

# Due-Diligence Keeps Cross-Border Deals On Track

## Counsel Debate Best Practices To Avoid Costly Disputes

BY AMALIA DELIGIANNIS

WHEN COMPETITION IN Western markets becomes too intense, companies often find the courage to venture into new and burgeoning markets. However, most of the untapped markets of the world exist in underdeveloped countries where the legal, political and economic dangers of doing business are off the charts.

Just ask Enron. The company dreamed of constructing the world's largest independent power plant in Maharashtra, India, in 1992. Enron, along with its partners—Bechtel Enterprises and General Electric—were convinced they could make a killing in a country starved for electrical power.

But the project was mired in controversy from the beginning when environmentalists and local groups voiced opposition to the plant's construction. It also ran into financial trouble in 1995 when a newly elected state government wanted in on the action and agreed to invest in the project. However, it was unable to find financing after Asia's financial markets crashed. On top of that, the state and federal governments revoked loan guarantees totaling \$285 million, and the American triumvirate completely underestimated India's willingness to pay for electricity at market rates.

Today, the plant is on hold and the investors have about as good a chance of recouping the money they poured into the venture as Enron does of emerging from bankruptcy. The question that remains is whether or not anyone will pick up the pieces, finish the plant and take over its operation.

Although these types of cross-border deals more often than not harbor untold business and legal challenges, it doesn't

### COUNSEL to COUNSEL COVERAGE

mean companies, and especially their in-house counsel, can't reduce the risks of doing business in nascent markets. At Martindale-Hubbell's recent Counsel To Counsel forum in Boston—"Managing Cross-Border Disputes and Litigation in a Mad, Mad World"—a group of in-house counsel and law firm lawyers discussed ways to ensure these deals don't evolve into legal and financial nightmares.

#### Foreign Matters

"In order to stay in business many companies are pulled into jurisdictions they formerly considered exotic," said panelist Hoil Kim, vice president of strategic development at Cabot Corp., a Boston-based manufacturer of specialty chemicals. "At Cabot, we're at a stage now where it's a really critical part of our strategy to go into these places. But the obvious side effect of that is it's inevitable you're going to face possible disputes."

These disputes can include everything from foreign companies breaking contractual obligations, violating trade regulations or re-engaging on licensing permits. Panelists agreed that to avoid these disputes, in-house counsel need to conduct an overall risk analysis of all of their client's international transactions or projects. This entails assessing the steps needed to complete the transaction, as well as identifying and enforcing the company's rights if a dispute erupts.

They also need to determine whether or not the government in the foreign jurisdiction will support you if a problem emerges, and if the economic and political situation in the country is stable enough to warrant a long-term investment. It also doesn't hurt to study the country's human rights record. Nike, for instance, has experienced a num-

ber of high-profile public relations disasters after opening factories in developing countries that abuse or underpay workers.

"There's always a threshold issue of selecting the right country," said panelist Dennis Haines, in-house counsel at Suez NA, a French-Belgian conglomerate that provides utility services to industrial and municipal clients around the world. "Certain countries pose greater concern than others because of unpredictability and the issue of people's safety."

To maintain a safety net and to keep deals from becoming burning problems, it's important to develop a system that helps assess people or potential business prospects prior to offering the job or engaging their services.

For instance, GTECH Corp., a leading, global information technology company that creates and manages networked marketplaces for lottery and commercial customers, conducts a thorough due diligence and background check of employees and representatives prior to hiring or retention, and employees sign an annual certification of compliance with the company's code of conduct, as well. A committee of senior managers also reviews the background and integrity of potential representatives and business partners. This form of risk management helps ensure the integrity and quality of employees, representatives and business partners worldwide.

If there are questions about integrity, they aren't hired, says Miriam Ross, assistant general counsel and director of compliance at GTECH. "In today's environment, companies are held to a high standard of transparency and accountability—you must be on the alert for improper activities and have the systems in place to distinguish business risk from fraud. Whatever language, whatever venue, companies need to be constantly vigilant."

Ross believes what makes GTECH's committee of senior managers work is their

independence.

“You have the business people on the ground who are terrifically motivated to put deals together; that’s their job,” she says. “Having an independent body that reviews all of the materials is simply good corporate practice and gives the company an objective view to evaluate and understand the business risks.

## Bargaining Chips

No matter how many preventive tactics in-house counsel employ to mitigate the risks of conducting business overseas, at some point they will be embroiled in a dispute. At which point, in-house counsel will need to decide how best to resolve the situation.

Most foreign companies prefer arbitration when a dispute arises because only a handful of countries actually operate under common law principles. However, the costs associated with arbitration can be as expensive as a drawn-out court battle. In addition, international tribunals, such as the International Chamber of Commerce, face a huge backlog of cases. Many multinationals also complain that arbitration doesn’t afford them the ability to adequately present their cases. As a result, most pan-

elists at the Martindale event believed litigation is the best way to resolve a cross-border dispute.

“Arbitration can present a false economy. The cost of litigation is usually much lower than the cost of a bad result in arbitration,” said Michael D. Pinnisi, general counsel and vice president of business development at Kionix Inc., which creates technology-based products for the automotive, consumer electronics and biotechnology industries. “Arbitrators often look for a middle ground rather than impose a correct outcome that heavily favors one party. That phenomenon can turn the arbitration process into a risky game of guesswork because you don’t have much discovery to help predict an outcome in advance, and even less recourse from a bad decision after the fact.”

Some panelists, however, believed that U.S. companies should explore alternatives to litigation or arbitration before heading into court [see “Managing Disputes From A Distance,” p. 10]. For instance, Electronic Data Systems Corp. (EDS), a global IT outsourcing company based in Plano, Texas, often has its senior executives attempt to resolve business disputes with overseas busi-

ness partners before filing suit. According to Victoria Lazar, counsel of corporate acquisitions and finance at EDS, the two parties get together and discuss the advantages of resolving the dispute out of court and preserving the business relationship.

“That procedure works well to resolve disputes quickly and amicably,” Lazar said. “If that falls apart, we then consider arbitration or litigation.”

## Courting A Solution

At the end of the day, however, perhaps the most important thing in-house counsel can do to avoid a dispute is to hire a local lawyer who understands the regulatory, political, cultural and judicial hurdles of doing business in the region.

“You need the local expertise,” Kim said. “It’s absolutely critical, even in places where people may not have the business understanding of the commercial issues that are very every day to us. But at the same time it’s important that either somebody in-house or an outside lawyer be available to bridge the deal and ride herd on the process, particularly when a dispute arises.”

Companies also can use local lawyers to learn about a country’s business conventions

## Managing Disputes From A Distance

**Miriam Ross, assistant general counsel and director of compliance at GTECH Corp., recommends taking the following steps to avoid arbitration or litigation in cross-border disputes:**

- > Set time limits to report and discuss disputes within the organization
- > Determine whether the jurisdiction in which you are doing business will adhere to arbitration/mediation rules
- > Avoid incorporating the U.S. legal process into resolution (for example, common law concepts don’t “translate” in civil law jurisdictions)
- > Ensure business partners clearly understand arbitration rules
- > Keep senior management advised of legal developments
- > Involve your tax and accounting people early in the project
- > Allow sufficient time to discuss disputes among business partners



(Clockwise from top left): **John B. Gatlin**, deputy general counsel of The Gillette Co.; **Hoil Kim**, vice president, strategic development at Cabot Corp.; **Miriam Ross**, assistant general counsel and director of compliance at GTECH Corp.; **Michael D. Pinnisi**, vice president, business development and general counsel of Kionix Inc.

## Counsel to Counsel Forum At A Glance

### “Managing Cross Border Disputes And Litigation In A Mad, Mad World”

#### Chair:

- > **Hoil Kim,**  
Vice President of Strategic Development  
Cabot Corp.

#### Law Firm Co-Hosts:

- > Blake, Cassels & Graydon
- > Nixon Peabody

#### Facilitator:

- > **Leigh Dance,**  
ELD Project Marketing International

and track record in litigation and arbitration. Many times local counsel can offer strategic advice on the business environment.

“The idea is to use their experience from the legal perspective to tell us what issues they’ve seen arise for their business clients in each of the various markets that we’re thinking of entering,” Pinnisi said.

And when litigation erupts, they can steer you through all the legal hurdles.

“You’ve got to be prepared on the business side and the legal side to camp out for three or four months to try and resolve [a problem] before it gets ugly,” Haines said. “If it goes to litigation, whatever happens, take the time and have a support mechanism in place to resolve it.” ◀



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