Mayer Brown's office in Brussels, said the documents in question could be as varied as shareholder meeting minutes and internal emails — basically, anything that could be relevant to the transaction.

By going through such documents, attorneys can both uncover potentially problematic issues and gain a

better overall understanding of the company they've been tasked with representing, he said.

Construct the Right Roster

In addition to issues pertaining to the different jurisdictions, it's important to remember that cross-border deals involve multiple physical locations spread across the globe, meaning it's imperative to put together a team capable of dealing with everything at hand.

As Thompson put it, "assembling a strong and coordinated team across jurisdictions with clear leadership is critical."

While it's different for every firm — some seem to have offices in every nook and cranny on Earth, while others haven't quite conquered the world just yet — the ultimate goal remains the same: to have the right people performing the right tasks in the right places.

"Both in terms of process and substance, having a team that communicates effectively across time zones and languages ensures that everyone is able to respond quickly and nimbly to changing circumstances," Thompson said. "Clear leadership and delineation of roles is necessary to meet the timing requirements of transactions and avoiding needless fire drills because of a lack of clear communications."

Baker & McKenzie LLP partner Duffy Lorenz said her firm makes good use of the fact that it boasts 77 offices in 47 countries.

"We leverage the expertise of our local lawyers who have deep market practice knowledge in their respective jurisdictions," she said.

And while it is possible to get through cross-border transactions without having "boots on the ground," as Lorenz put it, sometimes there's no way to replicate the benefits of having people where the action is.

"The attorneys in our non-U.S. office effectively establish connections and an appropriate level of trust with the other side," said Helen Mantel, a partner at Baker & McKenzie. "They are instrumental in providing interpretations of both the law and the culture throughout the transaction."

Be Forward-Thinking

According to Mantel, attorneys should map out everything that needs to be done from the get-go, to avoid any potential stumbling blocks and to diminish the likelihood of surprises. By doing this, lawyers may sometimes spot issues that could arise before they have a chance to become problems, and they can figure out a plan of action just in case.

"We take a comprehensive 'end to end' view of the transaction ... so that we can spot and resolve material cross-border issues early on," she said. "This allows us to increase deal certainty and protect the value of the deal."

Thompson said determining early on what areas of a merger or acquisition might be of concern to regulatory authorities can give attorneys a leg up when the time comes for those authorities to begin grilling them about the deal.

According to Thompson, attorneys should study up on the required regulatory approvals and clearances that will be needed, including both competition and antitrust clearances and foreign review processes or restrictions that could come into play.

“An early emphasis on identifying any sensitive elements in these types of transactions can avoid surprises and delays late in the negotiation process or even after signing, and make sure the parties are thoughtful in their allocation of risk,” he said. “This process needs to include both a technical analysis of filing requirements as well as consideration of potential political hot-button issues and development of strategies to try to manage those issues.”

While each deal is its own unique beast, previous transactions in a given location can provide precedent for what issues may arise, and according to Mantel, understanding the “intricacies” of the jurisdiction you are dealing with will help you deliver what your client wants.

Consider the Culture

Understanding and appreciating the cultural differences that can exist in the different jurisdictions involved in a cross-border deal can be “vital,” according to Thompson. He noted the different roles attorneys can actually play depending on where they hail from as an example of that point.

“In some jurisdictions, lawyers tend to take more of a technician role than they typically do in the U.S. legal market,” he said. “Understanding those differences can help in thinking about the various channels of communication between the parties and how to most effectively utilize those channels.”

Thompson explained that in some legal markets, it’s still considered proper to have in-person meetings while negotiating a transaction — a practice that “has become less common in the U.S. over time.”

He detailed one situation in which a non-U.S. party involved in a deal he worked on had “effectively refused” to make any of the concessions desired by the other side during a series of conference calls over a few weeks, but “immediately” agreed to negotiate when he, his team and his client flew to the country to sit down face-to-face.

“We had a very productive discussion,” he said.

According to Mantel, having people who truly understand a culture that a U.S. attorney may be unfamiliar with can be the difference between a deal that ends with a happy client and a deal that ends badly.

She explained that when taking on cross-border deals, coordination between one of your firm's U.S. offices and one of its relevant non-U.S. offices becomes “critical,” because it helps to limit miscommunications, thus allowing the transaction to move smoothly.

“Having a local team with deep expertise really brings value to the client,” Mantel said.

--Editing by Jeremy Barker and Edrienne Su.