

Top 10 Tips to Consider in a Cross-Border M&A

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[Joanne M. Schreiner](#), [Julie A. Schoepf](#), [David L. Ma](#)

A 2004 study by Bain & Company found that 70% of mergers failed to increase shareholder value.¹ A 2007 study by the Hay Group found that more than 90% of mergers in Europe fail to reach financial goals.² Regardless of the risks, companies continue to use mergers and acquisitions as a means to expand and diversify their holdings. In 2006, the annual value of global mergers and acquisitions exceeded US\$ 4 trillion and international mergers alone accounted for US \$1.3 trillion.³

While the volume of mergers and acquisitions quickly retreated due to the global financial recession, as the global economy slowly recovers, companies are increasingly eyeing global acquisitions as a means of leapfrogging competitors.

As before, the risks associated with any merger or acquisition are still very real and, in the realm of cross-border transactions, the risks become even greater. Here are ten tips to consider in a cross-border transaction.

1. Corporate governance differences

Be aware of any corporate governance practices that may be significantly different from US norms. Are shareholder consents required? Are written consents sufficient or is a physical meeting required? Are there relevant statutory notice periods? Do the shares need to be registered or is physical transfer sufficient? Furthermore, there may be domicile requirements to be taken into consideration. For example, a Swiss Aktiengesellschaft (public corporation) requires that a majority of the board members be Swiss nationals except in a few narrow exceptions.

2. Mechanical closing issues

The timing of the closing in an international transaction may become rather complex due to numerous moving parts combined with time zone complexities. Consider having the parties wire funds into counsels' trust accounts prior to the closing to facilitate same day wire transfers, and having local counsel handle some of the closing logistics.

3. Manage cultural differences

When working with counsel or business persons from difference cultures, keep in mind that different cultures have difference work expectations. US culture tends to demand a faster work pace than some other cultures. For example, it may not be customary in some countries to open their office on the weekends or holidays.

4. Due Diligence

Coordinate with local counsel to create a due diligence checklist. There may be documents or due diligence items that are significant in the foreign jurisdiction that are not relevant in the US or vice versa. Furthermore, some jurisdictions may have a significant amount of public information available that are not typically available in the US. For example, many European countries have public stock registries that list not only the shareholders of a corporation but also the directors and officers.

5. Noncompetition Agreements

Some countries severely restrict the enforceability of noncompetition agreements. It may require some creative thinking to craft a noncompetition agreement that is enforceable in the relevant jurisdiction. For example, in Switzerland, a noncompetition agreement may not be enforceable in connection with an employment agreement, but may be enforceable in connection with a Stock Purchase Agreement. Furthermore, keep in mind that some, but not all, countries will use “blue penciling” to modify an otherwise overbroad covenant reasonable under the law.

6. Documentation requirements

Note that in some jurisdictions, in order to effectuate a share transfer, various share transfer documents and powers of attorney may be required and these documents may require notarized signatures. Unlike in the US where a notary’s primary function is to administer oaths and affirmations and witness signatures, in counties like Germany and Switzerland, a civil-law notary has a high level of legal training, equivalent, in some areas, to that of a lawyer. The notary may require additional documentation and process before notarizing a document.

7. Currency exposure

Be aware of underlying currency issues and be prepared to shift currency risk or hedge any currency risk implicit in the transactions.

8. Labor and Employment Laws

Many European countries severely restrict the ability to fire employees and local labor laws may also impact or regulate employee work hours and benefits including overtime, vacation and severance. For example, France does not recognize “at will” employment and, as such, the employer must provide each employee with a written contract and the employer may only terminate the employee for cause. Furthermore, employment agreements are typically for an indefinite term and agreements for short engagements are heavily regulated and disfavored.

9. Accounting

Different countries have different accounting rules. Be aware of any significant difference between these accounting standards and GAAP to minimize confusion between financial terms.

10. Obtain competent local counsel

Do your research on local counsel. The scope of an engagement with local counsel will heavily depend on the sophistication of the deal, but there will almost always be certain aspects of the deal where both the US lawyers and the business people will lean heavily on the specialized knowledge, experience and advice of local counsel. Make sure to do proper research on the local counsel to ensure they are competent and able to handle the requirements. Discuss in detail the fee arrangement and scope of representation to avoid post-closing sticker shock.

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http://www.bain.com/bainweb/About/press_release_detail.asp?id=17759&menu_url=for_the_media.asp

(2) <http://www.haygroup.com/fr/press/details.aspx?id=10796>

(3) <http://aibse.homestead.com/documents/07Rottig.pdf>