

Representing a Client Investing Abroad

By Victor Haley and Ellen Smith

Doing business abroad, in any country, poses unique issues and challenges. Nevertheless, there are common issues inherent in each deal and each location. In an offshore transaction, it is essential to evaluate and minimize business risk, understand applicable law, determine the necessary types and level of due diligence and observe local customs and practices. Although such issues arise with respect to all offshore deals, for illustrative purposes, this article focuses on doing business in Brazil.



Valuation Analysis

At the outset of an offshore transaction, a U.S. investor in a foreign country needs to obtain reliable and accurate information on valuation of the target asset and costs arising from the acquisition. In many countries, including Brazil, valuation of real property is often not as precise as valuation in the United States. Therefore, it is important for an investor to gather and evaluate accurate financial information to perform an independent valuation analysis. In doing so, the investor will often require the assistance of local consultants; these consultants should be selected with great care. In addition, an investor needs to understand applicable currency exchange restrictions and costs that may prove to be risky or expensive for the client. For example, the payment of dividends back to the United States may be subject to tax.



foreign country. For example, the choice of investment entities should be carefully evaluated as different entity structures may have different legal and tax consequences. On the taxation front, the client needs to evaluate and understand how to achieve pass-through status for U.S. tax purposes, local tax issues (such as “social” taxes which fund programs for the poor), cross border taxation and tax consequences of currency conversion and repatriation. Some countries impose various local ownership and management requirements on local entities, such as the requirement that one or more local shareholders or managers must have an interest in the entity. Law firms often provide such services although they may require a broad power of attorney to do so. Finally, many countries have enacted restrictions on foreign ownership of and investment in property that mandate extensive and costly application and approval processes. Such requirements must be taken into account at the outset of the deal structuring phase.

Due Diligence Investigation

When representing a client investing abroad, it is vital to conduct thorough due diligence investigation of the asset or interest being acquired. Local counsel will play a key role in this process as there are myriad issues and risks that may not be common in U.S. transactions. For example, evaluation of title to assets can be especially problematic in Brazil, where there are several different standards of title to property (registered title similar to that revealed by a U.S. title search,

Influences on Transaction Structure

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Selecting and Working with Local Counsel

Selection of knowledgeable local counsel is perhaps the most important step toward ensuring that the client is adequately advised of risks and opportunities. As a first step, it is imperative to identify which potential local counsel possesses appropriate expertise and industry knowledge. A preliminary visit to conduct interviews may be the best means of making this determination. However, in some locations and with some types of transactions, there may not be a local attorney or firm with such expertise. As a result, the U.S. attorney may need to expend some time upfront educating local counsel regarding the client's industry or specific concerns. Once potential local counsel is found, all potential conflicts should be identified and resolved. Given that lawyers and law firms in some countries do not have the same view of client conflicts as exists in the U.S. legal system, this process may not be as easy as in the United States.

Building a relationship with local counsel is a key component in making a client's offshore deal run as smoothly as possible. Thus, it is important to try to identify local counsel with whom the client and main counsel are comfortable on a personal and communications level. A local counsel who understands how Americans conduct business (and perhaps who worked in or was educated in the United States) will provide an advantage.

In communicating with local counsel, the client and main counsel need to understand what to ask and should not assume that the local counsel is telling them everything they need to know. Sometimes local counsel may make assumptions about what information is or is not important to communicate, but such assumptions may be inaccurate. Along these lines, it is also helpful to make clear to the local counsel in writing exactly which items or issues will be handled by the local counsel and which will be the responsibility of the client's U.S. counsel. Many concepts and practices that are familiar to clients and counsel working within the U.S. legal system may not be common in other countries, necessitating consistent communication and education in dealing with local counsel.

perfected possessory title resulting from long term physical possession of the property with some evidence of title and title derived from mere possession of the property). Legal descriptions of property, especially for rural assets such as timber or agricultural properties, are often ambiguous at best. Third parties such as indigenous peoples and descendants of slaves may hold legally mandated rights to property that need to be identified and evaluated.

Environmental Liability

Environmental liability can also pose unanticipated risk to a client investing abroad. The extent and type of liability vary by location, and it is crucial to understand the local application of such liability, which may not be as clear as application of liability to which a U.S. investor is accustomed. It is advisable for a client to have a U.S. style Phase I Environmental Site Assessment performed although the necessity for such review may need to be explained to local parties. Including strong environmental indemnification

language in deal documents and investigating whether environmental liability insurance is available and appropriate are also advisable actions for a client.

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Insurance Options

Several types of insurance may make the foreign investment risk more palatable to the client. For example, U.S. style title insurance is increasingly available in Brazil and elsewhere. While title insurance can be costly (upwards of \$4 per \$1,000), the policies are written in English, governed by U.S. law and enforceable in the United States. Therefore, the client may consider the cost a good investment. Country risk insurance, which may be available from an agency of the U.S. Government called the Overseas Private Investment Corporation (OPIC), can help to provide coverage against losses

from causes such as governmental restrictions on currency convertibility, nationalization or confiscation of an investment, political violence or terrorist acts. Larger insurance companies can provide insurance similar to OPIC coverage in countries that OPIC does not cover. These policies are generally more expensive than OPIC policies.

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Observation of Local Customs

In negotiation of the transaction, observation of local customs is one key to success. As a first step to doing business in a new country, running an internet search regarding doing business in that location is very helpful. Once in the country, all U.S. parties should take care to not act or negotiate "like an American." In the United States, parties often want to quickly cut to the chase in negotiations and attempt to resolve the major issues first. This approach may seem the most efficient, but it will not be effective in many foreign countries.

Closing Considerations

In terms of the actual closing, it is important to consider timing and logistics. Generally, the entire process tends to take twice as long and cost twice as much as U.S. parties initially project. For instance, the process of moving and registering funds through the international and domestic wire transfer systems can be time consuming. Additionally, considering that all parties should most likely be in attendance at the closing, there is a possibility that further negotiation may occur.

The U.S. parties should expect a good deal of general discussion and pleasantries before the real business negotiations commence. Offers of food and drink should not be refused. Once the parties are ready to commence negotiation, U.S. parties should listen to the positions of all deal parties and avoid being seen as confrontational or overly critical. For example, insisting that the definitive documents be in English may be seen as an affront. In the course of negotiation, knowing that an answer of yes may in fact mean no, and vice versa, is important. While Americans tend to cross issues off their lists once the matter has been discussed and ostensibly agreed upon in a meeting, parties of many other cultures think nothing of revisiting an issue again and again after the initial discussion and supposed agreement. In fact, it is not uncommon for issues to be reintroduced and renegotiated at the closing table, after the parties have signed definitive agreements.

Over the next five to eight years, the fastest growing economies will be in Brazil, China, India and other emerging countries. To capitalize on the resulting investment opportunities, a U.S. investor will have to learn how to do business in these countries. Investor's counsel can help guide the investor through the traps and pitfalls of investing abroad to achieve a profitable and secure investment.

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