New Horizons

How external counsel can help you explore and secure market entry opportunities

IR Global members offer jurisdiction-specific advice on how external counsel can help you explore & secure market entry opportunities. In the following pages, you will hear from 70+ IR Global members, covering 8 chapters, who are well positioned advisors on the key questions addressed.

IR Global – **Going Beyond Expectations**

IR Global was founded in 2010 and has since grown to become the **largest practice area exclusive network of advisors in the world.** This incredible success story has seen the network awarded Band 1 status by Chamber & Partners, featured in Legal 500 and in publications such as The Financial Times, Lawyer 360 and Practical Law, among many others.

The group's founding philosophy is based on bringing the best of the advisory community into a sharing economy; a system that is ethical, sustainable and provides significant added value to the client.

Businesses today require more than just a traditional lawyer or accountant. IR Global is at the forefront of this transition, with members providing strategic support and working closely alongside management teams to help realise their vision. We believe the archaic 'professional service firm' model is dying due to it being insular, expensive and slow. In IR Global, forward-thinking clients now have a credible alternative, which is open, cost effective and flexible.

Our Founding Philosophies

- **Multi-Disciplinary**

We work alongside legal, accountancy, financial, corporate finance, transaction support and business intelligence firms, ensuring we can offer complete solutions tailored to the client's requirements.

- **Niche Expertise**

In today's marketplace, both local knowledge and specific practice area/sector expertise is needed. We select just one firm, per jurisdiction, per practice area, ensuring the very best experts are on hand to assist.

- **Vetting Process**

Criteria is based on both the quality of the firm and the character of the individuals within it. It's key that all of our members share a common vision towards mutual success.

- **Personal Contact**

The best relationships are built on trust and we take great efforts to bring our members together via regular events and networking activities. The friendships formed are highly valuable to the members and ensure client referrals are handled with great care.

- **Co-Operative Leadership**

In contrast to authoritarian or directive leadership, our group puts teamwork and self-organisation in the centre. The group has steering committees for 12 practice area and regional working groups that focus on network development, quality controls and increasing client value.

- **Ethical Approach**

It is our responsibility to utilise our business network and influence to instigate positive social change. IR Global founded Sinchi, a non-profit that focuses on the preservation of indigenous culture and knowledge and works with different indigenous communities/tribes around the world.

- **Strategic Partners**

Strength comes via our extended network. If we feel a client's need is better handled by someone else, we are able to call on the assistance of our partners. First priority is to always ensure the client has the right representation whether that be with a member of IR Global or someone else.

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Market entry: **understanding regional challenges in a market divided by Covid-19**

The global pandemic has opened new opportunities for cross-border trade, but there are regional pitfalls that businesses need to be aware of. IR Global explores the market entry options for businesses looking to expand.

The global Covid-19 pandemic may not be over, but business leaders around the globe are approaching the end of 2021 with far more optimism than at the close of last year. The global economy is projected to grow 5.9% by the end of 2021, and a further 4.9% in 2022: while these figures are skewed by the 5.93% decline in 2020, they still signal a reassuring step in the right direction towards economic recovery.

With growing confidence that the end is in sight – at least in terms of restrictions on travel and everyday life – many organisations are looking towards growth strategies that will enable them to seize opportunities in the global, and regional, economic rebound.

Market entry will undeniably play a central role in that growth. M&A in particular has emerged over the past 12 months as a valuable tool for businesses looking to mitigate the regional risks created by the pandemic and rapidly pivot their business model to gain a competitive advantage.

Yet it's not the only method of market entry for businesses looking to meet long-term global expansion plans against the backdrop of the pandemic. Although restrictions on travel made M&A a convenient market entry option (both logistically and economically) during the heart of the pandemic, the gradual easing of these restrictions is bringing alternative market entry strategies back to the fore, including export, distribution partnerships, and 'boots on the ground' strategies like the development of brand-new wholly owned subsidiaries.

However, despite increased optimism and signs of economic recovery, it's crucial that businesses recognise the ongoing impact of the pandemic. Covid-19 has cast a long shadow across the global business landscape and will continue to do so for many years: for businesses exploring expansion in this 'new normal', it's important to understand the distinct regional challenges and opportunities. Global political responses to the pandemic have been varied, with different governments adopting different levels of support – from providing extensive policies, packages and emergency legislations designed to aid businesses and stimulate national GDP growth, to giving virtually no governmental support at all – creating disparate opportunities and risks in each region.

At present, two major challenges are set to colour the global market in the months ahead. For advanced economies, who are approaching the end of direct pandemic disruption thanks to successful stimulus packages and wide-reaching vaccine rollouts, supply chain challenges are still impinging on growth. The income-developing countries who play such a crucial role in that supply chain, meanwhile, are still facing direct disruption due to the pandemic, with access to vaccines marked as the number one prohibitor to economic growth in many of these regions.

The result is an even more complex global trade picture than usual and, as such, businesses looking to market entry for growth are recommended to ascertain in-depth local knowledge at the earliest opportunity.

Businesses' reasons for exploring expansion have also changed. The afore-mentioned "competitive advantage" is fast over-taking pure financial growth or geographical footprint as a driving force behind market entry, with target regions, acquisitions or trade partners increasingly being chosen in order to access local talent, technology, Intellectual Property (IP), or trade benefits in particular to gain fast access to growth pockets such as e-commerce, telecommunications and digital.

Last, but by no means least, is the issue of corporate responsibility (CSR) in a post-pandemic world. Covid-19 has intensified the spotlight on social and ecological concerns: from the climate crisis to wage disparity and inequality. As you will discover throughout this publication, CSR has become a key component across every aspect of market entry, whether it's in choosing a target for M&A, selecting trade partners, assessing market compatibility or ensuring that satellite operations overseas are committing to the same CSR standards as the central business.

In the following pages, IR Global members share unique local insight into their jurisdictions, from the effects of Covid-19 to the CSR factors that are influencing market entry strategies in their region. Covering many of the core aspects of market entry and the complications that can arise – from regional real estate regulations and insolvency practices, to conflicting intellectual property laws and legal dispute processes – *New horizons* provides an in-depth, regionalised perspective on the global business landscape.

Editor

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M&A

Our International Mergers & Acquisitions group has member firms in 100+ jurisdictions around the world. They offer a full global service offering from deal initiation to completion and our members include corporate finance advisory firms, investors, lawyers, due diligence and transactional support advisers. Due to communication channels within the network, we offer unrivalled access to a huge cross border pool of global connections, whether you are looking for acquisition targets, partners, or someone to purchase your business.

For more information visit:
www.irglobal.com/working-groups/mergers-aquisitions

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Vaibhav is a co-founder at KNAV, an internal accounting, tax and business advisory firm. With over 26 years of international experience, Vaibhav drives businesses for their organisation development, value unlocking, strategic growth, financial planning and fund raising.

He has been part of several M&A and investment deals over a couple of decades. He has been instrumental in marquee deals in consumer and enterprise businesses and is a preferred advisor to various transactions.

He received an executive education at Harvard Business School on Private Equity & Venture Capital and Leading Professional Service Firms, as well as Drucker Management at Drucker Institute, Claremont Graduate University. Vaibhav is a Fellow Chartered Accountant, US Certified Public Accountant, Accreditation in Business Valuation from AICPA, Chartered Global Management Accountant. Masters Degree in Commerce, Mumbai University with 1st Rank

Founded in 1999, KNAV is a full-service global accounting and consulting firm, that offers a complete suite of services including Assurance, Taxation, Valuation, International Transfer Pricing, Accounting Advisory and Business Advisory Services.

Today, KNAV is an international organisation comprising of more than 200+ professionals in 6 countries: United States, Canada, United Kingdom, Netherlands, India and Singapore.

Please visit us at www.knavcpa.com or write to us at markets@knavcpa.com

QUESTION ONE

What are the biggest advantages of using M&A to enter new markets in the current landscape, as opposed to market entry via exporting, direct investment, subsidiaries, and other methods?

Some of the most successful businesses have been built on the back of constant, sustainable organic growth. However, one cannot ignore the apparent benefits that follow inorganic growth. Inorganic growth has the potential to turn the scales to create something extraordinary. This stems from 'synergies'. Be it superior market knowledge, ready supplier network, ease of regulatory compliance or existing talent base: if planned out well, M&A activities can expedite growth and ease the common hurdles in tapping a new geography.

The international market is strewn with uncertainty. India has seen rising focus on 'self-sufficiency' and preference to 'Make in India' projects. Public expenditure and policies are focused on addressing problems of domestic businesses (especially MSMEs) and unemployment. New foreign policy with China has led to curbs on imports routed through the country. The after-effect of supply chain disruptions and on-hold infrastructure projects provide resistance to new entrants. These, along with the monetary, regulatory, and foreign policy pursued by India, make entry through acquisitions a preferable option.

In fact, the first nine months of 2021 saw inbound M&A activity of $48.60 bn, the highest ever record for the period since 1980s in India. Up to 41.7% of the inbound M&A activity was sourced from the US. The country is expected to grow at 8.3% this fiscal year and continues to be a highly wooed destination for global businesses.

While the market seems ripe for acquisitions, we recommend vigilence on all fronts: from deal evaluation, due-diligence, and structuring to post merger integration. Close regard should be payed to the practical feasibility of synergies expected, along with analysis factoring in Covid and non-Covid related disruptions.

QUESTION TWO

The social and environmental impact of target markets are becoming a key part of M&A – what's your advice on how clients can navigate this complex area and gain full transparency?

Recently, a rising number of investors have switched to formalised ESG evaluation. The Securities and Exchange Board of India (SEBI) has increased its focus on business responsibility and sustainable reporting. ESG compliance has become a norm for most greenfield and brownfield projects now. Importance of ESG is undoubtedly rising in all transactions and buyers need to continuously look for ways to assess potential targets on these fronts.

At present, the deal evaluation matrix blends the transactions' effect on carbon footprints, supply chains, social and sustainable impacts into the valuations. Positive differences in ESG footprints are a prime source of unexplored synergies for the new age M&A transactions. Deal makers can try understanding these differences by cutting to the social and cultural norms of the organisation.

A thorough due diligence identifying both positive and negative externalities is required. This can often be challenging since, by virtue, ESG is not easily quantifiable. However, using the help of independent domain experts and social activists, and undertaking a detailed review of government guidelines on the subject, a buyer may form a reasonable assessment of the target's ESG performance.

As we deal with softer aspects, buyers must ensure that the primary information that flows from the target is unbiased and untainted. System generated reports and independent, third-party reports should be sought to increase reliability. Final agreements must sufficiently provide for these matters in the management representations and warranties. For Indian listed targets, buyers must ensure compliance with integrated reporting, disclosures in Business Responsibility and Sustainability Report (BRSR) and commentary under "Management Discussion & Analysis". At a broader level, evaluating one's performance on the United Nations 17 Sustainable Development Goals offers a universal framework to measure positive societal outcomes.

QUESTION THREE

Corporate acquirers are facing stiff competition from private equity players on the global stage, changing the pace of overseas M&A. What's your advice to clients trying to navigate this competitive, fast paced M&A market?

Strategic Investors and Private Equities investors come from very different perspectives. A comparison of the two acquirer classes today suggests that PE companies' financial discipline, focus, flexibility, and incentive structure has given them the edge. Contrary, one major advantage enjoyed by strategic buyers over their PE counterparts is the ability to create value internally through consolidation, innovation, and operational excellence and efficiency.

Strategic investors must think out of the box and take informed steps to successfully close a M&A deal. Below are few of the suggestions that can help to navigate this competitive, fast paced M&A market:

- **Engage quality deal makers and advisors**

Although strategic investors have the benefit of knowing the industry and a good overview of potential acquisition targets, the selection of targets could be limited. Onboarding a network of advisors, bankers and lawyers can enable investors to identify potential targets as swiftly as other industry players. Advisors would save considerable amount of time and resources by increasing the efficiency of deal making process. They also possess the ability to act swiftly and flexibly when uncovering vital information.

- **Look beyond synergies**

Corporate buyers' due diligence primarily focuses on the target's high value assets and on identifying and validating potential synergies post acquisition. Along with these key metrics, a strategic buyer can look through PE/VC's lens and evaluate other metrics, including present value analysis and external growth opportunities, to make a polished decision. Other key metrics – including due diligence of cash flows, management, and potential exit (in case of unforeseen circumstances) – should also be thoroughly considered before negotiating an offer.

- **Financial discipline and deal financing**

While strategic buyers' capital usually derives from the profits of ongoing business operations, PE companies have the challenge of fundraising from limited partners. This may appear to act in strategic buyers' favour, but actually imposes financial discipline on the PE firm that some strategic buyers may miss.

It becomes increasingly important for strategic investors to become creative in terms of deal structuring, financing, and negotiations. Looking beyond the traditional methods of valuation and deal financing – which puts significant impact on the liquidity position of a Company – strategic investors can consider other alternatives including leveraged buy-out (LBO) model.

- **Create flexible value creation targets**

Most strategic buyers look to fully integrate the acquired firm into their business to realise the synergies planned in the transaction. The process of unlocking synergies includes various facets, which are beyond the control of acquirer. There are significant chances that the M&A transactions fail to achieve its objective, often due to the difficulties in blending the two cultures or non-compatibility of acquired business.

In such a scenario, the strategic investors should also consider the alternative possibilities, including possibility and ability to allow the acquired business to operate on a standalone basis. Allowing the acquired business to operate on standalone basis would encourage the targets management to operate in a lean and efficient manner.

Increasing focus on discipline, flexibility and having a wider perspective would significantly help the strategic investors to excel on the M&A battlefield.

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Mercedes is a lawyer based in Barcelona (Spain) and specialised in advising companies doing international businesses. She focuses in corporate (including middle market M&A), commercial (including franchising) and real estate matters. Thanks to her vast experience in negotiations and transactions she can quickly assess where there are risks, threats and strengths in a certain operation, and can anticipate what the other party's next steps are likely to be. She has led or participated in the creation of strategic alliances and joint ventures.

Apart from her experience in law firms, Mercedes worked as the head of the legal department of a medium size international consulting company based in Barcelona. This experience provided her with in-depth know-how from international consultants. She also dedicated two and a half years of her professional life to prepare a Spanish franchising company for its internationalisation and still collaborates with some franchising consulting companies today. During recent years she has been a member of the advisory board of a private equity entity focused on the acquisition of small companies within several business sectors, with the purpose of creating consolidated groups which can benefit from their synergies.

QUESTION ONE

What are the biggest advantages of using M&A to enter new markets in the current landscape, as opposed to market entry via exporting, direct investment, subsidiaries, and other methods?

Each internationalisation process requires a different strategy, depending on the type of market and the experience of the parent company: direct sales (exports), licensing, or setting up a subsidiary or a joint company could be a better strategy in many cases, as opposed to M&A. For companies whose senior management team is less experienced in international deals, cross-border M&A can be a difficult challenge to manage.

Acquiring a company in a foreign country implies more risks than other internationalisation strategies, but it could provide much faster access to the market or technology. M&A is especially advisable in any of the following cases:

- The target company has deep access to the local market, particularly if this market is very fragmentated and the target company has created an extensive commercial network.
- The target company owns permits or licenses granted by the regulatory authorities which are otherwise difficult to obtain. This is especially applicable to some business sectors, like telecommunications, natural resources, infrastructure and manufacturing.
- The target company has substantial know-how or technology that is otherwise difficult to create or acquire. EU Directive 2016/943 on the protection of trade secrets acknowledges that businesses acquiring, developing and applying know-how and information is the currency of the knowledge economy. Trade secrets are valued as much as patents and other forms of intellectual property right, especially for small and medium businesses.

QUESTION TWO

The social and environmental impact of target markets are becoming a key part of M&A – what's your advice on how clients can navigate this complex area and gain full transparency?

Corporate social responsibility (CSR), environmental and governance factors have been gaining in prominence and therefore should also be counted as an asset (or a liability) of a target company. This implies that some aspects considered as minor in the past now require more attention during due diligence, including: CSR; codes of ethics; labour related issues; diversity and inclusion; data protection and privacy; IP, know-how and trade secrets; and the company's presence in social networks.

Implementing high standards of the above-mentioned issues within the buying company helps them to identify, adapt and raise these standards at the target company, and can potentially increase value creation after acquisition.

M&A is a good tool to globalise CRS and related issues, however it is obvious that this matter becomes more complex when the buying and target companies are based in territories with a very different regulatory, social or political environment. In these cases, legal advisors should make a bigger effort to help clients fully understand this gap.

An M&A lawyer should be aware of the latest trends in CSR and related issues and be able to see: what is behind and beyond the documents shown; what formal risks could be acceptable in the scope of the whole transaction; what apparently correct situations could derive in high risks after the transaction is closed; and when it is necessary to advise on the advantages of cancelling or re-modelling the operation.

QUESTION THREE

Corporate acquirers are facing stiff competition from private equity players on the global stage, changing the pace of overseas M&A. What's your advice to clients trying to navigate this competitive, fast paced M&A market?

Corporate acquirers have an initial advantage, which is previous knowledge of the sector where the target operates. However, when the purpose of the acquisition is to acquire capabilities that the parent company doesn't have (e.g. technology), this advantage is substantially reduced.

Corporate acquirers have recently tried to legally secure the transaction as soon as their interest in the target is confirmed from a strategic or operational point of view. While a typical Memorandum of Understanding (MOU) or Letter of Intent (LOI) are non-binding – and even used to contain a clause stating that no liability would arise in case of not completing the transaction – some buyers now try to enter binding MOU's or LOI's.

The problem is that a binding document has relevant legal and financial consequences for both parties, therefore a typical MOU or LOI does not match. This is especially applicable when it is necessary to introduce clauses such price adjustments based on due diligence or conditions precedent in order for the buyer being obliged to purchase. In these cases, the document should have the form of a 'preliminary agreement', which usually contains a commitment from the seller to sell and a commitment from the buyer to acquire, but subject to conditions and price adjustments.

A preliminary agreement (PA), in order to be easily enforceable and also have a dissuasive effect if the seller wants to breach it, should contain clear clauses regarding the consequences in case of breach. Normally these consequences include the obligation to repay the expenses incurred by the buyer (mostly due diligence, legal, tax and financial advice, but also others like trips, valuations, etc.). Under Spanish laws it is possible to include 'penalty indemnities', which use to be a lump sum to be paid in case of breach and does not need to be related to any cost incurred by the buyer. To agree this in advance avoids having to prove in court the cost of damages caused by the breach.

After the PA is signed, it becomes a must for corporate acquirers not only to execute thoughtful due diligence, but also to have the ability to be flexible and move swiftly to close the transaction.

TOP TIPS

Effective M&A due diligence in a post-Covid landscape

- Prioritise important items. Many issues in due diligence need to be examined and mentioned, but do not provide any unexpected relevant information for the transaction; then try to find as soon as possible what are the key issues and inform about them as soon as possible.
- Include the new important. The social and environmental impact of target markets are becoming a key part of M&A. Offer the client the possibility to include aspects like CSR and trade secrets in due diligence.
- Inform about post deal implications. Due to the increasing complexity of operating a business in all sectors, it is necessary to try to foresee and inform buyers on possible issues after closing. Most post-deal problems in M&A are caused by several factors, including technology integration, culture gap, customers loyalty, employees' engagement, senior management issues and communication challenges.

"Acquiring a company implies more risks, but it could provide much faster access to the market"

Arco is a mid-size Spanish law firm with offices in Barcelona, Valencia, Madrid, Mallorca and Ibiza. We are well known in M&A and re-structuration and have specialists in regulatory affairs (healthcare, pharma, infrastructure, land planning and other sectors), public-private partnerships (port and metro, among others), public tenders, litigation, corporate (some of the partners are members of the board of PPP companies), and commercial issues.

The firm was founded 25 years ago by professionals who had developed their careers in senior positions of public administration. Nowadays it consists of around 60 professionals and we're proud of being able to provide high quality services while keeping a warm relationship with both their clients and members.

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Mitch has been practicing for close to a decade, primarily on corporate and commercial transactions, M&A, private equity deals, capital markets transactions, technology, data privacy, and energy-related matters. She has worked hand-in-hand with many in-house counsels to help navigate the Philippine legal landscape and to provide practical solutions to complex legal issues.

Mitch has had extensive experience with cross-border deals, joint ventures, due diligence, counterparty negotiations, government bidding and consultancy, regulatory compliance, corporate housekeeping, and has rendered various legal services for both Philippine and multi-national corporations.

She handles various matters before Philippine regulators, including the Securities and Exchange Commission, Philippine Competition Commission, National Privacy Commission, among others. She's handled litigation before the Philippine Supreme Court, Court of Appeals and trial courts, and is a trained arbitrator with the Philippine Dispute Resolution Center Inc.

She currently sits as Corporate Secretary for various corporations including PressReader PH, Inc. and Paradigm Pharma (Philippines) Corporation, among others.

QUESTION ONE

What are the biggest advantages of using M&A to enter new markets in the current landscape, as opposed to market entry via exporting, direct investment, subsidiaries, and other methods?

Even as we approach a post-Covid era, the fundamental benefits of M&A remain: strategic growth through strengthening or diversifying assets; increasing revenue through linking; creating management efficiencies; and bolstering market position to stabilise long-term growth potential.

M&A provides buyers with an opportunity to take full advantage of an existing business ecosystem that can enhance and improve what they have already built. Since the pandemic has forced many companies to quickly adapt to a different way of doing business, those that have proved successful possess one of the most valuable assets that can be acquired: adaptability. Businesses that have not only survived but flourished prove that their output is seen as both important and essential, even when consumer behaviour is severely affected. Taking on businesses like these through M&A grants buyers full access to that target's resilience.

Through M&A, regulatory hurdles in entering a market are largely overcome since you are buying into an existing operation. Buyers can focus more on where synergies and efficiencies can be optimised to increase revenue, rather than on licensing or compliance issues. M&A also allows acquirers to benefit from a wellspring of talent assets, which provide the very backbone upon which any company relies. Localised experience can prove invaluable especially in highly regulated industries or with very targeted market audiences. M&A buyers need not reinvent the proverbial wheel, they need only to ensure that the new wheel to be acquired can fit comfortably onto their own vehicle.

Increasing market share is always a desirable outcome for M&A but is also an anticipated net effect of modes such as exporting, direct investment, or establishing subsidiaries. However, maintaining market dominance is only typically achieved through successful M&A, especially in highly competitive industries. Acquiring an established business means you're already ahead of the curve of new entrants on day one.

QUESTION TWO

What methods of financing a deal are The social and environmental impact of target markets are becoming a key part of M&A – what's your advice on how clients can navigate this complex area and gain full transparency?

Corporate acquirer clients should first have a clear handle on what their own social and environmental impact policies are before determining whether a target can meet those same standards. Apart from reviewing community impact policies and environmental responsibility plans, clients should be able to look at data from real consumers to better gauge what the target has done to establish its social presence and communicate its concern for the environment. Due diligence best practices continue to evolve and now include looking into less traditional sources of information: social media and customer feedback.

It's also important to ask questions, such as how is the target's social and environmental impact measured? Are concrete policies addressing such impact in place and enforced? Is the company culture reflective of inclusive community policies and supportive of environmentally responsible goals?

While 100% transparency cannot be guaranteed, answers to questions like these can provide buyers with enough indicators to determine if the target is ensuring that social and environmental factors are being addressed.

QUESTION THREE

Corporate acquirers are facing stiff competition from private equity players on the global stage, changing the pace of overseas M&A. What's your advice to clients trying to navigate this competitive, fast paced M&A market?

While private equity (PE) investors are rapidly gaining more visibility and traction, even in smaller markets such as the Philippines sellers are still more often interested in ensuring that their vision is carried to fruition rather than receiving expensive and sometimes risky financing deals. This is something corporate acquirers can offer to sellers: they share in the risks and burden of ownership to bring sellers' visions to greater heights or grant sellers the opportunity to include their legacies as part of a larger conglomerate story.

When deciding whether to acquire, it is best that buyers have a pre-determined criteria of what or who their ideal target is, so that M&A decision-making can be achieved within a quicker timeframe. What usually prolongs the process for corporate acquirers is overthinking risk assessments and due diligence results, as opposed to PE firms that are often able to determine growth potential, investment returns, and viability of exit mechanisms almost automatically, with formulaic precision. This can be done by corporate acquirers, too, if they engage external counsel at the start. When external counsel is made aware of their clients' goals as early as possible, they can assist in bringing value to the M&A process, ironing out due diligence inefficiencies, and avoiding contract negotiation impasses.

Founded in 1924, Feria Law, now Feria Tantoco Daos, is a Philippine law firm that remains one of the most trusted, respected, and experienced in the country. The firm attends to a broad range of client needs through our specialised understanding of the Philippine legal environment, extensive work experience with clients across a wide range of industries, and a nuanced appreciation of both local and international business practices.

Our key practice areas include corporate and transactional law, M&A, securities offerings, corporate structuring, financing modes, regulatory and compliance, and a wide range of capital market transactions. The firm also handles litigation and dispute resolution matters, including commercial, intra-corporate and civil disputes, asset recovery and fraud-related disputes, as well as arbitration, mediation and conciliation proceedings. Feria Law has also acted as the national legal adviser for the government on energy-related matters such as the decade-long privatisation process of government-owned generation assets, contributing to electric power industry reform in the Philippines.

At Feria Law, we aim to be the preferred Philippine law firm that builds on its legacy and innovates towards the future.

TOP TIPS

Effective M&A due diligence in a post-Covid landscape

- Choose the right external local counsel. Locally experienced advisors that offer not only accurate but practical insight make all the difference. Every jurisdiction comes with unwritten regulatory and transactional nuances unfamiliar to even the most prestigious international lawyers.
- Chart your due diligence goals with external counsel. Local counsel in multinational deals are often engaged at the eleventh hour with a very limited scope, to drive down costs and confirm existing findings. Early input on due diligence can identify the most crucial red flags to streamline the process.
- Virtual due diligence is indispensable. In the Philippines, many businesses are still averse to a fully virtual due diligence process, mainly because digitisation was not a priority before Covid. Today, virtual data rooms are a must and buyers' assistance may be needed.

"Sellers are still more often interested in ensuring that their vision is carried to fruition rather than receiving expensive, and sometimes risky, financing deals"

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Christophe de Kalbermatten studied in the Universities of Geneva, Heidelberg and New York. He has been a lawyer with Python since 2001 and Partner since 2003, after having practiced with Jones Day in the USA and in Geneva. Christophe is a pragmatic lawyer with an excellent knowledge of the legal affairs of large and medium corporations. This enables him as lawyer and notary public to lead complex M&A and real estate projects. Christophe also advises the board of several manufacturing companies. He is also active in the reorganisation and insolvency field and acts as liquidator of regulated entities on mandate of the FINMA.

Christophe regularly advises and represents clients in M&A cases. In the last five years, he represented the Steinhoff group in a multinational transaction concerning several brands and factories and the group Boas Yakhin in the sale of its elderly homes division. He also advised the City of Sierre and Technoark SA in the acquisition of a majority participation in the Technopôle of Sierre. He is also sitting on the side of several technology companies that he advised in financing rounds such as Teleretail (Aitonomi), a startup offering technology for autonomous self-driving robots and Vima Link SA, a company with cutting hedge technology in the field of artificial intelligence.

PYTHON is a highly recommended business law firm established in 1981 with five offices across Switzerland and a presence in the EU. Our skilled, experienced, multilingual attorneys are greatly appreciated for their client-orientated focus and commitment to our core principles of efficiency, flexibility, independence, high quality and creativity.

Practice Areas:

- Arbitration
- Banking and Finance
- Commercial Contracts
- Corporate and M&A
- Intellectual Property, IT, Date Protection and E-Commerce
- International Legal Assistance and Criminal Law
- Litigation and Insolvency
- Private Clients

Our corporate and M&A department has been advising on corporate matters and transactions for 40 years. We have been assisting our clients in all types of domestic and cross-border transactions including stock and asset deals, mergers, spin-offs and co-investments. We also advise multinational companies on their restructuring projects or when they establish a presence in Switzerland.

Our primary goal is to serve our clients with business-oriented and sound advice. With our unique experience, we can provide quick and efficient solutions to all kind of legal issues. We also work closely with our colleagues of Python tax department and offer one-stop-shop services in corporate and tax matters.

QUESTION ONE

What are the biggest advantages of using M&A to enter new markets in the current landscape, as opposed to market entry via exporting, direct investment, subsidiaries, and other methods?

In developed and sophisticated markets like the Swiss market, but also in the European and US markets, the acquisition of an existing local entity is generally the best expansion method. The benefits of using M&A to enter new markets are mainly the following:

Speed. It can take years to enter in a new market by exporting or setting up subsidiaries. An acquisition shortens this timeframe thanks to:

- An existing and experienced team already in place in the new market.
- Developed relationships with customers and suppliers.
- Well-located business infrastructure and facilities.
- Confirmed regulatory approvals.

Reduction of competition. When buying a local player, the acquirer reduces competition of the size of the target and reduces the risk of local players slowing down the market entry by acting together to deny access to the market.

Cost efficiency. It increases buying and negotiating power thanks to the larger combined budget and preserves margins that would otherwise have to be reduced to take a share in the new market.

Cultural. No need to understand the local culture and the way to make business. Furthermore, the acquired company brings diversity and new ethics to the group.

Efficient use of excess liquidity. The buyer could have the opportunity to buy an undervalued business and/or to place its excess liquidities in a new country and currency with a better allocation of assets and risks.

QUESTION TWO

The social and environmental impact of target markets are becoming a key part of M&A – what is your advice on how clients can navigate this complex area and gain full transparency?

It has now become critical to consider all Environmental, Social and Governance (ESG) aspects in M&A. Apart from being an altruistic concept that reflects on the image of the company and its recruiting capacity, ESG criteria have proven to bring long-term economic benefits. It is not a surprise that these aspects have recently played a larger role in purchasing decisions. This trend is not going to change soon with the pressures of climate change and diversity in society.

As a general rule, when looking to make acquisitions for the long term, the buyer should look to assess whether a target business is a 'good actor' across the ESG or not.

Well-advised buyers will broaden their due diligence exercise to ESG aspects and not limit themselves to financial, legal and tax investigations. The ESC due diligence will depend on the industry of the target business and will take into account the following factors:

- Environmental: e.g. carbon emissions, sustainability of resource use, management of waste.
- Social: e.g. supply chain risks, product safety and quality, labor practices, diversity and inclusion.
- Governance: fraud and corruption, fair trade, business ethics and governance and transparency.
- Image: perception of the target in the press with respect to ESG aspects.

A range of different experts should be involved, under the coordination of the lawyer leading the transaction.

Speaking to industry experts will provide a more accurate understanding of, for example, how a business' governance and how it treats its workers. When entering into new business areas, it is also possible to have a general idea of the ESG perception of that field by reviewing the investment guidelines of ESG funds.

TOP TIPS

Effective M&A due diligence in a post-Covid landscape

Target entities in your field of business. Knowledge of the markets, the players, the margins and the technological developments will allow you to perform due diligence quicker and more efficiently.

Have trusted advisors that are the target's industry experts. An experienced advisor should help you streamline your diligence request/questionnaire to focus on the most relevant and important matters.

Engage the process as early as possible and keep momentum. The earlier your advisors know, the better prepared they can be with the right resources when helping you analyse the opportunity, prioritise requests and prepare a sensible bid. Ideally, the team should be in place and the planning of the deal – with all steps from due diligence to closing – should be ready and presented to the seller within 30 days of knowing the opportunity.

By-pass none-core elements. Your advisor may want to perform a "full" due diligence, but this is generally not advisable in a fast-paced M&A market. You can strip non-core elements from advisor reviews to save time. There's no need to do an environmental review for a company that develops software on leased facilities. Use your advantage as player in the field to be able to deal with "unknowns", take the business risk and offer a quick close to the seller, while a private equity player will need more time and due diligence to understand the materiality of the risks.

QUESTION THREE

Corporate acquirers are facing stiff competition from private equity players on the global stage, changing the pace of overseas M&A. What is your advice to clients trying to navigate this competitive, fast-paced M&A market?

We are today in a market that is in favour of sellers. With very low interest rates, companies able to generate a positive cash flow are in demand. If you add to that a main location and operating currency in Swiss francs, you understand why many investors worldwide are looking at acquiring Swiss companies.

In today's market, it is often speed more than price that is needed to edge out private equity players. You need to speak with key persons in your competitors, partners or suppliers to know ahead of the private equity firms that the company may be for sale. If you are not able to do so, there remains only speed in the execution of the transaction, and this comes with risks, as potential buyers have less time and opportunity to conduct the diligence necessary to submit a reasonable bid.

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For over 15 years, Bradley has held a number of significant executive positions including founding Lone Star Scooters, which offered medical equipment and franchise opportunities across the country; Lone Star Bio Medical, a diversified DME, pharmacy and home health care company; and BMS Consulting, where he provided strategic analysis and M&A intermediary services to executives in the healthcare industry.

In addition, he is a regular columnist for HomeCare magazine, where he focuses on healthcare marketplace trends and innovative business strategies for the principals of healthcare companies.

At Vertess, he is a Managing Director and Partner with considerable expertise in DME, urgent care, home health care, hospice, pharmacy, medical devices, and related healthcare verticals.

VERTESS is an international healthcare merger and acquisition (M&A) advisory and consulting firm with more than 100 years of collective executive and transaction experience.

Our team members have an extensive background in launching, building, and successfully exiting their own healthcare companies. We have an exceptionally strong presence in several healthcare verticals, where we have been one of the leading national M&A intermediary services for the past decade. We focus primarily on the personal and professional goals of our clients, thus helping to facilitate transactions that make the most sense for them. The VERTESS professional team's expertise spans diverse healthcare and human service verticals, ranging from behavioral health and intellectual/developmental disabilities to DME, pharmacies, home care/hospice, urgent care, dental practices, life sciences, and other specialised services and products.

VERTESS was formed by a visionary group of results-oriented professionals as an alternative to traditional M&A firms and investment banks. We offer sellside, buyside, valuation, and consultation services to our clients based on their desired outcomes with a focus on tangible results. Our approach is systematic, collaborative, and action-oriented.

QUESTION ONE

What are the biggest advantages of using M&A to enter new markets in the current landscape, as opposed to market entry via exporting, direct investment, subsidiaries, and other methods?

The biggest advantage of using M&A, and what makes entering new markets through M&A unique compared to those other channels, is that you are acquiring an existing entity: one that should be established and already have all the pieces in place to operate effectively in its market. By using any of the other methods, you won't be entering the market as a complete, operational entity.

If you're a foreign national company and want a presence stateside or are looking to quickly establish a footprint in a different market, typically the best way to do so is to acquire a different entity and rebrand it as yours. Such an approach means you're not dipping your toe into the shallow end of the pool. You're going down to the deep end and jumping in head first.

Using M&A should also mean there's less work compared to the other methods. The house is built and ready for you to move in. Will there be work? Obviously, but it should be less — potentially far less — work than other avenues. In addition, you will not be making the go-to-market mistakes one can only learn to avoid by going to market in a particular geography.

Finally, from a risk perspective, entering via M&A helps insulate your company. If this separate entity in the new market is "infected with a virus," this should just largely affect the satellite, not the mothership. In other words, most legal or liability risks should be contained at a local entity level as opposed to graduating up to the corporate level.

QUESTION TWO

The social and environmental impact of target markets are becoming a key part of M&A. What's your advice on how clients can navigate this complex area and gain full transparency?

Trying to navigate these issues – or any other complex areas in an unfamiliar market – on your own will be difficult at best, futile at worst. Who you use to enter the market through M&A should be in a position to give you that perspective and insight into the particular market and the complex areas affecting it.

For example, at VERTESS, all our managing directors are former healthcare operators, entrepreneurs, and clinicians. This means we intimately know the healthcare markets that we operate in and can provide detailed insights concerning the macro and micro conditions, as well as the projected short and long-term trends and developments, within the market. Outsiders are typically either unaware of these conditions or will only have a surface-level understanding of them and their likely impact on the market.

"If you are looking to quickly establish a footprint in a different market, typically the best way to do so is to acquire a different entity and rebrand it as yours"

QUESTION THREE

Corporate acquirers are facing stiff competition from private equity players on the global stage, changing the pace of overseas M&A. What's your advice to clients trying to navigate this competitive, fast-paced M&A market?

In the United States, private equity has long been a major player in M&A. It's been a huge factor here for at least the last decade, whereas Europe is just starting to experience increased competition between private equity and corporate strategic rollups. Based on what we've seen private equity interested in and looking for, it's oftentimes quite different from corporate acquirers. In other words, they're not necessarily always going after the same target.

The emergence of private equity can be very good news for companies looking to be acquired. When we're representing a client on the sale side, we can create a very competitive process by having strategic and financial buyers submitting offers. In fact, almost all the sales processes we run now will have potential strategic and financial partners regardless of the outcome our clients desire. Why? We want to create a more competitive environment to run our processes, which makes our clients happier because they ultimately get a better outcome.

TOP TIPS

Effective M&A due diligence in a post-Covid landscape

- Broadly speaking, little has changed. The rules of fundamental best practices for effective M&A due diligence are essentially the same.
- That said, it's still important to understand how Covid has affected the markets you're targeting. Specifically to healthcare in the United States, the pandemic sped up the advancement of some healthcare markets and services by ten to fifteen years. There are many healthcare companies that do not operate the same way they did pre-Covid because the federal government and other regulatory bodies changed policies to help the country navigate the pandemic, some of which sped up a progression that would have taken many years.
- Companies were forced to adapt technologies really fast. If they didn't become tech-enabled, they were left by the wayside. We now view telehealth as a major way that healthcare will be delivered, which is particularly important because we have fewer doctors who need to see a growing number of patients. Virtual care should have been an integral part of our delivery system for some time now, but it took Covid to convince insurance companies to finally cover services delivered via telehealth.
- Another effect was that the pandemic forced the healthcare market to grow in the correct direction. As an example, we've understood that people tend to live longer, have better quality of life, and received better care if they're at their home as opposed to going to a nursing home. Covid further solidified this understanding among the broader population.
- When choosing an M&A partner, work with someone local. If you're in Europe and interested in buying a healthcare company in the United States, you need to work with someone stateside. The right partner will help you understand everything you need to know, such as laws, market trends, competition, growth opportunities, and Covid's impact, that will be required for success.

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Tuomo Kauttu is a partner at Aliant and the head of the Aliant practice in Finland. He specialises in corporate law, mergers and acquisitions, IPR, and international business transactions. Tuomo graduated from the University of Helsinki with a Master of Laws degree and received his postgraduate LL.M. from the University of Washington. The focus of the LL.M. program was on corporate law and corporate taxation, M&A, investments, and business planning.

Over the past 25 years, Tuomo has represented businesses of all sizes engaging in cross-border transactions, and international projects and investments in a diverse range of industries. Beyond transactions, Tuomo has advised various forms of business entities on corporate law and governance issues, and has helped high-tech companies with legal issues in developing tomorrow's technologies and managing risks arising from intellectual property issues.

Tuomo is a member of the Finnish Bar Association and an associate member of the American Bar Association (ABA), being involved in the professional work of the ABA International Business Law Committee and Committee on Mergers and Acquisitions. He is also an expert member in the International Chamber of Commerce (ICC) Commission on Commercial Law and Practice.

QUESTION ONE

What are the biggest advantages of using M&A to enter new markets in the current landscape, as opposed to market entry via exporting, direct investment, subsidiaries, and other methods?

M&A provides many advantages in comparison to market entry via exporting, direct investment, subsidiaries, licensing, franchising, partnering, turnkey projects or other methods. This view applies to business executives who think in terms of markets and lawyers who think in terms of jurisdictions and methods.

M&A transaction provides regulation predictability. It is partly local and partly in common within the EU and among Nordic countries. First, the M&A immediately provides the status of local company. The acquired business is treated as a Finnish firm, governed by laws as a local corporation. Secondly, there have been no recent significant changes in the legislation or practice in relation to M&A in Finland. Regarding EU, the Commission proposed recently that the Merger Regulation will be revised to lower the threshold for national courts to make referrals concerning merger cases that have an EU community-wide element. Also harmonisation of corporate laws will increase with directive on cross-border mergers that may improve cross-border mobility and simplify the procedure of changing a company's home place within the EU. The Nordic countries have adopted the Nordic Corporate Governance Model. This governance model allows the shareholder majority to effectively control and take long-term responsibility for the company they own, including a principle of equal treatment of shareholders and transparency.

Aliant Finland attorneys help foreign companies to do businesst in Finland and the Nordic region, while also helping Finnish companies with overseas matters. Our practice offers the highest quality legal services with a team of experienced professionals. We assist businesses with commercial transactions and international operations in a diverse range of industries, including technology, machinery, manufacturing, energy, airline, retail, construction and real estate. We provide corporate law services and advise clients on corporate governance. We help companies developing tomorrow's technologies to manage intellectual property risks and represent corporate clients, institutional investors and others in transactions involving the purchase or sale of businesses. We assist in the purchase and development of real estate, as well as the construction and leasing of facilities.

The acquisition of a local company provides also the benefits of local market knowledge and established customer base. M&A may be the most appropriate entry strategy when the target company has substantial market share, or is a direct competitor. Furthermore, through M&A the company gains access to talent, diversification of risk and faster strategy implementation. M&A growth is a simple method in acquiring technology, talent, new production capabilities and product development, R&D, brand-value, distribution or innovative startups.

In summary, the M&A may be the best method to make a long-term strategy to become a mid-term strategy.

QUESTION TWO

The social and environmental impact of target markets are becoming a key part of M&A – what's your advice on how clients can navigate this complex area and gain full transparency?

The Finnish Corporation Act is a general corporate statute that applies to profit business corporations. There are no special corporate laws for companies creating benefits for society in addition to benefits for shareholders, or adhering to environmental purpose or sustainability. Nor does the Corporation Act itself allow a legal structure that expressly expands the purpose of the corporation beyond advancing the pecuniary interests of its shareholders. However, the Act enables a corporation to determine its purpose in the by-laws, superseding the law. It is allowed to adopt social or environmental aspects by stating it in the by-laws as a purpose, and consequently as a business field.

The social and environmental aspects become a key part of M&A when the acquirer is prepared to add the purpose clause into the by-laws of the target company. This can be agreed in the acquisition agreement and accomplished in a shareholders meeting with majority 2/3 of votes and shares being represented in the meeting. When less than 2/3 of the voting shares are acquired, it is necessary to agree on binding obligations for voting in the acquisition agreement or related agreement with shareholders, having at least 2/3 majority of the voting shares.

Such entry strategy becomes visible when defined as a self-regulation strategy that businesses undertake to show the public that they are willing to take responsibility for the environmental and social consequences of their actions. This can be set forth in Corporate Social Responsibility (CSR) statements, using and referring to a code of conduct

The environmental impact of the Finnish market is becoming increasingly attractive for investment, especially for M&A entries in hydrogen, battery factory and giga-factory projects, and wind-power industry. There is a progressive hydrogen cluster in Finland, consisting of clean tech, energy and smart tech companies. There is a huge potential for environmental focused cross-border M&A transactions.

QUESTION THREE

Corporate acquirers are facing stiff competition from private equity players on the global stage, changing the pace of overseas M&A. What's your advice to clients trying to navigate this competitive, fast paced M&A market?

TOP TIPS

Effective M&A due diligence in a post-Covid landscape

Finnish law offers little protection to an inconsiderable buyer. Conducting appropriate due diligence, will provide to the buyer protection that is not offered under the law. Adequate due diligence process is still important despite of the Covid-19 era improved virtual proceeding techniques. As a part of hybrid M&A strategy, the due diligence may be conducted partly virtually and partly in person. Do not fully ignore in-person investigation, site visiting and meetings with key employees and stakeholders.

Pay additional attention on key contracts, director and employment contracts and cyber security. Many due diligence processes are still asset-focused, but currently risks arise out from virtual form as well. It is important to understand how secure customer data and business-critical software is.

Effective coordination between legal, financial and technical due diligences is helpful. Legal checklists often refer to financial, accounting and technical information and documentation, which are not examined by the lawyers, and may cause confusion when coordination is disregarded.

In Finland, the amount of private equity funding in 2020 almost doubled from the level of 2019, and in five years the amount has tripled. To successfully navigate this competitive market, corporate acquirers should focus on target companies at the right stage of growth, operating in suitable business fields, and owned by shareholders, motivated to gain value typical to acquisition and not-typical to private equity investment. Private equity investors are active and temporary growth-oriented owners in unlisted startups and growth companies. Among other things, private equity investors can provide a combination of capital, expertise and networks to support the growth.

Acquisition is typically used to explore new options with local players, reshape the emerging industry and adapt through acquiring underperforming competitors or part of their supply chain. Companies that want M&A growth are seeking cross-sector targets to broaden their product and service offering as well as expand their addressable market and consolidate existing market share. When M&A transaction is used to acquire technology companies or innovative start-ups, the businesses are looking to acquire technology, talents and new production capabilities. In classifying corporate stock and debt, the freedom of contract applies to some degree to corporate law issues.

In Finland, there is no minimum requirement of share capital, and a corporation has the power to create and issue shares, all in a single class or divided into two or more classes. Accordingly, a corporation may issue convertible bonds and shares.

As an alternative to equity securities, capital transactions may be structured in the form of secured or unsecured loans, which may contain a clause giving the lender the opportunity to participate in the growth of the business beyond the passive receipt of the principal and interest payment.

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Nick Chen has been traveling and working in China since 1973. He is the managing partner of Pamir Law Group, an international law and business consulting firm with offices in Shanghai and Taipei. Nick has a long track record of successfully closing transactions in a broad range of industries in China and Taiwan. He is a practical, street-smart client resource who provides an integrated business and legal approach focused on client growth. He is focused on results, cost effectiveness and effective communication.

Nick has successfully completed hundreds of foreign investments into Greater China in all coastal and many interior provinces for Fortune 100 multinational corporations, privately held and family group companies and private equity groups from the US, Europe and Japan. He has closed over USD5 billion in deals in the region, assisting companies and investors to develop and implement practical cross-border strategies and programs to achieve safer business operations and growth. He attended Yale College and NYU School of Law. He is admitted to practice in the District of Columbia.

QUESTION ONE

What are the biggest advantages of using M&A to enter new markets in the current landscape, as opposed to market entry via exporting, direct investment, subsidiaries, and other methods?

New foreign market entrants may compare greenfield start-ups vs acquiring existing targets, which reflect different strategies and implementation plans. Each approach entails different starting points and presents different potential growth trajectory and velocity. By incorporating more local insight, market knowledge and operational capacity, one can significantly enhance the enterprise's ability to build a sustainable, scalable, resilient business.

Assuming suitable targets can be identified as a baseline platform, entering a new market through M&A allows the investor to "hit the ground running." To capitalise on this beachhead, the challenge becomes how to continue to grow, meld and acquire additional key components of a successful business including:

- Key upper management, technical, supply chain and operational teams (including China proven HR, legal, security, logistics team leaders)
- A recognisable and trusted local brand for market traction. The days of blind adoption of foreign brands are gone in China. Building and managing localised intellectual property capital is an important factor for success.
- Insight into complex consumer/customer preferences. Chinese consumers have very specific tastes and needs that will likely not mirror those of consumers in your home market. Your product/service offering will need to meet local preferences.
- Compliance capacity. Local systems to manage relationships with key stakeholders in government and others in the ecosystem related to each industry.
- Capacity to manage regulatory approvals systematically.
- Logistical infrastructure/assets (distribution centers, vehicle fleets, manufacturing facilities, AI and e-capabilities, etc.).
- Future opportunities and repeat income business streams to be cultivated based on serious market 'street-smart' understanding of trends and supply/demand.
- Understanding of the local context and its connection to global trends.

In reality, finding a perfect target that offers all of the above might prove to be "mission impossible". The next best thing is to work with a knowledgeable team on the ground that can develop a strategy to find several targets that together provide the competencies needed to address any gaps.

Pamir is an international law and business consulting firm based in Asia with offices in Taipei and Shanghai, with a long track record of successfully closing transactions in a broad range of industries in the PRC and Taiwan.

Pamir's lawyers are from top law schools and law firms. Our attorneys are former partners and senior associates from global law firms located in New York, Silicon Valley, London, Hong Kong and Tokyo.

Our team of multilingual professionals can bridge the gap between different business cultures and support clients in multiple languages, including English, Chinese (Mandarin, Taiwanese, Cantonese, Shanghai and Suzhou dialects) as well as Japanese, Spanish and French.

Our clients include multinational Fortune 100 companies, venture capital funds, international law and private equity firms. We also represent Asia-based listed companies, privately-held conglomerates and high net worth family groups.

We co-counsel with leading law firms from Asia, North America, Latin America and Europe on their client matters. We represent leading PRC groups in their activities overseas.

QUESTION TWO

The social and environmental impact of target markets are becoming a key part of M&A – what's your advice on how clients can navigate this complex area and gain full transparency?

The post-WW2 Bretton-Woods religious commitment to "maximising shareholder value" had its Chinese parallel in Deng Xiao Ping's "To Get Rich is Glorious". Spectacular double-digit growth for decades, with many innovative disruptive enterprises dominating new sectors, has been visible across the Chinese, regional and global business-scape.

The externalities of environmental pollution, increased wealth gap and deterioration of the rights of marginalised and under-represented stakeholders has received governmental and regulatory attention. Market penalties and increased enforcement, denial of access to financing and listing, and the recent focus on "Common Prosperity" are certainly trends for the future.

Even dominant local champions such as Alibaba, Tencent, Didi and many local companies have begun adjusting to this new paradigm and megatrend. Lavish waste, ostentatious consumption and high-profile flaunting of wealth are closely associated with potential corruption and tax evasion.

While different than western ESG standards, China has already begun to implement and enforce its own CSR and de-carbonisation commitments. International companies that do not learn and abide by these evolving guidelines and systems operate at their own peril.

Some Chinese banks have adopted Equator Principles to ensure that project finance access must comply with EP/IFC Performance Principles. Thus, annual corporate performance certification by third party professionals will be required for project finance. Corporate laggards who fail to comply will be in a Jerry McGuire scenario with their shareholders, unable to secure financing necessary to "show them the money".

TOP TIPS

Effective M&A due diligence in a post-Covid landscape

China and International Due Diligence are completely different. Due diligence in China is not about verifying documents on a checklist about past activities; it is about verifying the realities of the target's business in the context of its changing society. It is also a valuable opportunity to stress-test the target's management team on judgment call capacity, checks and balances and anti-corruption standards that might be important in the future.

Protecting the business assets/value is the key condition precedent. If this baseline cannot be established then buying into a disaster, in order to close, is not defensible as "best business judgement". Due diligence does not end at closing but begins now that buyer's funds, reputation and technology are invested and need to be protected.

You need a strong team of local strategic advisors. The questions are endless in China and someone must be able to find the answers.

QUESTION THREE

Corporate acquirers are facing stiff competition from private equity players on the global stage, changing the pace of overseas M&A. What's your advice to clients trying to navigate this competitive, fast paced M&A market?

Corporate, PE, or hybrid PE/Corporate buyers along with founders and other stakeholders in an M&A deal are very different animals with often divergent goals. The goal of maximising shareholder return is often incompatible with broader stakeholder interests such as ecological responsibility, community engagement, workers' rights and the many guidelines set out in ESG, CSR and Equator Principles. The interests of founders to protect their management team and the workers who built the startup may take precedence over maximising profit in the short term. Time horizons, strategic development pathways, leveraging different talents and strengths over time are likely to be more important than maximising stock price. PE investors are often focused on valuation at an earlier exit, when a corporate player is looking at a longer time frame.

Trying to compare lychees and kumquats can be misleading. Focusing on operational and market realities such as synergies, teamwork, leveraging strengths, and many other things that not countable on a balance sheet are less important to pure financial investors. In truth, many pay lip service to the value of operational and management teams, but in reality have little real understanding of the complex realities of operating in a rapidly changing Chinese market. A corporate buyer can get an edge over a purely financial investor by showing the target that they are committed to work together to generate sustainable growth.

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Charles specialises in M&A, real estate transactions and corporate finance. He has extensive experience in M&A matters, during the past having completed billions of dollars in such transactions in Eastern Europe.

From major retail firms to port operators, pharmaceutical companies to renewable energy ventures, and more, Charles has assisted on numerous mergers and divestiture projects including advising on acquisitions, project financings, competition matters, privatisations, concession agreements, deal structuring, litigation, and post-acquisition operations and activities.

Charles has also advised a variety of borrowers and banks in lending transactions, including syndications and US and EU listed bonds.

A Certified Compliance and Ethics Professional (CCEP-I), Charles has worked on numerous compliance matters as well as on fraud and employee malfeasance cases, including investigations of possible violations of the Foreign Corrupt Practices Act (FCPA) and matters before the Romanian anti-corruption authority (the DNA).

Some of Charles' M&A highlights include acting for sell-side in the divestiture of Romania's 2nd largest hypermarket chain and representing Romania's national telecom company with the selling of its cable business, among many others.

Vernon | David is a boutique law firm specialising in complex commercial transactions and disputes, regulatory matters and compliance issues. We provide high-end bespoke legal advice to a wide array of domestic and international clients ranging from startups to large multinational companies and foreign governments. We have offices in Bucharest, Romania, and in Chisinau, the Republic of Moldova.

We provide our clients with one-on-one attention, in a collaborative and business-focused setting. This allows us to offer highly skilled assistance on a broad range of legal topics. To deliver high-quality, cost-effective services, we place a premium on common sense, creativity and experience. We bring, passion, innovation, entrepreneurial zeal, and commitment to advancing the interests of our clients.

We have worked on some of the largest deals and transactions in Romanian history, including advising TMK with its acquisition of Resita Steel, assisting Iulius Mall with the Palas Project, as well as representing Xannat (former Anglo-American group company and Romania's largest aggregates mining company) with its management buy-out.

Our Bucharest and Chisinau teams work closely together in advising clients on a range of investment-related matters, including financings, mergers and acquisitions, real estate issues, labor matters, renewable energy, environmental regulations and general commercial transactions. We also have a dynamic commercial litigation practice. The firm is ranked in all the major guides (Legal 500, Chambers & Partners and IFRS 1000).

QUESTION ONE

What are the biggest advantages of using M&A to enter new markets in the current landscape, as opposed to market entry via exporting, direct investment, subsidiaries, and other methods?

Entering a new market is one of the greatest challenges a company can face. M&As can be the fastest path to growth, and can often save a company time, energy and money compared to starting a business from scratch.

Infrastructure, whether soft (HR, IP) or hard (buildings, machinery), plays an essential part of most businesses. Building production centres, storage warehouses and distribution facilities are all expensive but acquiring enterprises that already have some or most of these assets saves both money and time. Targets that add value through new technology, IP rights, proven skills, and market share can seriously improve a company's bottom line almost immediately.

This also applies to regulatory matters, authorisations and permitting requirements. Acquiring fully licensed, functioning facilities and businesses can provide a serious jump start to any new business. This is particularly true in developing countries like Romania and Moldova, where obtaining the necessary authorisations can be tricky and time consuming.

Last but not least, employees and their know-how are a vital element of any successful business. Retaining and integrating key staff them into the new merging/acquiring company – and ensuring that everyone is rowing in the same direction – is crucial.

QUESTION TWO

The social and environmental impact of target markets are becoming a key part of M&A – what's your advice on how clients can navigate this complex area and gain full transparency?

Social and environmental (SE) considerations now require greater clarity, transparency and accountability from the companies involved.

Implementing a successful SE strategy promotes positive stakeholder engagement and is increasingly viewed as a significant driver of value. Due to increasing regulatory requirements, the financial consequences of a company miscalculating SE risk can be severe and the negative PR and media consequences can be legendary.

In order to successfully mitigate potential regulatory, litigation or reputational risks, an acquirer should have a clear understanding of the key SE risks and opportunities in the target's business and operational jurisdictions. This assessment should be evaluated against the acquirer's own SE policies to ensure alignment.

Taking into account the constraints typically imposed by a target on the conduct of buy-side due diligence – in terms of timing, access to information, ability to conduct site visits etc. – it is important for an acquirer to have an informed view of what the key SE risks and opportunities may be.

In our experience, an acquirer may assign a dedicated SE team to lead this effort, working closely with local advisors to ensure that risks are identified, and all concerns and issues are properly addressed.

Key considerations from a diligence perspective should include the assessment of: (i) the target's approach to SE governance; (ii) the target's SE procedures, policies and processes; (ii) what management incentives are in place to promote SE governance; and (iv) the sufficiency of personnel and other resources to properly handle SE matters.

QUESTION THREE

Corporate acquirers are facing stiff competition from private equity players on the global stage, changing the pace of overseas M&A. What's your advice to clients trying to navigate this competitive, fast paced M&A market?

In recent years, and even more so recently due to the Covid-19 pandemic, private equity players have become a major force on the M&A market. However, it is a truism that money talks and so many deals will usually come down to the price.

Having said that, corporate acquirers can have certain non-monetary advantages. For instance, corporate acquirers often have a better "story" to tell with regard to the integration, development and future of the target. The history of the buying company, global brand recognition and a vision for the future can be very appealing, especially to start-up entrepreneurs who are selling their "baby". In our experience, some entrepreneurs are willing to give up some monetary value for a perceived long-term future for the target or for it being part of a global player or larger organisation.

Corporate acquirers can also take advantage of possible deal structures and opportunities that may not be available to some private equity firms. For example, those that have ongoing operations in certain markets or regions can be much more appealing to partners that wish to enter those markets or regions.

Finally, if you can't beat them, join them. Corporate acquirers may wish to consider exploring opportunities to joint venture with private equity firms to add value and long-term stability to deals. They often have excellent market experience and management skills that private equity could use, while in turn corporates may want to reduce the upfront risks in relation to starting a business or entering a new market. If the joint venture is successful, the corporate acquirers can also offer a reasonable and timely exit for the private equity firm.

TOP TIPS

Effective M&A due diligence in a post-Covid landscape

- Focus on Covid-19 related risks and opportunities. Disrupted supply chains, loss of production and decline in revenue should be taken into consideration, yet with increased risks there is increased opportunity for buyers of stressed targets. For sellers, adequately protecting and addressing the pandemic's negative impacts can significantly increase their negotiation position.
- New tools and digital innovations are helpful, but personal contact is important. Due diligence became a remote process at the outbreak of the virus. Although this is likely to continue in a post-Covid landscape, we recommend finding ways to have personal contact, which we find extremely valuable.
- Consider compliance and Cyber Security. The pandemic prompted a sudden increase in remote and virtual work environments. GDPR, digital operations and related compliance matters (including cyber security) should be given a hard look by buyers. Sellers should ensure the appropriate programs have been implemented and be prepared to answer detailed questions.

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Rajesh Khairajani is the Partner for Financial Reporting and Valuation Practice at KNAV. He is based out of Atlanta, GA. Selected in 2015 as one of the 40 under 40 honourees by the NACVA, Rajesh has conducted over 1,200 appraisals across various geographies.

Rajesh is member with the American Society of Appraisers, American Institute of Certified Public Accountants and the Institute of Chartered Accountants of India.

His service area expertise includes:

- Valuations for financial reporting (PPA's, impairment testing, valuation for share based payments, intangible valuations)
- Valuing complex securities
- 409A valuation
- Economic valuations for transfer pricing
- Cross border mergers and acquisition and due diligence
- Valuation for litigation support and dispute settlement
- Valuations for SBA loans

In early 2007 Rajesh started the valuation service line of KNAV. Since 2007 KNAV's Financial Reporting and Valuation Service (FRVS) line has conducted over 500 valuation engagements specialising in transaction valuations and valuations for financial reporting purposes under U.S. GAAP and IFRS.

Rajesh's association with KNAV began in 2005 when he joined the firm's assurance service line as senior associate. He was involved in various special projects of the firm such as due diligence, accounting advisory and U.S. GAAP restatements.

Founded in 1999, KNAV is a full-service global accounting and consulting firm, that offers a complete suite of services including Assurance, Taxation, Valuation, International Transfer Pricing, Accounting Advisory and Business Advisory Services.

Today, KNAV is an international organisation comprising of more than 200+ professionals in 6 countries: United States, Canada, United Kingdom, Netherlands, India and Singapore.

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QUESTION ONE

What are the biggest advantages of using M&A to enter new markets in the current landscape, as opposed to market entry via exporting, direct investment, subsidiaries, and other methods?

Acquiring or merging with another company ensures that the resulting entity can immediately operate in a new geography or industry without the gestation period typical of organic growth strategies. With the uncertainty of how Covid will pan out (its long-term impact on the overall economy and its impact on the regulatory, taxation and monetary policy of the Biden administration) the outcome of making fresh investments to scale up operations would be more unpredictable than acquiring an existing company.

Advantages of using M&A as an entry strategy include access to existing clientele, ability to unlock synergies in terms of sharing expertise, a readily available framework with more in-depth understanding of regulations, and an established workforce. M&A also assists companies to boot strap their valuations due to the addition of new revenue and earnings.

A shift to hybrid working, or a permanent work from home model, can also be a major deciding factor for businesses assessing their mode of entry. Another important factor with long-term impact is the investment climate under the Biden administration.

QUESTION TWO

The social and environmental impact of target markets are becoming a key part of M&A – what's your advice on how clients can navigate this complex area and gain full transparency?

Environmental, Social and Governance (ESG) is fast gaining prominence as one of the parameters driving M&A transactions. Potential buyers take into account the historical track record of ESG compliance, as well as future compliance investment, when pricing a deal. There are various qualitative and quantitative factors associated with ESG compliance, such as the firm's market standing and cost efficiency. Surveys reveal that poor performance on ESG factors has often prevented a deal or impacted the motivation to enter one.

From a buyer's standpoint, it would be apt to incorporate compliance with ESG factors early in the due diligence process. Often, ESG is looked upon as a peripheral requirement by the management, yet lack of compliance poses serious threats to the buyer. The comfort obtained by the buyer during their due diligence process can be corroborated by a third-party expert report on ESG compliance. Hiring local third-party experts is also useful when buyers are treading new industries and new geographies.

ESG factors can be used as a lever in negotiating the terms of a deal. The assumption is that positive ESG performance is reflected in the historical date of the target, and thus in the purchase price. However, demonstrable value on account of ESG enables vendors to demand a premium.

After consideration of ESG at the due diligence stage and incorporating ESG in the purchase agreement, it is advisable that the buyer draws up a post-acquisition plan, incorporating integration plans with the buyer's ESG policies and identifying any potential liability or opportunity likely to arise from the seller's ESG practices.

QUESTION THREE

Corporate acquirers are facing stiff competition from private equity players on the global stage, changing the pace of overseas M&A. What's your advice to clients trying to navigate this competitive, fast paced M&A market?

In recent years, private equity has garnered attention due to their deep pockets and a certain 'glamour factor' attached to them. Having a renowned PE investor as a shareholder is a matter of pride for a company. There are thousands of PE firms out there with billions of dollars to spend. Both the numbers of PE firms and dry powder continue to grow, but there is still a relatively smaller number of companies that may be available for sale/investments.

Our advice to clients looking for an M&A target is to present their value proposition, in terms of what they bring to the table. Synergies such as supply chain, distribution network, specialised IP, access to new market and ability to leverage on the existing client or vendor relationship is unique to a corporate buyer.

We advise clients to identify the target's rationale behind the M&A activity at the onset. A target company may use the M&A activity as a means to exit the business, while certain target companies want to attract additional investment for further growth and expansion. For the former, any value proposition that the client may be able to bring to the merged entity would not influence their decision, but it would appeal to the latter. The buyer should spell out their strategy and vision for the target right at the start of negotiations to enable them to evaluate whether their vision aligns with that of the potential buyer.

PE investors are generally only pursuing financial synergies, their ultimate goal being an exit with lucrative returns. Corporate acquisitions are motivated by strategic synergies, so we would advise our clients to highlight this in their offer to a target. The industry expertise that a corporate buyer can bring on board is unparalleled. Moreover, a corporate acquirer introduces various integrational benefits in terms of access to clientele, domain expertise, diverse workforce etc.

Following the exit of a PE investor after five to seven years, there is a question whether the same level of performance achieved by the PE investor during their tenure can be sustained. This approach often makes companies dependent on such investments, which may not be favourable in the long term. Additionally, divergence in the approaches of different PE investors leads to continuity issues of performance enhancement measures.

TOP TIPS

Effective M&A due diligence in a post-Covid landscape

- Assess the resilience of the business with regard to top line and profitability impacts, to gauge the actual impact of Covid on performance.
- Look at the target company's agility towards the challenges of the pandemic, in terms of ability to manage supply chain disruptions, defaults on debt related payments. This would help the company evaluate how swiftly the target can adapt to challenging situations
- Assess the target's policy towards employees over the pandemic period by looking at attrition and measures adopted for employee well-being. Such analyses would offer a window into the company's culture and attitude towards the workforce.
- Evaluation of the targets dependence on government aids provided during the pandemic to understand the impact on the business when such aids are withdrawn

"Our advice to clients looking for an M&A target is to present their value proposition, in terms of what they bring to the table"

Employment

Employment issues have many facets from engaging and retaining employees to dismissals and various disputes which inevitably arise. IR Global members are unique in that they offer both corporate advice to international businesses and individuals with complex or sensitive employment law issues. They offer a global service and work across borders to ensure that each issue is handled efficiently in accordance with the laws of each relevant country.

For more information visit:
www.irglobal.com/working-groups/employment

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Monika E. Naef is Partner and Owner of DUFOUR Advokatur AG (Dufour Attorneys). Her focus areas are employment and business law, business development and M&A, international business relations and trade law. After earning her law degree from the University of Basel and passing her bar exam in Basel-Land, Monika became in-house legal counsel for a multinational pharmaceutical and chemical group, with global leadership responsibilities.

She also headed the multifunctional M&A review team as well as the Trademarks Department. In 2005, she moved into private practice by establishing DUFOUR Advokatur together with other partners at its current domicile. Monika attended INSEAD (International Executive Programme) and is a Certified Global Negotiator (CGN-HSG).

From the beginning, DUFOUR Advokatur AG wanted to offer more to its clients than just legal advice. We created a unique consulting culture – with unconventional ideas, an excellent team spirit and a concept of competence that extends beyond the legal view to include the social and emotional aspects of a mandate.

Today DUFOUR successfully advises a large number of companies, private individuals, foundations, non-profit organisations and pension funds. In the field of pension funds, charitable funds, foundations and NPOs, DUFOUR has established itself as the top specialist in Switzerland. We offer comprehensive legal advice and have a team of recognised experts with core skills in employment law, corporate law, licensing and trade law as well as matrimonial property and inheritance law. In addition, DUFOUR has excellent knowledge in the legal aspects related to the following industries: pharmaceuticals, chemicals, Medtech, trade & logistics, construction and the art market.

Time and again we find that when providing intelligent and creative solutions in particularly complex or challenging projects, successful legal advice means more than just being right. It demands all of our expertise, experience and passion as legal advisors.

QUESTION ONE

What are the key cultural factors surrounding employment and working practices that businesses should be aware of in your jurisdiction – and how can businesses access the local intelligence they need to integrate?

Of the 8.637 million people residing in Switzerland in 2020, 25.5% or more than 2.2 million were foreign nationals, mainly from EU or EFTA countries. The workforce in Switzerland is very diverse and the government puts a strong emphasis on integration.

Part-time work is very common for female employees and increasing for younger male employees, particularly when starting a family. 88% of the female population aged 25-39 are working compared to 70% aged 55-64.

The retirement age is currently 65 for men and 64 for women and is expected to be increased and aligned over the next few years for all.

As the unemployment rate is low (5.1% for women, 4.8% for men in the age bracket 15-64), recruiting qualified personnel can be challenging. The workforce is generally well educated, with 36% of the population having tertiary degrees, and 47% having secondary degrees. Switzerland boasts a so-called dual educational system in which professional skills are acquired through a two to four year apprenticeship learning on the job and parallel schooling.

Cost of living and salary levels are high compared to surrounding countries.

Switzerland has entered into treaties with the European Union, EFTA and the United Kingdom which allow nationals from these countries to easily obtain the required work and residence permits in Switzerland. Companies also employ a large number of cross-border workers (approx. 350,000 in 2020) who reside in a neighbouring country but work in Switzerland.

While employment law is relatively liberal in Switzerland, employers must be aware of certain restrictions and limitations. There is no concept of "hire and fire". Statutory notice periods are dependent on the length of tenure. Unfair dismissal may create cause for damage claims by employees.

QUESTION TWO

What challenges have clients encountered as they merge their own corporate employment and agreement practices with local employment regulations? How have you helped them to navigate this during market entry?

While English is spoken in many areas and many laws are available in English translations online, it is not an official national language. Translation of documents for communication with authorities can be costly.

Some employment policies need to be adapted to meet local legal requirements. However, Swiss employment law is flexible enough that it's usually possible to stay close to global policies.

Obtaining work permits for non-Swiss, EU or EFTA nationals can be challenging, as these are limited in number. The Cantons (26 individual sub-states with their own legislation) cannot grant more permits than their allocated quota per year. Before requesting a permit for a third-country national, an employer must show what measures were taken to hire Swiss or EU/EFTA nationals and why they were unsuccessful. Recruitment firms require an operating permit in Switzerland – a challenge for global recruitment of multinationals that can result in fines.

Global incentive plans and stock ownership plans can produce local taxation challenges for employees, which can ultimately make them unattractive. For companies listed on the Swiss stock exchange, special rules apply regarding senior management and Board compensation. Shareholders have a "say on pay" during the annual general assembly. The requirement to provide information to shareholders in this context can be quite onerous.

Switzerland is one of the top economies in innovation. Employee inventions are another stumbling block in global policies. Under Swiss law, there are different types of employee invention. Not all inventions automatically transfer to the employer and depending on the nature of the invention, additional compensation is due to the employee.

Employees have information and consultation rights in various matters, ranging from decisions regarding pension fund solutions to the work environment and transfer of undertakings.

TOP TIPS

Preserving company culture as you build a team in a new market

- Create a culture of trust
- Be curious about the culture of the new market, learn how things are done differently
- Teach new hires about your company's values and beliefs
- Visit the new market in person

Another challenge is understanding Switzerland's social security system, particularly the pension fund system, which rests on three pillars. The first pillar encompasses a state pension plan granted by the government that addresses needs such as old age, invalidity and death. The second pillar relates to employer pensions (which covers old age, invalidity and death), which are by law required to be separate from the employer. Particularly for companies accounting under US GAAP, this can be difficult to understand. Typically, an employer will join an existing pension fund. Contributions to the first and second pillar are split 50/50 by the employer and the employee. The third pillar relates to tax-privileged private savings and is, therefore, less relevant for employers.

QUESTION THREE

What are the key steps businesses need to take to attract and retain talent in your jurisdiction – from progression expectations to financial incentives?

While remuneration – in particular a properly set-up incentive scheme – remains a key element, cultural issues and creating a climate of trust with flat hierarchies have become almost equally important. Employees need to be engaged in all areas and processes. Employers should invest in employees' education and personal growth. Multinational organisations can offer assignments outside of Switzerland to boost attractiveness. Since Covid-19, offering flexible working models is now often expected by (younger) employees. However, the legal framework governing remote work is not yet well established in Switzerland.

Employer branding by recognised organisations, such as "Great Place to Work®", should be considered, particularly as they offer standardised certification procedures.

Regular vetting of employee compensation with the average market terms should ideally become a standard procedure.

"Global incentive plans and stock ownership plans can produce local taxation challenges for employees, which can ultimately make them unattractive"

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Henrik has worked in the legal sector for almost 20 years. He deals with employment law, data protection, debt collection and bankruptcy. He has helped Danish and international clients conduct legal proceedings before the Danish courts for many years, with a particular focus on annulment in bankruptcy, leased property valuations and public housing, employment and insurance law. Henrik advises financial institutions, insurance companies, housing associations, and small and medium-sized companies. With the right to appear before the Danish Supreme Court, Henrik can take cases all the way to the top. He is also a qualified arbitrator. Henrik has been an IR Global member since 2019.

Holst, Advokater is a business-oriented, full-service law firm that advises clients of any size in all significant business areas. We have around 95 employees (55 lawyers and 40 secretaries and administrative staff). Our offices are located in the heart of Aarhus and Copenhagen. At Holst, every case starts with curiosity, understanding and an honest dialogue. We strive to ensure it ends with the best possible solution, legally, commercially and for all parties. We draw on broad expertise across many disciplines – and approach legal issues with empathy and understanding. It's about trust: Trust is the basis for giving and receiving the best advice. And trust that, together, we will achieve the best results.

We do it because we are passionate about our profession and passionate about helping you. That's why we do what we do, with simplicity, productivity and engagement.

QUESTION ONE

What are the key cultural factors surrounding employment and working practices that businesses should be aware of in your jurisdiction – and how can businesses access the local intelligence they need to integrate?

Powerful collective organisations known as labour market parties (social partners) are fundamental to the Danish labour market. Membership of an organisation is quite common for both Danish employers and employees. Foreign employees and companies can also become members of the Danish organisations, either voluntarily or they can be compelled to join.

Denmark has a long tradition of the State interfering as little as possible regarding the regulation of wages and working conditions. As an example, there is, among others, no statutory minimum wage in Denmark. Instead, wage and working conditions are mainly regulated through collective agreements that are entered into between trade unions and employer's organisations.

A collective agreement is an agreement between two parties stipulating which working conditions shall apply to an employee's employment at the company in question or industry.

Subject to a collective agreement, an employer is obliged to grant working conditions in accordance with the collective agreement to all employees working within the area of the collective agreement - regardless of whether they are a member of a trade union or not. If an employer is not a member of an employer's organisation, the trade union may enter into an agreement with the individual employer. Such agreements between an individual employer and a trade union are often entered into as so-called "adoption agreements". Under an adoption agreement, the employer becomes obliged to comply with the collective agreement which normally applies within the specific professional area.

The labour market parties are responsible for ensuring that the collective agreements entered into are observed.

The best way for companies to obtain knowledge about the Danish model is to request independent legal advice. If a company instead requests advice from an employer's organisation, the company may risk becoming comprised by a collective agreement.

QUESTION TWO

What challenges have clients encountered as they merge their own corporate employment and agreement practices with local employment regulations? How have you helped them to navigate this during market entry?

Holst, Advokater has assisted several foreign companies with numerous employments in Denmark. Most companies are surprised by how the Danish labour market is regulated, since this often deviates significantly from employment regulations of their home country. As mentioned, Denmark has a long tradition of the State interfering as little as possible when it comes to regulating wage and working conditions; however, several mandatory rules must be observed, such as rules for providing a safe and healthy working environment in Denmark. There are requirements for everything from the physical setting to the planning of work. For example, working hours must be planned in such a way that employees are granted a rest period of at least 11 consecutive hours within each 24-hour period.

Holst, Advokater also assists with clarifying whether there is a need to establish an actual subsidiary or branch office in Denmark, including also registration with the Danish authorities. In addition, Holst, Advokater advises on work and residence permits should a company wish to employ foreign labour. Different rules apply to Nordic labour, European labour and non-European labour. In the event of non-European labour, applications for work and residence permits must be submitted to the Danish Agency for International Recruitment and Integration (SIRI), which can be a complicated and time-consuming affair and where it is an advantage to know the system.

Holst, Advokater also advises on whether an employee is comprised by Danish or foreign social security so that employers aren't hit by unnecessary costs for social security.

If an employer in Denmark has not observed its duty to pay taxes, they will be jointly and severally liable with the employee as a general rule in respect to the unpaid taxes. Hence, Holst, Advokater also assists with guidelines about tax obligations.

QUESTION THREE

What are the key steps businesses need to take to attract and retain talent in your jurisdiction – from progression expectations to financial incentives?

In order to attract and retain talent, the following is important in Denmark:

- **Good options for career development**

Many younger talents are highly motivated by responsibility, but it can be difficult for an employer to meet this at the early stage of their careers. If there are heads in the company that have worked their way up, this shows the younger talents that there is good potential in the company for developing and making a career, including also the required responsibility.

TOP TIPS

Preserving company culture as you build a team in a new market

Building a team in a new market places employees somewhere outside the head office, which is often the main threat against company culture. Hence we recommend:

- Having online coffee breaks: a large part of the employee culture is found during coffee breaks and other informal meetings. To retain and establish routines as much as possible, employees should be encouraged to book personal online meetings with each other, at which they can speak freely
- Running virtual activities for the entire team: there are many online activities – games, quizzes or virtual guides – that may help strengthen team spirit in a new culture where there is distance between colleagues.
- Making online meetings a standard: if physical meetings become exceptional, remote teams are less likely to feel excluded.

"Many younger talents are highly motivated by responsibility, but it can be difficult for an employer to meet this at the early stage of their careers"

- **Competent and committed heads**

A culture with good feedback is needed and must match the habits and requirements of the next generation. The most represented generation in the labour market right now is the one that has grown up with instant gratification, likes and comments. This should be reflected in the culture of feedback.

- **Work-life balance and purpose**

Flexibility and co-decision making will become important competition parameters in future, among others, due to the fact that companies functioned so well during the two most recent lockdowns in Denmark. Businesses should offer flexible working hours, virtual presence, internal rotation of assignments, job swaps with colleagues from other departments, continuous skill development, etc.

The generation currently dominating the labour market is very willing to take risks when it comes to job security. They would rather be unemployed or initiate their own start-up than work with something that is not of interest to them.

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Admitted to the Bar in 1997 and founder of Galion, Lionel Paraire has a DESS de Droit des Affaires and a Magistère-DJCE (Masters in Business and Tax law) from the University of Montpellier.

He worked for six years with Cabinet Jeantet Associés, then worked at the firm Baker & McKenzie, and then Mayer Brown where he became Of-Counsel.

Lionel has been Senior lecturer at the University of Paris XII in Labour Law and European Labour Law. He is a member of Avosial, EELA (European Employment Lawyers Association), ANDJCE (Association Nationale des Diplômés Juriste Conseil d'Entreprise) and IBA (International Bar Association). He is also Senior lecturer at the University of Montpellier I (DJCE).

He is an expert in individual employment relations and (high risk) litigation and dispute resolution. He regularly assists companies with restructuring and the labour and employment law aspects of corporate transactions.

Moreover, he has written numerous articles for specialised press (Jurisprudence sociale Lamy, RF Social, l'Entreprise, l'Usine Nouvelle) and the national press (La Tribune). Lionel frequently takes part in conferences on varied subjects of labour and employment law and provides training for his clients.

Lionel speaks French, English, Spanish and German.

"In France, the legal environment is constantly changing as a result of government reforms and/or case law evolution"

Galion is an independent French business law firm dealing exclusively with labour and employment law and specialising in advice, litigation and dispute resolution.

Galion creates and develops "made-to-measure" solutions adapted to clients' needs, culture, business and organisation.

Our approach is based on three fundamental points:

- Technical excellence maintained in a context of increasing legal uncertainty.
- Pragmatic vision and a strong corporate culture to act effectively,
- Partnership, availability and commitment, essential for creating a close working relationship.

Galion advises on labour and employment law issues, including:

- Individual employment relations: Management of contractual relations, secondment and expatriation of employees, executive remuneration, individual litigation and dispute resolution.
- Collective employment relations: Employee representative bodies operation and allocation, collective bargaining and collective litigation.
- Reorganisation and restructuring: Implementation of consultation process, downsizing and outsourcing.
- Remuneration and employee savings schemes: Remuneration policy, reward schemes, profit sharing agreements, company saving schemes and retirement schemes.
- Assistance with the labour and employment law aspects of M&A transactions and due diligence reviews.
- URSSAF Audits and social security dispute resolution.
- Litigation and Dispute resolution: Assistance and representation of companies and executives before courts and administrative bodies.
- White-collar crime litigation: Work accidents, criminal offence of obstructing the works council.

QUESTION ONE

What are the key cultural factors surrounding employment and working practices that businesses should be aware of in your jurisdiction – and how can businesses access the local intelligence they need to integrate?

In France, employment law affords employees a high level of protection (e.g. working time, right to disconnect, dismissal procedure). Nevertheless, the legal environment is constantly changing as a result of government reforms and/or case law evolution. Thus companies and particularly foreign employers need to be assisted when coming to or acting on the French market. It is not possible nor necessary to know or understand everything about French law, but businesses should have the right reflex at the right moment: choosing the wrong option may result in costly individual or collective litigation.

It is also important to become familiar with the working culture of French employees. Like many other European countries, France has its own distinct attitudes and values, which are prominent in day-to-day life. They also underpin the workplace and expectations in business.

In general, the French workplace is quite formal and conservative: appointments are usually made for all business matters, meetings are arranged well in advance and focused on the matters to be discussed. There may be discussions and debates, but ultimately decisions are made by senior members of staff and respected.

QUESTION TWO

What challenges have clients encountered as they merge their own corporate employment and agreement practices with local employment regulations? How have you helped them to navigate this during market entry?

Being a global company does not prevent you from doing business in France. Local advisors are important, as they are a bridge between the business needs and the local legal environment, especially in employment law, which is key in France. Our role is not to say "no", but "yes, in such a way".

The biggest challenge is finding the right balance between existing corporate employment practices or agreements and local employment legislation or collective regulations, as the case may be.

As employment attorneys, we often help our international clients to adapt their existing regulations with local corpus. For example, a global policy needs some amendments before being implemented in France, following a particular procedure that may involve both local staff representatives and labour administration.

While English is often considered the international language of business, it is easier to get accepted into the French workplace by speaking at least a little of the language. While at many international companies it is perfectly possible to get by with English alone, taking the time to learn the basics will be considered respectful in France. From a strictly legal standpoint, many documents are not binding towards French employees if they are not translated into French. We then advise and help to prepare bilingual legal documentation in order to comply with French law.

TOP TIPS

Preserving company culture as you build a team in a new market

- Trust your local lawyers to get the best of them. Your local lawyers should be somewhat familiar with your industry and its legal environment. If not, they should be willing to learn everything about it. Likewise, your local lawyers should be willing to take time to educate you and your staff about the legal environment of your business (e.g. through newsletters or other articles).
- Anticipate as much as possible. Relying on specialised and connected lawyers will save you time and money. As lawyers become more and more specialised, they also must have connections with other specialists and/or other colleagues from other jurisdictions.
- Do not neglect the importance of French working culture. French employees take their breaks (coffee or cigarette breaks, lunch or vacations) as seriously as their work. It does not mean that French employees do not work hard, but they definitely work differently.

QUESTION THREE

What are the key steps businesses need to take to attract and retain talent in your jurisdiction – from progression expectations to financial incentives?

Whether creating a new business from scratch or acquiring an existing local company (which entails due diligence specifically dedicated to human capital), the most important thing is to show confidence in local teams (which does not exclude close management).

Employees are increasingly looking for some sense in performing their job. It is not only a question of progression in their career or financial expectations, but also understanding and appropriating the business project.

Attracting and retaining talent implies knowing and addressing employees' expectations, keeping in mind that these expectations are constantly changing according to economic and social context. The best example today is telework (télétravail), which may have already been implemented in some (mainly large) companies, but has been strongly encouraged by the French government since the beginning of the Covid-19 pandemic. Both employers and employees have seen that business was not harmed by telework and could even entail productivity improvements notably in Paris and other large French metropoles where commuting is very time-consuming. Having employees teleworking one or two days per week is and should remain the norm within many companies after Covid-19.

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Aliff is a senior partner with ALMT Legal with over 30 years of experience. As a hardcore M&A and tax lawyer for over two decades, Aliff realised the potential for developing a complimentary tax and employment practice and now heads a thriving labour and employment practice at ALMT Legal. The practice encompasses all aspects of employment law, from structuring contracts to drafting company policies and procedures. This includes issues relating to sexual harassment, data protection and anti-bribery, implementing reduction in workforce schemes, effecting terminations for misconduct and other reasons, developing employee stock options schemes and establishing and advising on social security benefits and obligations, as well as effectively handling all employment-related disputes in various forums across India.

Today, Aliff is recognised as an outstanding lawyer in his chosen fields of practice. His expertise enables the firm to provide seamless advice in all kinds of cross-border deals, something which clients have consistently appreciated. Aliff has been ranked among the Top 100 Private Practice Lawyers in India by the India Business Law Journal in 2018-19 and 2020-21. He is featured in Asian Legal Business magazine's 'A-List of India's Super 50 Lawyers in 2020'.

ALMT Legal is a dynamic and progressive full-service Indian law firm that provides high-quality services at a reasonable cost. With approximately 70 lawyers and 20 partners across offices in the strategic commercial centres of Mumbai and Bangalore, ALMT Legal has an established reputation as one of India's top bracket firms. ALMT Legal's practice areas encompass all aspects of Indian law and regulations ranging from corporate and commercial to tax, banking and finance, employment, corporate M&A, private equity, dispute resolution, intellectual property, shipping, aviation and even immigration laws. With its broad base of partners, the firm can operate seamlessly and ensure adequate partner attention on all matters, big or small. The partners are always available and responsive to client needs and provide practical solutions to complex issues within the framework of complex laws.

ALMT Legal has been consistently recognised by global legal publications, including Asia Law Profiles, Legal 500, Chambers and Partners, IFLR 1000, India Business Law Journal as a highly recommended Firm for various practice areas including labour and employment, M&A and private equity, capital markets, tax, banking and finance and commercial disputes.

"Though the law relating to sexual harassment in India is only limited to protecting women, most companies have created gender-neutral policies to protect both genders"

QUESTION ONE

What are the key cultural factors surrounding employment and working practices that businesses should be aware of in your jurisdiction – and how can businesses access the local intelligence they need to integrate?

Respecting cultural diversity in India is vital as people come from diverse backgrounds. For example, there are several religious and festival holidays in India and therefore preferring one to the other when deciding the annual holiday list may not be welcomed by the employees.

India has a lot of public holidays (around 20 each year) and while only four are compulsory holidays, it is advisable to provide between 10 to 15 each year and a mix of all religious holidays. Some companies follow the practice of say 10 fixed holidays and two to four optional holidays where the office works but employees are allowed to take a festival or religious holiday would be debited against annual leave.

Diwali (festival of lights and the Indian new year) is considered extremely auspicious in India and thus, employees expect Diwali pooja (prayer) and lunch to be conducted for blessing the workplace with prosperity.

Employees also expect their annual bonus to be paid around Diwali, and even the statutory bonus is structured in a way so that the employers can pay it around Diwali rather than at the end of the calendar or financial year.

Apart from celebrating Diwali and other festivals, many businesses also organise annual functions for distributing awards to the employees.

Finally, there are various policies of offshore entities, such as a strict hierarchy system and shorter vacation period which, if imposed on the Indian subsidiary, are not appreciated by the employees. Indians are used to an annual vacation of at least 20 if not 30 days in addition to the public and festival holidays.

QUESTION TWO

What challenges have clients encountered as they merge their own corporate employment and agreement practices with local employment regulations? How have you helped them to navigate this during market entry?

Different states have different rules as well as some state-specific statutes that apply to businesses. These include different working hours to holidays and other welfare provisions. We have advised clients on integrating the global practices and policies to make them in line with the local law as well as helping them structure a uniform policy when they have offices in different parts of India so that policies meet different state requirements as well as employee expectations. We have also advised on various alternative benefits and options to suit both the businesses and the employees.

Separately, though the law relating to sexual harassment in India is only limited to protecting women, most companies have created gender-neutral policies to protect both genders.

TOP TIPS

Preserving company culture as you build a team in a new market

- Structure flexible working policies for ease of working.
- Consider offering a joining bonus/incentives to encourage employees.
- Offer training programs and career development programs that the employees are interested in.
- Respect different cultures and religions by recognising and celebrating different local festivities.
- Introduce open-door policies and virtual cross-team interactions so that employees feel comfortable approaching seniors/management and allow them to make suggestions relating to business/operations.

QUESTION THREE

What are the key steps businesses need to take to attract and retain talent in your jurisdiction – from progression expectations to financial incentives?

In recent times, a lot of businesses have started offering joining bonuses to employees to encourage them to accept the offer. Several businesses also offer retention bonuses (linked with tenure) to encourage and motivate the employees to continue their employment for the long term.

Some companies offer ESOPs and different types of stock-related benefits such as Stock Appreciation Rights to the employees. These are now deemed less attractive by employees due to tax implications in India and uncertainty in valuations. Some businesses organise office retreats and outings which helps retain talent as well as increase productivity. We have also seen some companies offering wellness programs as part of their leave/travel allowance or as an incentive to attract new employees and increase productivity at the same time.

Employees are increasingly being offered training and various career development programs to enhance their skills, which are helpful both to the businesses as well as the employees as it uplifts their professional profile at the same time.

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Shilpen has a dual practice focused on dispute resolution and employment law. His expertise as a litigator is in high value commercial dispute resolution and contentious corporate and partnership matters, often involving an international element. He has conducted a number of reported cases and cross-border disputes and has a reputation for securing the best commercial outcome for his clients.

Shilpen also advises and represents employers, employees and professional clients in all aspects of employment and partnership law. He has expertise in restrictive covenants, discrimination, whistleblowing, restructuring and bonus disputes. He represents senior executives, self-employed professionals and company directors in connection with their entire workplace needs, including claims in the Employment Tribunal and the High Court.

Shilpen is a Londoner and is passionate about the capital's unique identity and cultural variety. He is a committed advocate and driver for diversity and inclusion in the workplace. Shilpen is a CEDR-accredited independent mediator and accepts appointments in relation to business and workplace disputes.

QUESTION ONE

What are the key cultural factors surrounding employment and working practices that businesses should be aware of in your jurisdiction – and how can businesses access the local intelligence they need to integrate?

The UK offers a very business-friendly climate together with a progressive approach to employment law. Our laws are presently aligned with the EU which means employees enjoy the same basic rights and protections in this jurisdiction.

In my view the three main cultural factors that define the modern British workplace are flexibility, diversity and adaptable employment contracts.

We are undergoing a silent revolution in terms of working practices and the Covid-19 pandemic has brought widespread recognition that many employees can work effectively from almost anywhere. Businesses are questioning the need for expensive offices and how these spaces should be used. Meanwhile many employees have enjoyed working remotely from home and are reluctant to return to commuting to work five days a week. This is leading to innovation and a less prescriptive approach by employers, with many businesses trialling a hybrid model where employees can work partly from home (or anywhere) and partly from the office.

It is also essential to recognise that the British workplace is very diverse. We welcome every ethnicity, physical ability and personal orientation and each worker has a legal right to expect fairness and equal treatment from their employer. The Equality Act 2010 prevents discrimination and harassment of employees in relation to nine "protected characteristics" comprising age, disability, gender reassignment, marriage or civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

The third key feature is the freedom to negotiate flexible remuneration terms and post-termination restrictions with workers. When it comes to paying staff we have minimum wage protection, but other than this employers are generally free to agree incentives, bonuses and commissions as they see fit. Employers can also protect the legitimate interests of their business by introducing contractual restrictions to prevent interference with customers, protect confidential information and guard against competition and poaching of senior employees. When breaches occur, an employer can be confident that properly drafted clauses will be recognised and robustly enforced by our Courts.

There is less freedom when it comes to industry sectors with recognised trade unions, as these will entail collective bargaining requirements which I have not touched on here.

gunnercooke is one of the UK's fastest growing law firms, providing a wide range of corporate and commercial legal services to businesses, banks and financial institutions. The firm was founded in 2010 to challenge, improve and evolve the way that legal services are delivered. We believe that the legal industry serves neither clients nor lawyers the way it should. Our founders set about doing things differently from day one, flattening out the traditional hierarchy and establishing a new model based upon flexibility, transparency and freedom.

All gunnercooke lawyers have a client-focused approach and at least 10,000 hours' practising experience. They also operate on a fixed-fee basis, meaning work is scoped out from the outset and cost certainty is guaranteed. As a result, all clients have access to trusted advisors who have a breadth of experience and knowledge, enabling them to work on all matters from straightforward transactions to complicated cases that require complex solutions.

The firm has been recognised for 44 industry awards and currently employs over 330 legal professionals and management consultants across seven offices; London, Manchester, Leeds, Birmingham, Edinburgh, Glasgow and Berlin.

TOP TIPS

Preserving company culture as you build a team in a new market

- Know your company culture. What are the ethical priorities (and brand values) of the business and what are the existing strengths on which you want to build? If you have clear ideas it will be easier to transfer and instil these things.
- Ensure that you have bespoke employment contracts and an employee handbook that reflects the company's culture and requirements.
- Be open to flexible working and experimenting with this. Do not associate productivity or effectiveness with a physical presence in the office. This is even more important given health and safety considerations in the wake of the pandemic.

QUESTION TWO

What challenges have clients encountered as they merge their own corporate employment and agreement practices with local employment regulations? How have you helped them to navigate this during market entry?

In my experience EU businesses rarely struggle with the requirements of UK employment law. This is because the underlying protections are similar, but our requirements are often lesser and more flexible than what they are accustomed to. If anything, I think they find the process of hiring and firing in the UK quite straightforward.

Meanwhile US businesses, for example, do tend to need more adjustments when moving into the UK. This is because we have a fairly robust employment regime and employees have more statutory rights here than they do in America.

The first thing for a new employer to address in this jurisdiction is the employment contract. There is no legal requirement for an employee to have a written contract of employment, but every employee must be given a statement of minimum employment particulars. It is generally advisable to go further than this and produce full employment contracts together with an employee handbook dealing with workplace policies and procedures.

The Working Time Regulations 1998 (WTR) can sometimes come as a surprise to employers. These regulations require employers to take reasonable steps to protect workers' health and safety to ensure that each worker's average working time (including overtime) does not exceed 48 hours per week. There is a right to opt out of the maximum working week limit, but it must be dealt with expressly in writing.

The WTR also gives workers a right to receive a minimum of 5.6 week's paid holiday per year.

The protection against dismissal provided by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) can also be a potential banana skin for employers. This is a complex area but, briefly speaking, these regulations protect employees by automatically transferring them to a new employer when a business is transferred or there is a change in the provision of services. If employers get this wrong, it can trigger claims of unfair dismissal.

TUPE does not apply to transfers into the UK from abroad, but transfers from other EU member states may be caught by local legislation. There is also uncertainty about the potential application of TUPE to a transfer of a business from the UK to another country. This is an area that needs careful handling.

QUESTION THREE

What are the key steps businesses need to take to attract and retain talent in your jurisdiction – from progression expectations to financial incentives?

I think businesses entering the UK market need to be clear about their objectives and have a defined ethos and work culture if they want to attract the best British talent. Employers that are open-minded about work and how it is delivered will find this flexibility rewarded. If they also commit to investing in a diverse and inclusive workforce this will make the transition even better. There is a growing body of research linking diversity with increased productivity.

This is not to say that employers should not demand high productivity and deliverables from their workers. On the contrary, the UK is a jurisdiction where you can clearly set your standards, reward your staff accordingly and rely on the legal system to help with protecting your legitimate business interests.

It is essential to take specialist advice before making the decision to establish a presence here. This will ensure proper compliance with tax and other statutory requirements and also minimise the risk of inadvertent breaches of employment law which could result in expensive liabilities through claims in the Employment Tribunal or the Court.

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Francisco has been a Founding Partner of Ponte Andrade Casanova since 2005. He is a lawyer who graduated from the Universidad Católica Andrés Bello in 1977. He studied postgraduate studies at the University of Cornell, NY, USA, where he obtained a Master's Degree in Regional Planning in 1983.

He has been a professor at the University Institute of Insurance and Universidad Central de Venezuela. He has been a speaker on matters related to Insurance, Social Security, Pensions and the LOPCYMAT in institutions such as ANRI; BIRD; CAMCARONI; Chamber of Caracas; Miranda Chamber, Electric Sector. He has been a member of the boards of Banco Exterior, Seguros Anauco, of the Chamber of Insurers of Venezuela, of the National Insurance Council, of Seguros Comerciales Bolivar. He has co-authored a book: Organic Law on Prevention, Conditions and Work Environment (LOPCYMAT). Compliance and Responsibilities. Analysis and Experiences 2005-2010.

President of the Social Security Sub Commission of the Venezuelan Federation of Chambers of Commerce and Production (FEDECAMARAS) and member of the Committee on Safety, Hygiene and Environment (SHA) of the Venezuelan American Chamber of Commerce and Industry (VenAmCham).

Member of the Board of Directors of VENECAPITAL - Venezuelan Association of Private Equity.

Ponte Andrade Casanova (PAC) is a full-service law firm offering high-quality legal services to leading multinational corporations and their subsidiaries, as well as local companies and individuals in Venezuela. PAC stands out due to its practitioners' 40+ years of experience and specialised expertise, the tailor-made services it offers, and its ability to compete with larger, higher-profile firms.

The firm offers advice in the fundamental branches of law applicable to industry, commerce, and individuals. The firm specialises in civil law; commercial law; technology, media & telecommunications (TMT); procedural law; labour law; tax; administrative law; occupational health and safety; banking and insurance law.

PAC attracts some of the biggest names in major industry sectors, consistently providing market-leading advice on matters of crucial importance to their business models. Among the firm's clients are national and multinational companies of the following sectors: entertainment, digital streaming, VOD and OTT broadcast, and advertising; e-commerce; technology; banking; insurance; pharmaceutical; land, sea and air transportation; telecommunications; construction; manufacturing; cosmetics; household products; among others.

QUESTION ONE

What are the key cultural factors surrounding employment and working practices that businesses should be aware of in your jurisdiction – and how can businesses access the local intelligence they need to integrate?

In Venezuela, our jurisdiction, it's important to understand the political, economic and social contexts before analyzing the key cultural factors surrounding employment and working practices. This context has transformed Venezuela's labour landscape and one of the most important factors has been the emigration of those between 20 and 45 years of age. This phenomenon has been taking place for at least 10 years now and this demographic, which makes up most of the working population, has settled and established ties in their recipient countries. Venezuela should work to create the conditions necessary for migrants to come back to the country.

Regarding the key cultural factors surrounding employment and working practices that businesses should be aware of in Venezuela, it's important to consider telework and other new ways of establishing and maintaining labour relationships that have affected the local labour market. Combining these new elements with globalisation, embracing cultural diversity in the workplace is an important first step for businesses that want to be competitive when trying to fill vacancies with people from other nations and cultures, facing the risks that come with cross-border work. Venezuela can also consider itself lucky to enjoy a great deal of social cohesion and solidarity that transcends class and results in a lot of social and economic class mobility.

In Venezuela, we can combine our human capital with a cultural diversity that inspires creativity and drives innovation. A key element of Venezuela is the local market knowledge and insight, achieved through a mix of academic expertise and practical experience, that Venezuelans can provide to the businesses that employ them. Venezuela's a land of great cultural and ethnic diversity with top-of-the-line higher education institutions that allow for great knowledge, talent and entrepreneurial initiative from the local population.

QUESTION TWO

What challenges have clients encountered as they merge their own corporate employment and agreement practices with local employment regulations? How have you helped them to navigate this during market entry?

Venezuela has seen more acquisitions than mergers in recent years. It's also become common to see, in this past year at least, Venezuelan companies acquire foreign companies' subsidiaries and local operations. In these cases, the acquired companies had already been operating in Venezuela for a number of years, which facilitates labour matters given that they were already compliant with local legislation.

There are usually two types of these acquisitions: either a company is bought by investors, or it's absorbed by a company of the same type of industry or operation. In these latter cases, one must consider labour union matters, not only because of local legislation but also given that there may be two different union cultures as a result. This difference in culture can be observed not just from the labour benefits perspective, but the political perspective as well, taking into account that the level of communication between two unions and their respective companies may also differ. The acquisition process saw many changes regarding corporate culture, both in management and communications. In some instances, communication with employees allowing them to thrive was a vital component of a successful acquisition and integration. While in those cases where employees and management were kept in the dark, we rarely saw anything other than failure.

Venezuelan legislation is very protective of workers, and the process for employee termination is very restrictive. Knowing the ins and outs of this process, as well as keeping a clear vision of the political, economic, social and labour contexts are what we recommend our clients to ensure their success. Sharing our past experiences in similar contexts, designing tailored compliance measures, maintaining good relations with union leaders are what help guide our clients through successful acquisitions.

TOP TIPS

Preserving company culture as you build a team in a new market

- Understanding the political, social and economic contexts of your new jurisdiction is critical to building a stable workplace culture in a new market. Understanding your employees' views, needs and wants is the way to ensuring a happy workforce which is the best way to succeed.
- Employee happiness is vital to maintaining your company's culture, and happiness doesn't just come from ensuring good salaries, it has a lot to do with practical conditions in the workplace as well. Think of what benefits can be offered to your workers, rewarding employees for their consistency, loyalty and performance is a great way to keep them happy.
- Flexibility is crucial. Countries are impacted differently by many factors, such as public transportation, safety and Covid-19. Understanding how these factors affect your employees in a new jurisdiction is important. Your workplace rules may need to be different depending on where your company is.

QUESTION THREE

What are the key steps businesses need to take to attract and retain talent in your jurisdiction – from progression expectations to financial incentives?

In Venezuela, we find two distinct situations: talent retention in our jurisdiction, and talent retention in companies.

The effect migration has had on a great deal of the working population leaving the nation and has resulted in the diminishing of the labour force with technical, as well as practical knowledge. On the other hand, the high rate of inflation has created a lot of horizontal mobility in the market, with people moving jobs quickly trying to secure better salaries and conditions, often sacrificing workplace culture and positive environments to do so.

We've seen an increase in informal jobs and a de facto freedom to use foreign currencies as references when negotiating salaries. Partly due to Covid-19, we've seen a rise in telework and other new ways of establishing working relationships, such as a local gig economy revolution. This has given people more opportunities to find employment, but also made it harder for companies to retain talent or fill vacancies. Due to this, human resources professionals must work harder to attract talent to their organisations, and keep them there in the long term. HR departments must take long looks at their own cultures, and find new and innovative ways to connect with workers and include them in finding solutions to workplace issues. Human talent is the workhorse of any organisation, and talent management is a process that requires adequate investments of time, effort and money.

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Dr Gerd Müller-Volbehr studied at the Universities of Munich, Augsburg and Paris II (Panthéon-Assas) and is a founding partner of ACURIS Rechtsanwälte. He advises in the areas of labor law, corporate law, commercial law and data protection.

In the field of labor law, he advises international companies on restructuring, the design of operational structures and the management of work processes. In this context, co-determination (negotiations with works councils) and collective bargaining law are strongly relevant. He also specialises in the areas of compliance and data protection, company pension schemes and employee leasing.

ACURIS is a partnership of highly qualified attorneys-at-law located in central Munich. We are dedicated to finding the best solution for our clients in each individual case. We are counseling for national and international clients on complex legal and strategic issues. We represent our clients in and out of court and in arbitration proceedings.

ACURIS offers tailored legal advice, handling each mandate with a high level of commitment and a strong sense of responsibility. Strategic thinking, top-quality legal expertise, specialisation, long-standing experience in the legal areas and our thorough understanding of complex economic interrelations enable us to successfully assert our clients' interests.

ACURIS advises especially in the fields of company law, M&A, employment law, commercial and data protection.

For expertise required beyond the legal areas we cover, we leverage our network of leading law firms and tax advisory firms in Germany, Europe, the United States, and many other countries.

QUESTION ONE

What are the key cultural factors surrounding employment and working practices that businesses should be aware of in your jurisdiction—and how can businesses access the local intelligence they need to integrate?

Cultural factors in every country are subject to changing times. Globalisation in recent decades has certainly contributed to the fact that cultural differences in the individual countries have diminished to a certain extent, especially in working life, and that working conditions have become more compliant overall. In addition to the changing times, the corporate culture in a country is by no means compliant. For example, the corporate culture in an IT company is likely to be very different from that of a traditional industrial company in the steel industry. In addition, caution is advised against stereotypical observations, which makes it hard to define the German corporate culture.

Without claiming general validity, it can be stated for successful companies in Germany that their employees have a high sense of duty, appreciate working independently, strive for perfection in technical matters and have a need for security in social terms. In addition to these traditional specifics, equal rights for men and women and, with regard to the German migration society, equal treatment according to social and ethnic origin – as in many other countries – have gained in importance in recent years.

Since every company has its own corporate culture, general knowledge of cultural peculiarities in the working life of a country is certainly helpful. However, it is much more important for the success of an expansion to Germany to grasp and understand the corporate culture of the specific company. According to the so-called iceberg model by Edward T. Hall, a distinction can be made between visible and non-visible cultural elements. The former include vision, mission, guiding principles, strategy and external presentation. The latter include rules, status, relationships, values and norms, attitudes and feelings as well as people's basic needs. Recording all these factors and assessing them in an overall view is a demanding and time-consuming undertaking. It certainly does not guarantee the success of the integration of two companies, but it can promote it considerably.

QUESTION TWO

What challenges have clients encountered as they merge their own corporate employment and agreement practices with local employment regulations? How have you helped them to navigate this during market entry?

A minimum of uniform regulations is a mandatory prerequisite for operational efficiency in international corporations. When standardising employment and labour practices, it certainly depends on the corporate culture in the respective target company. In companies with an indifferent culture, which is mostly found in small companies or start-ups, decisions can generally be made quickly. This also applies in particular to the adaptation of working conditions. Transformation processes are harder in companies with a traditional, performance-oriented or collaborative corporate culture. Resistance can arise, which must be overcome through careful communication and clearly defined strategic goals. Successful company integrations also examine the future responsibility of employees, as well as their performance and commitment.

For example, Japanese and Chinese companies grant German employees relatively great freedom and thus personal responsibility. For this reason, many employees and managers in Germany value parent companies from these countries.

Companies from abroad should also recognise the opportunity that a works council can provide for integration or transformation. Often the integration is to take place through a new matrix structure. Such a lasting change in organisational structure obliges the employer to negotiate with the works council on the conclusion of a reconciliation of interests and to conclude a social plan. These negotiations will certainly be facilitated if the advantages of the new group strategy for the German company and, at the same time, the retention of the corporate culture are credibly communicated as much as possible. Incidentally, a consensual arrangement between the employer and the works council is more likely to be accepted by the employees than unilateral stipulations. The co-determination in Germany can therefore contribute to the success of corporate integration as a cultural specificity. The same applies to the standardisation of working conditions, such as the group-wide introduction of performance management as the basis for variable remuneration.

> **"It is important for the success of an expansion to Germany to grasp and understand the corporate culture of the specific company"**

TOP TIPS

Preserving company culture as you build a team in a new market

- When taking over a company in Germany, let target companies operate for one to two years and only observe them. In this phase, the specifications of the corporate culture should be determined.
- If new structures and regulations are to be introduced in a target company, it is important to take cultural specifics into account to formulate a strategic goal, justify the necessity of the changes and leave room for employees to work independently. Co-determination is an important factor in the success of the change process.
- To attract employees, take their needs into account. Employers should be open to new developments, such as mobile working and work-life balance.

QUESTION THREE

What are the key steps businesses need to take to attract and retain talent in your jurisdiction—from progression expectations to financial incentives?

Company takeovers always trigger uncertainty among employees of the company being taken over. Often, managers especially in such a situation think about a professional reorientation. This can lead to a significant brain drain that damages the company. Therefore, it is important to identify key employees at the beginning of a takeover and bind them to the company by offering attractive development prospects and retention bonuses.

When recruiting young employees, the special characteristics of Generation Y must be taken into account. In the work context, this generation strives for self-realisation and seeks to find meaning in what their work entails and what their employer stands for. In addition, there is a high need for variety, leisure time and flexibility as well as personal and binding relationships. For employers, this means giving regular feedback to Generation Y employees and offering them the opportunity to grow in their jobs and develop personally and professionally. In addition to recognition of one's own work and interesting work content, the compatibility of family and work is important. If these expectations are not sufficiently met, employees of this generation will decide against a company.

IP

IR Global's Intellectual Property group has member firms in 60+ jurisdictions around the world.
The group offers unrivalled sector expertise and knowledge, so whether your focus is in Biotechnology, Computers, Electronics or Pharmaceuticals, we have leading Intellectual Property experts who understand the specifics of the IP practice area and the field in which you operate.

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Founder and partner at Dipchand LLP, Elizabeth's practice focuses on intellectual property law and litigation with a particular emphasis on biotech and tech. She provides practical advice and strategic enforcement strategies to clients on all forms of IP rights. Elizabeth's clients rely on her to advocate in high-stakes disputes with complex issues in order to protect and enforce the critical IP rights at the core of their business. In the solicitor-side of her practice, she regularly advises clients on IP identification issues, acquisitions through R&D, ventures and partnerships, IP management through life cycle strategies, licensing and assignments, and leveraging technology for the prosperity of the venture.

Dan Pollack built his practice on one primary objective: to help creators and start-ups share their work with the world. Dan often works with creators and creative agencies – photographers, filmmakers, musicians, and writers – to protect and maximise their work value. Additionally, Dan serves as legal counsel for the two leading associations of professional image creators in Canada. Dan advises both emerging and established clients on various issues in his extensive private practice, including copyright acquisition, enforcement, litigation strategy, contracts, licensing agreements, and releases. He also regularly advises his clients on legal issues relating to marketing, social media, litigation, privacy, and corporate law.

Nestled in the heart of downtown Toronto, Dipchand LLP is a boutique law firm, focused on Intellectual Property, Corporate Law, Franchise Law and Litigation. Dipchand LLP's commitment to cultivating strong relationships with our partners and clients results in tailored, strategic advice to guide ventures of all sizes through Canada's dynamic legal landscape. We measure our value as trusted advisors by the unparalleled calibre of our legal advice and quality of service. The firm earns a rock-solid reputation over years of dependable service, which we constantly strive to maintain. If intellectual capital forms the cornerstone of your business, Dipchand LLP has the legal partners you need.

QUESTION ONE

What legal steps do businesses need to take to protect their intellectual property as they move into your jurisdiction?

Canada's Intellectual Property (IP) regime is similar to those in other common law jurisdictions such as the US, UK and Australia. IP rights are primarily managed through federal statutes, namely the Canadian Patent Act, Trade-marks Act, Copyright Act, and Industrial Design Act, in addition to the Plant Breeders' Rights Act; these statutes are administered by the Canadian Intellectual Property Office. However, provincial courts have jurisdiction where causes of action relating to intangible assets, such as passing-off of an unregistered trademark or the misuse of trade secrets or confidential information, have arisen at common law. Note that copyright registration is not required to assert a claim for copyright infringement, unlike in the US.

In either statutory or common law rights, only Canadian registered rights or rights arising from conduct in Canada at common law can be enforced in Canada; no foreign IP rights are assertable in Canadian courts. Thus, planning to move into the Canadian marketplace begins well before getting your goods to the border.

Whether you are diversifying revenue streams, striving for multinational brand engagement or expanding your investor base, your company's IP strategy plays a critical role.

This reality is acknowledged by the widespread treaty participation that provides a framework for companies to coordinate global registrable patent, trademark and design strategies in key markets such as Canada, based on foreign priority dates. Whether your company's critical IP is founded in patents, trademarks or designs, Canadian legal advice is needed on applicable foreign priority claim deadlines.

QUESTION TWO

How can businesses conduct a full exploration of existing established products/brands in the local market – and how can they identify what level of risk they pose to the IP registration process?

Competitive assessments are critical before market entry – it will save your venture time, effort and may dictate how they enter or participate in the Canadian market. While much legwork can be done internally and outside of Canada, it is imperative to engage in direct market intelligence gathering and include lawyers and market monitoring consultants. Accordingly, the risks posed to the IP registration strategy will be influenced by the following factors:

Market Entry Rationale. At the outset, identifying the reason your company is entering the Canadian market will frame the type of entry. These considerations may direct the priorities of your IP strategy. Is your company looking to scale in revenue, expand its market reach, increase its brand awareness, or leverage technological know-how not present in Canada? In the case of bringing new technology into Canada, a patent and trade-secret strategy should be the first consideration.

Target Consumer. Who is your proposed consumer? Does this market know your company and/or its goods and services? Do you have clients in Canada who know about your company from other jurisdictions? If your company's trademarks and goods and services are already known here, you may have a base of goodwill to build upon. However, if your brand is unknown and not particularly distinctive, the IP strategy may need to shift towards new branding specifically for the Canadian market.

Existing Canadian Market Players. There is a fine line between competitors and potential partners. As a direct entrant into Canada, the initial outlay to protect your IP has to be worth the projected revenue. However, these costs may be mitigated through strategic partnerships with local partners who are already market players, or even a less integrated relationship through Canadian distributors or license relationships. In these instances, the IP risks can be mitigated from the outset through registrations and contracts, with the business risks apportioned between you and your Canadian partner.

"Planning to move into the Canadian marketplace begins well before getting your goods to the border"

TOP TIPS

Establishing a local IP claim in your jurisdiction

- Know Your IP Asset Base. Make the most of your IP asset base through deep understanding of the type, volume and generation and development of your intellectual capital within your organisation
- Have a Global IP Strategy. Clearly articulate a long-term, forward-thinking IP strategy that provides for the possibility of market expansion by properly relying on international treaties. In executing your IP strategy, determine what you need to do in different relevant jurisdictions as you progress – this requires coordination with IP advisors who know the right questions to ask at the right time to the right advisors.
- Know Your Sandbox. A competitive assessment allows your company to get to know who is in your Canadian competitive space. Is expansion into Canada feasible? Is there a brand conflict? Does your IP give you a competitive edge that needs to be protected on a priority basis?

QUESTION THREE

What additional security measures do you advise your clients to take to protect their IP as they establish their corporate identity in a new market?

In Canada, it is the rights holders' responsibility to monitor and enforce any of their registered rights or those that have arisen through common law. There is no Canadian 'Trademark Police', but it is possible in the right circumstances to enlist assistance from the Canadian Border Agency in the event of importation of allegedly infringing goods.

Registration Preserves Enforceability. The best security measure is to ensure that your company owns and controls any registrable and unregistrable IP that it relies on to do business with or without reliance on foreign priority claims. This provides the option of traditional enforcement action in the event that your rights are infringed.

Deterrence Through Management. The best way to fight over IP is to avoid the fight. Taking steps to keep your intangible assets managed will deter misuse internally and externally. This strategy relies on day-to-day practices such as record keeping, trade secret management, and proactive brand management. Further, your company's IP rights must be dealt with clearly and explicitly in all types of agreements, such as employment and independent contractor agreements, R&D contracts, manufacturing, supply, distribution and licensing agreements.

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Yasir Masood is a Trademark Lawyer who has been active in the field of IP since 2016.

After completing his law studies in Germany in 2013 and gaining initial experience in law firms in Germany and England, Yasir joined Dennemeyer's Dubai office in 2016. He is part of the trademark and legal departments.

Area of expertise: corporate law, trademarks, copyrights, prosecution and enforcement, IP portfolio management.

Jan Wrede, Managing Director of the Dennemeyer Dubai Office is an Intellectual Property attorney who has been active in the field of IP since 1996.

Admitted to the bar in Germany and Italy, Jan Wrede practiced IP law between 1996-2013 with two major Italian IP patent and law firms and, in 2014, he opened the Dennemeyer Dubai Office, focusing on IP in the whole MENA region. He is also registered Arbitrator with DIFC (Dubai), GCC CAC (Bahrain), KCAC (Kuwait) and SCCA (Saudi Arabia).

Area of expertise: IP portfolio management.

The Dennemeyer Group offers high-quality services for the protection and management of Intellectual Property rights and is committed to being the first-choice partner for customers globally. With more than 55 years of experience in the industry and 20+ offices worldwide, Dennemeyer manages nearly three million IP rights of around 8,000 customers.

Organisations with even the largest, most diverse IP portfolios turn to the Dennemeyer Group for reliable protection, administration and management of their most valuable assets. In addition to a full spectrum of IP-related legal services, Dennemeyer offers IP strategy consulting, comprehensive IP management software, IP payment services and cutting-edge patent search and analytics tools. For more information, visit dennemeyer.com or follow the company on LinkedIn.

QUESTION ONE

What legal steps do businesses need to take to protect their intellectual property as they move into your jurisdiction?

As soon as a plan to start activities in the UAE is made, it is important to register your intellectual property rights (IPRs) without delay.

For trademarks, mere use does not provide a strong basis for trademark protection. The UAE follows the first-to-file principle; the one who first files the trademark application is presumed to be the rightful owner. On the other hand, the UAE does not require applicants to prove use of the mark as a registration requirement, and it only has to be used within five years after registration.

Official trademark registration fees are comparatively high in the UAE, and a separate application is required for each class of goods or services, so it is financially wise to select the trademarks that you really want to protect in the UAE. More formalities are required in the UAE, which causes additional costs. The foreign applicant has to appoint a local trademark agent via a notarised Power of Attorney, legalised from the UAE embassy in the applicant's home country and then super-legalised by the Ministry of Foreign Affairs in the UAE.

An alternative will soon become available as the UAE joins the Madrid System of the World Intellectual Property Organization on 28th December 2021. This will enable foreign applicants who are part of the Madrid Member States to extend their basic home registration to the UAE without the need for the above-mentioned local agent, unless opposition is raised.

As for patents, the UAE recently announced the introduction of a grace period for applications published before filing. It will, however, be limited to UAE patents, so applicants are well advised to continue securing their inventions before going public via the national or PCT route.

QUESTION TWO

How can businesses conduct a full exploration of existing established products/brands in the local market – and how can they identify what level of risk they pose to the IP registration process?

Before entering the market, it is always advisable to conduct an official trademark search of the TMO database through an IP expert, who can advise on the level of risk that recently filed and registered marks may pose to the intended trademark. If identical or similar brands are found, further intelligence needs to be carried out to define all defence options; the owner may have usurped your brand and could hold it illegitimately. Sometimes coexistence agreements can be negotiated, or a variation of the proposed mark can be approved.

Technical features of your product can be checked through a patent search. It can then be seen if and how the product may need to be adapted, or if a negotiation with the prior owner is advisable.

Trade names can be cleared ahead, although each local UAE register holds its own database, with almost 40 different registers currently active between the seven Emirati mainland Chambers of Commerce (or Departments of Economic Development) and the Free Zones.

> **"Official trademark registration fees are high in the UAE, and a separate application is required for each class of goods or services"**

QUESTION THREE

What additional security measures do you advise your clients to take to protect their IP as they establish their corporate identity in a new market?

The most important task is to register your own IPRs in your own name. Leaving this to the local agent/importer/distributor can jeopardise the business should the relationship end. Although recovering your IP assets is generally possible, it may need an expensive and lengthy court action.

Secondly, it must be assured that contracts with local distributors are clear on all IPRs involved. The local distributor should not be authorised to register any rights in their name. Instead, they may be given a license to use the IPRs for an agreed period of time in the UAE. All goodwill must be attributed back to the owner.

Third, every trademark use should be well documented by storing dated copies of all commercial communications. This will lead to watertight legal proofs in case of disputes.

Finally, commercial agency, distribution or license agreements should be registered with the authorities to make them immediately enforceable. This will also legally help to act against any unwanted parallel (or grey) imports, as it will establish a proof of exclusivity.

Similarly, care should be taken that NDAs are in place with prospective business partners so that confidential information concerning IPRs remains secret. This is of particular importance in relation to patents, as a premature disclosure can lead to the loss of the novelty requirement needed to obtain a patent.

As with license agreements, all changes in ownership should be recorded with the IP Office without delay. It is also highly recommended to instruct a trademark watch service to monitor new filings in the country so that you can immediately react by opposing applications that are too similar to your own trademarks.

Last but not least, an effective anti-counterfeiting strategy is vital. In five of the seven Emirates, brand owners can record their registered trademarks with the customs authorities, so that they can watch incoming shipments for products that infringe their trademark rights and act swiftly.

TOP TIPS

Establishing a local IP claim in your jurisdiction

- It is advisable to register trademarks both in Latin and in Arabic letters, to prevent third parties from obtaining the registration of a slightly different version of one's mark through transliteration.
- Register your trademarks in your own name to safeguard your rights. They should not be allowed to be registered in the name of local partners.
- Keep proofs of use of your trademark. These should be ready in case of any dispute.
- Use through third parties needs to be done via a written contract setting out the ownership of the IPRs involved and attributing the use exclusively to the original owner.

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Ismail's legal experience encompasses serving Fortune 500 companies, mid-sized privately held companies, and entrepreneurs. He presently serves as Corporate and Litigation Counsel to large and mid-sized businesses throughout California, Nevada, and Texas, as well as General and Personal Counsel to high-profile hospitality operators in California and Nevada. Ismail's practice emphasizes Business and Intellectual Property matters, with a focus on healthcare, biopharmaceuticals, biotechnology and hospitality. Ismail has counseled the firm's healthcare provider clients in acquiring or selling assets, while maximizing return and minimizing risk. He has helped clients acquire or sell over $1 billion worth of healthcare-related assets, including hospitals.

Ismail has considerable trial and arbitration experience, having been involved in over 80 trials and arbitrations across multiple jurisdictions since the inception of his legal career.

He has successfully litigated shareholder accounting disputes, trade-secret matters, trademark/trade-dress infringement claims, commercial and breach of contract matters, complex developer defense litigation and employment matters. Ismail has substantial experience before the USPTO, having litigated multiple TTAB proceedings involving trademark disputes.

Ismail is admitted to practice law in California, Nevada, and Texas. He attended the University of California, Irvine and obtained a double major in International Studies and Political Science. Ismail attended law school at Pepperdine University, and currently serves on the Dean's Circle. During his tenure at Pepperdine, Ismail earned a Certificate in Entrepreneurship and Technology law from what is now known as the Palmer Center. Most recently, Ismail has earned his Graduate Certificate from Stanford University in Genetics & Genomics.

The Amin Law Group (TALG) is a multi-jurisdictional law firm that solves complex problems, leveraging cutting edge technology for clients, whether in the courtroom or boardroom.

We're forever grateful for outstanding clients with whom we've been fortunate to build long-term relationships. Because of these relationships, we have established a strong presence as a trusted legal team in California, Nevada, Texas and North Carolina.

We are outside-the-box thinkers who use experience, savvy, and practical know-how combined with advanced technology to guide our strategies and give our clients every edge possible.

We have perfected the art of aggressive representation while maintaining integrity and strict adherence to an ethical code of conduct.

We are nothing if we aren't completely dedicated to pursuing our clients' needs, wants, and best interests.

In the end, we're willing to go above and beyond to secure a win for our clients.

QUESTION ONE

What legal steps do businesses need to take to protect their intellectual property as they move into your jurisdiction?

In today's age of consistent malicious cyber-attacks, companies must take a proactive and aggressive approach to protecting their Intellectual Property (IP). First, an extensive audit of networks and systems should be conducted to ensure that IP, trade-secrets and proprietary information are appropriately protected. Second, as to IP itself, an audit of existing patents, trademarks and copyrights (including whether they need to be renewed or maintained as appropriate) is needed. Third, with respect to competitors and IP-piracy, a market survey of potential infringing applications (as to existing IP) along with an analysis of any new IP that the company wishes to secure should be carried out. The last thing a company needs is a cease-and-desist missive due to potentially infringing upon a patent, trademark or existing copyrighted materials.

QUESTION TWO

How can businesses conduct a full exploration of existing established products/brands in the local market – and how can they identify what level of risk they pose to the IP registration process?

The first step is appropriate and extensive due diligence. This means searching the US Patent & Trademark Office's systems for Trademark and Patent registrations which may conflict with a proposed registration. Also, the company should search the US Copyright office's library to ensure there are no conflicting and existing copyright applications.

QUESTION THREE

What additional security measures do you advise your clients to take to protect their IP as they establish their corporate identity in a new market?

Active monitoring and maintenance are critical components of protecting IP. Ensuring that your IP portfolio value is not diminished by infringing activities is paramount in this regard. There are multiple ways to monitor the market for infringement and TALG has positioned itself as an innovator in this regard. Moreover, protecting your networks (whether cloud based on physical servers) is also critical. The latter requires a strong IT support partner and regular training throughout the various departments within the Company.

TOP TIPS

Establishing a local IP claim in your jurisdiction

- Confirm that your registrations are valid and have been properly maintained.
- Immediately notify any infringing party of your intentions to protect your IP through a cease and desist correspondence.
- If the offending party does not respond, or responds in the negative, vigorously protect your remedies by taking action.

"In today's age of consistent malicious cyber-attacks, companies must take a proactive and aggressive approach to protecting their Intellectual Property"

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Peter Snoeker (Breda, 1959) graduated in civil law at the University of Leiden in 1988. After passing the bar exam, Peter in 1988 associated with a well-established Dutch law firm, where he developed expertise in the field of IP and received acclaim from clients. His entrepreneurial itch resulted in the co-founding of Spring Advocaten in 2007. Today, the office of Snoeker Advocatuur is located next to one of Amsterdam's beautiful canals, where Peter advises and accompanies his clients in the fields of trademark law, copyright, image right, contract law, design-patent law and media law.

Peter has built up extensive experience advising small to large domestic and multinational businesses in the sectors of (amongst others) retail, high-tech industry, financial services, design, architecture and healthcare. Media companies and the pharma and leisure industry have also found their way to Peter for professional advice. Peter is fluent in writing and speech in English, French, German and Dutch.

After working many years as a partner of medium-sized Dutch law firms in Amsterdam, Peter Snoeker established his own law practice Snoeker Advocatuur in Amsterdam, specialising in trademark law, copyright, image right, contract law, design-patent law, and media law.

Many companies regularly face infringement on their intellectual property rights. That can be of huge concern since that IP most often is a valuable and important part of a company's identity and economic basis. Therefore, any infringement on copyrights, trademarks or design patents should be handled professionally and without delay.

Snoeker Advocatuur offers professional services to small and mid-sized businesses, as well as well-established internationally operating companies. Those services are tailored to the respective demands of the business in question in the highly specialised legal fields of IP law. They are practical, personal, focused on the specific business goal with a no-nonsense approach, and reasonably priced.

QUESTION ONE

What legal steps do businesses need to take to protect their intellectual property as they move into your jurisdiction?

If the relevant business has and uses trademarks of any kind (such as, but not limited to, a word or several words, or a figurative sign or a specific color, or forms of goods, or sounds) which have not yet been registered as a trademark in the EU (of which the Netherlands are a part), that business needs to file that trademark/those trademarks for registration in the EU or the Benelux with the relevant Authority of the relevant trademark(s) prior to the move into the Netherlands. Obviously, a conclusive selection and enumeration in the registration of the relevant wares and services (present as well as future i.e. within five years after registration) for which the trademark should be registered, is essential to ensure effective protection. Upon registration of the trademark(s), any infringement may be successfully attacked by the trademark owner, which will prevent any competitor from using an identical or too similar designation/image for its own commercial purposes. The appointment of an attorney is required to comply with all the formal filing requirements.

If the relevant business offers a product and as yet no utility model design(s) registration of the design of that product has been filed in the EU or the Benelux, that business needs to file for registration of the appearance of that product as a utility model design in the EU or the Benelux with the relevant Authority of the relevant product(s), if legally possible in view of several issues such as – but not limited to – the novelty and character of the relevant product, the date of disclosure of the relevant product(s) to relevant public, the technical aspects of the product etc. Obviously, a conclusive depiction/image of the product and a conclusive designation of the product in the registration of the relevant product, is essential to ensure effective protection. Upon registration of the utility model design(s), any infringement may be successfully attacked by the design-owner, which will prevent any competitor from using an identical or too similar outward appearance of a product for its own commercial purposes. The appointment of an attorney is required to comply with all the formal filing requirements.

If the relevant business is the inventor or right-holder of an invention, and as yet no patent registration of the invention has been filed internationally or in the Netherlands, that business needs to file for patent registration with the relevant Authority of the relevant invention, if legally possible in view of several issues such as – but not limited to – the novelty and character of the relevant invention, the inventive step of the relevant invention, the applicability in practice etc. Obviously, a conclusive description of the invention is essential to ensure effective protection. During and after the registration of the patent, any infringement may be successfully attacked by the patent owner, which will prevent any competitor from using an identical or too similar invention for its own commercial purposes. The appointment of an attorney is required to comply with all the formal filing requirements.

The relevant business needs to register its tradename (its commercial designation) with the Dutch Chamber of Commerce and subsequently use its tradename in practice (on the business' website, on its stationary/invoices, on its product packaging etc.). During and after the registration of the tradename, any infringement may be successfully attacked by the relevant business, which will prevent any competitor from using an identical or too-similar tradename for its own commercial purposes.

> **"Businesses can only identify the level of risk that products/brands/art pose to the IP registration process through careful evaluation"**

The relevant business needs to have its copyrights on any concept, idea etc. protected by filing these through an i-Depot with the Dutch BOIP-Authority.

The relevant business needs to close an NDA with any person or business to which the relevant business would give any insight as to (any aspect of) the relevant business' market entry.

If the relevant business has as yet not registered a top-level domain name with ICANN, it needs to register its domain name with the Dutch domain-name Authority SIDN. Appointment of a registry is required to comply with all the formal filing requirements.

The relevant business needs to acquire relevant Adwords leading to its website which need to be formally be directed at Dutch citizens also.

TOP TIPS

Establishing a local IP claim in your jurisdiction

- Establish a budget for the IP-side of the market entry in the Netherlands.
- Establish a portfolio of wishes re market entry into the Netherlands and of management decisions on how to proceed along the above lines.
- Establish an overview of the IP rights in other territories/jurisdictions.
- Hire me for the job and subsequently bring me into contact with the Chief IP Officer and with lawyers in other territories/jurisdictions, who have done IP work for the relevant business.

QUESTION TWO

How can businesses conduct a full exploration of existing established products/brands in the local market – and how can they identify what level of risk they pose to the IP registration process?

Exploration of existing established products/brands is done through a variety of cumulative research with which I have plenty of experience, such as internet research, research in registers of relevant authorities, and engagement of specialised external agencies to research relevant business sectors.

Businesses can only identify the level of risk that prior existing established products/brands/art pose to the IP registration process through careful evaluation by an experienced IP professional of the findings of section 1.

QUESTION THREE

What additional security measures do you advise your clients to take to protect their IP as they establish their corporate identity in a new market?

A standard security measure is to include a robust trade-secrets-clause (as meant in the EU Trade Secrets Directive) and a robust copyright-protection and copyright-assignment/transfer-clause in any employment contract with a (prospect) employee, and in any contract with any external party which may come across IP of the relevant business.

The relevant business needs to put a copyright- and IP notice (C-in-circle) with year-mention on all documents which are circulated to third parties.

The relevant business needs to use general conditions which specify that the IP is property of the relevant business and may not be used in any way without express consent from the relevant business, and may in no way be considered to have been assigned by the relevant business wholly or partly.

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Admitted to the Paris Bar in 1988, François Illouz has over 30 years of experience in the fields of IP, audio-visual, communication and new technologies.

He represents prominent French and international companies before French courts and assists them to secure and enforce their IP rights. He is acting for international textile groups such as Lacoste, Lee Cooper, The Row, Weeplay and is involved in licensing contracts with Paris Saint Germain and 2024 Paris Olympics.

François has wide-ranging experience in drafting and negotiating contracts for audio-visual production of shows and broadcasting. He is an acknowledged specialist in media relations, press and private life protection.

He has a significant expertise in Art market law, including issues of counterfeiting, default of authenticity of art works and securing top art works transactions at an international level. He is a member of the Intellectual Property Commission within the Paris Bar Association.

As a former international high-level golfer, François also combines his athletic talents with his legal practice. His key Sports Law skills are: antidoping policy, sponsoring, television and image rights, advice for companies, associations, sports federations, professional athletes and sports agents. As such he represents Stade Français Rugby Club. He is arbitrator at the CNOSF Arbitration Chamber.

ILLOUZ AVOCATS's lawyers come from different horizons and have complementary practices in the main areas of law. They share their skills and knowledge within a boutique firm whose personnel size allows them to be reactive and available.

ILLOUZ AVOCATS sees itself as its clients' privileged partner, accompanying them throughout their evolution and offering them creative and tailored solutions to their problems. Pursuing this goal, ILLOUZ AVOCATS is committed to the critical values of rigor, ethics, trust, loyalty and reliability, ensuring excellent credentials nationally as well as internationally.

ILLOUZ AVOCATS assists its clients, for advisory matters and in litigation, arbitration in various areas of law such as business and contract law, commercial law, anti-trust law, real property law, corporate law, labor law, IP and IT law and sports law.

Internationally, ILLOUZ AVOCATS is part of the international IR GLOBAL network and has forged a network of international correspondents who share their values and with whom the firm has cooperated for many years in all areas of law. François Illouz has been the IP French referent of IR GLOBAL Network for the last 10 years.

"Companies should research their areas of specialisation by consulting existing literature, visiting trade shows or even doing simple but exhaustive research online"

QUESTION ONE

What legal steps do businesses need to take to protect their intellectual property as they move into your jurisdiction?

Companies must study the market and analyze the opportunity to set up a subsidiary or a permanent establishment. Creating a local structure can give the subsidiary a certain level of autonomy in relation to the rest of the business. Thus, if businesses goes badly, damage to the holding company can be limited. Then comes the delicate problem of choosing a name that does not conflict with a prior IP right.

Regarding product and services, it is necessary to determine the protectable elements that the business intends to exploit in France. The aesthetic appearance of a piece of furniture can be protected by registering a design, provided that it has a new and proper character, which enables it to meet the criteria for originality and makes protection through copyright possible. The product or service can also be protected by trademark registration.

It is advisable to seek advice from a lawyer specialised in IP in order to assess every potential means of protection. Once the products and services to be exploited have been determined, it is advisable to explore existing products and brands in the local market to make sure that the planned project does not infringe prior IP rights.

In cases of products or services eligible for copyright protection, it is important to file a precise description or a reproduction of the work in order to prove its date of creation, by sending a registered letter to yourself, depositing a Soleau envelope or sending registration to an authorized collecting society.

QUESTION TWO

How can businesses conduct a full exploration of existing established products/brands in the local market – and how can they identify what level of risk they pose to the IP registration process?

Conducting a full exploration of existing products and brands in a local market goes hand in hand with performing efficient prior searches for trademarks, designs and company names.

At the very least, it is necessary for companies wishing to safely enter a new local market to carry out prior searches, in particular with the National Office for Intellectual Property (INPI) or The European Union for Intellectual Property (EUIPO) in order to have an overall idea of identical or similar names, and of those creating a risk of confusion that are already filed as a trademark or used as a corporate name in the target market.

In regard to corporate names, companies can broaden their search by researching Similar Activity Groups (GAS). For example, GAS 5 includes 'Fruits and vegetables' and groups together retail outlets, wholesalers, processing and preservation of fruits and vegetables and fruit juice preparation. If a company already uses a company name but in a completely different industry, risk of unfair competition will be reduced or even eliminated.

Protected IP is not always registered, so companies should research their areas of specialisation by consulting existing literature, visiting trade shows or even doing simple but exhaustive research online.

In addition, to assess the level of risk they face, companies entering a new market must take into account relevant previous court decisions and trends in case law. It is recommended that a qualified IP lawyer not only reviews these prior searches, but also assesses the level of risk exposure during IP registration, in view of previous case law.

TOP TIPS

Establishing a local IP claim in your jurisdiction

- Before establishing an IP claim in France, companies can request an investigative measure based on Article 145 of the French Code of Civil Procedure, which provides that if there is a legitimate reason to retain or establish proof of facts on which the case may depend, admissible investigative measures may be ordered.
- On this basis, products, computer hard drives and emails featuring key words can be seized by bailiffs to prepare a claim against an unscrupulous competitor.
- Infringed materials might be seized on the premises of the infringer, at point of sale, at a trade fair or in customs while the items are in transit.
- In the event of an infringement of IP rights via the Internet, the plaintiff is entitled to bring the dispute before the court with the report drawn by the bailiff. (CA Colmar, 16 Dec. 2019, CA, Amiens, 27 March 2008)

QUESTION THREE

What additional security measures do you advise your clients to take to protect their IP as they establish their corporate identity in a new market?

Websites developed for the local market need to be created in the relevant language, so that in the event of legal action, it can be argued that the site is aimed at customers or local prospects.

In the context of action for unfair competition or infringements, arguments on the precedence of the domain name were previously rejected by judges on the grounds that the website was entirely in English and therefore did not target a French-speaking audience (Cour de cassation, Chambre commerciale, 29 mars 2011, 10-12.272, Ebay Europe v. Maceo).

Companies should also examine the potential risks of infringement of prior rights, or creating confusion with prior rights, exploited in the same or a similar market. If the involved IP right is a trademark, it is necessary to check that the competing trademark has been renewed regularly, especially if it has been the subject of serious exploitation for less than five years and does not incur forfeiture.

If it is about a design or a patent, and if there are prior rights likely to interfere with the activity of the new entrant, it may be useful to check that the protected product has not been disseminated prior to registration. Prior dissemination via the internet or in a trade fair could destroy the 'novelty' nature essential to the validity of the registration.

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Sönke Lund is a partner responsible for the department of Competition and Commerce, Intellectual Property, Information Technologies and International Business Law at Grupo Gispert. He has more than 20 years of experience advising companies within the national and the international market. He is a Rechtsanwalt (German lawyer) member of the Hamburg Bar Organisation and an Abogado (Spanish lawyer) member of the Barcelona Bar Organisation.

His expertise in International Business Law lie in the advice and defence of litigation cases related to the protection of intangible assets, as well as in general contract and commercial law, including product regulatory compliance and liability issues. Sönke Lund advises mainly international corporations (suppliers, manufacturers, distributers, retailers and internet platforms) in the fields of creation and technological development as well as in highly regulated industries, from life sciences to consumer products,

He is a member of many legal associations and committees, including the International Bar Association, the German Association of Lawyers and the Spanish group of the International Literary and Artistic Association (ALAI), among others.

QUESTION ONE

What legal steps do businesses need to take to protect their intellectual property as they move into your jurisdiction?

The first step is to distinguish between different objects of protection: copyright, trademarks, patents, designs, domains, know-how and trade secrets. Each area is subject to different regulations and requirements.

With the exception of copyright, it is necessary for IP rights to be registered and enforced in Spain, since trademark, design or patent applications made outside Spain grant almost no legal protection. In contrast, Spanish law grants copyright protection to foreign works on the basis of international agreements, without the need for registration. Copyright protection is relevant beyond the classical concept of "works" (music, literature, fine arts), especially in the entrepreneurial field of software, apps and databases. Although copyright protection is granted automatically with the creation of the work, there are many situations where, for evidentiary reasons, the declaratory effect (on authorship, time of creation, etc) must be secured. For this purpose, the work can be registered with the public copyright register, which allows the rights accrued by the rights holder to be held against third parties.

Patents, trademarks and designs are generally granted or registered on a first-to-file basis, which is why it is advisable to consider patent, design or trademark protection before entering the Spanish market. Foreign companies should screen potential Spanish partners in advance, as only a reliable partner is a viable ally for the registration and protection of trademark and patent rights.

Founded in 1940, Grupo Gispert has more than 75 years of experience. They provide legal advice both at national and international level, to businesses and individuals, from their offices in Barcelona and Madrid.

In order to understand the global needs of the client, the firm has set up a multidisciplinary team of high-qualified lawyers and economists that design the best strategies to help clients to reach their goals. The team consists of more than 35 professionals whose main target is reaching excellence in services provided.

At Grupo Gispert we believe that every client is a new challenge to prove our value and earn their trust. We also believe that progressing together and advising the client in all phases of their business makes us a better firm. We know that these goals may be achieved only with effort and commitment from every member of our team.

QUESTION TWO

How can businesses conduct a full exploration of existing established products/brands in the local market – and how can they identify what level of risk they pose to the IP registration process?

IP Risk Management is a complex task and differs from company to company. Each company faces different types of IP related risk in different business environments, so a unique plan is needed to identify and manage these risks efficiently. The business must first identify the relevant IP assets (copyright, trademarks, designs, patents and trade secrets), before measuring the IP risk sensitivity of the company, in terms of products and brands. The higher the risk tolerance, the higher the willingness to take IP related risks. We recommend setting the IP risk tolerance very low to start with, to ensure that the majority of IP risks are analysed, looking particularly at competitors when exploring products and brands in the market.

A freedom to operate (FTO) search may reveal potentially problematic trademarks and patents, and helps to assess the risk of infringing a competitor's trademark or patent. Exploration tools for patents in Spain are the INVENES, Espacenet and WIPO PATENTSCOPE databases. Registered designs can be found in the DISEÑOS database and the WIPO portal, amongst others. Trademarks and commercial names can be explored through the Spanish Patent and Trademark Office (SPTO). Besides these tools, the European Union Intellectual Property Network website is useful to gain a more complete picture of national and EU trademarks and designs.

"Technology is becoming increasingly important in day-to-day business and boundaries are being broken by the internet and e-commerce"

QUESTION THREE

What additional security measures do you advise your clients to take to protect their IP as they establish their corporate identity in a new market?

Technology is becoming increasingly important in day-to-day business and boundaries are being broken by the internet and e-commerce. Goods and services advertised online are visible worldwide, which makes brands and trademarks more vulnerable to attack by third parties. These attacks may be due to trademarks infringing third-party trademark rights, or acts of infringement by third parties. Therefore, it is more important than ever before to consider how, where and when goods or services are offered online and how our clients can prevent attacks in international business.

The increasing "technologisation" of goods and services also means that it is not always easy to differentiate between what is protected or protectable as IP and what is not. Within this context, interfaces are emerging, particularly in the protection of non-personal data and work processes, which are not covered by 'traditional' IP law through the principle of exclusivity. This applies above all to the areas of patent and copyright law where algorithms and so-called artificial intelligence are used. Both applications are, in principle, not protected as a 'work', but as a business secret. They must be protected by their owners from access and exploitation by unauthorised third parties, by technical means and waterproof confidentiality agreements. In this context, it is worth mentioning that as a strategic option, protection under business secrets legislation constitutes an opportunity for complementary protection of knowledge, processes and other intangible assets: i.e. if patentability cannot be granted or the subject should not have the value to justify the patent expenses.

TOP TIPS

Establishing a local IP claim in your jurisdiction

- In patent litigation, the scope of the patent needs to be determined correctly. Court decisions apply a triple identity test (same function, same method and same result), particularly when dealing with mechanical patents.
- To establish copyright infringement, the claimant must prove upon filing that they hold the copyright (either as author or assignee); the work is protected as an original expressed work; and it is being used by a person who is not authorised to use it. Evidence should be secured even before the first cease-and-desist letter Is sent, by notarising violated and violating contents. Lately, blockchain platforms may be used to protect copyrights, especially audio-visual works, by locating users, controlling licenses and preventing possible infringements.
- The owner of an unregistered but well-known trademark has the right to file a civil action to invalidate an identical or similar trademark registered for identical or similar goods. For trademarks in the EU a special rule applies, giving the proprietor of a trademark exclusive rights to prohibit all third parties from using signs identical or similar to their trademark in trade. This extends to third-party proprietors of later registered Community trademarks, without needing that latter mark to have been declared invalid beforehand.

Disputes

The IR Global Disputes group was formed to revolutionise the way cross border disputes are resolved and to provide high quality, affordable and experienced legal counsel who work together as one seamless legal adviser. This helps you resolve your dispute quickly, efficiently, and effectively. We provide a full cross-border disputes service with niche sector expertise offering ADR, mediation, arbitration and litigation services. Additionally, we offer specialist knowledge in product liability, white collar crime and investigations.

For more information visit:
www.irglobal.com/working-groups/disputes

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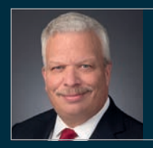

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Prashant Mara is a commercial and regulatory lawyer specialising in investigations and dispute resolution. He heads the disputes and business crime team at BTG Legal and has been helping clients manage risk and protect their interests for close to 20 years. His clients are from across a range of sectors including technology, energy, defence, automotive, aviation, industrials, pharma, and chemicals.

Prashant works closely with in-house counsel and business teams to understand risks and plan for dispute resolution that is most efficacious and efficient for his clients. His particular specialisation in foreign investment-related disputes, technology (including cybercrime) and engineering disputes, public procurement, and white-collar crime enable him to advise his clients on both civil and criminal defence/prosecution. Further, he spends a lot of his time providing board-level compliance and crisis response advice including dispute management and acting as the interface between his clients and the regulator.

Prashant was previously co-head of the India Group at Osborne Clarke in London and Cologne and prior to that ran the India desk of a Franco-American firm in Paris. He started his career as in-house counsel in Infosys and managed their European legal operations. Prashant is qualified to practice in India and read law at the National Law School of India University, Bangalore.

BTG (Business Transactions Group) Legal is a disputes and transactional law firm with best-of-breed technical expertise, a culture of innovation and teamwork, and an unrelenting commitment to excellence.

We provide expert advice tailored to our clients' business needs in a form that is simple, direct, and solution-oriented. We work on each transaction with the highest professional standards, bringing strong technical expertise and a clear-thinking commercial approach, whilst always maintaining transparency in our professional relationships.

How we do it:

- We focus on our industry sectors and have strong technical expertise in these areas.
- We maximize this sector expertise with our clear-thinking, commercial approach.
- We understand our clients' business and projects and tailor our advice to provide solutions.
- Our advice is presented clearly and simply and always considers the commercial and technical context.
- We build lasting relationships – our long-standing client relationships are a testament to this approach.
- We strive to maintain transparency and the highest of professional standards.

"The credibility of the counsel who argues in a court matters a lot in India and clients should be careful in selecting the right counsel for the right matter"

QUESTION ONE

How swiftly are disputes handled in your jurisdiction's court system? Are there any common complications to cross-border resolutions that businesses should be aware of?

Disputes take an inordinately long time to get resolved in traditional court systems in India. However depending on the value or jurisdiction of the relevant court (India has a federal court structure), higher courts such as High Courts or specialised courts such as Commercial Courts or Insolvency Courts are relatively quicker to navigate. Due to this, Courts in India encourage arbitrations that are faster and more efficient if structured properly. Therefore, it is important to pick your Court while filing cases (depending on whether that court has jurisdiction in the first place) or agree to arbitration in the contract.

Common complications:

- Claimants wanting to enforce a judgment from a superior court of a foreign jurisdiction should check whether that foreign jurisdiction is a "reciprocating territory" under the Indian Civil Procedure Code (Section 44A) and relevant notifications. If not, then the case will be reopened and merits will have to be argued in a suit filed in India.
- If enforcing against an Indian party, assets of said party in India should be verified to ensure solvency.

QUESTION TWO

Are there any cultural issues that businesses should be aware of when dealing with a legal dispute in your jurisdiction? How can working with a third party on the ground help to navigate these issues?

- Since litigation in India takes a very long time to resolve, there may be opportunities to settle (if the client is so inclined) at crucial junctures. It is important to pursue alternate resolution mechanisms where possible and also decipher genuine offers from settlements and those that are not.
- The credibility of the counsel who argues in a court matters a lot in India and clients should be careful in selecting the right counsel for the right matter.
- Law firms can assist on the ground in identifying (via third-party service providers) assets of the litigants, ascertaining bona fides of the litigants, identifying the right forum for filing proceedings, ascertaining strengths/weaknesses of the opposite party in litigation strategy and also pursuing alternate settlement mechanisms under instructions from the client.

TOP TIPS

Cost-effective and timely dispute resolution in your jurisdiction

- Choose institutional arbitration over ad hoc arbitration or litigation as a dispute resolution mechanism.
- Pick your battles carefully – it may not be cost effective to litigate in all cases. In such cases, use litigation as a tool for negotiation.
- Choose the right team and appoint empowered internal resources to work with outside counsel.
- Pick the right court or tribunal (amongst those that have jurisdiction) and the right counsel for that court and matter.

QUESTION THREE

What are the most common challenges when dealing with disputes in your jurisdiction? What measures can businesses take to navigate these obstacles to secure a cost-effective, timely resolution?

- When there are delays in the formal litigation process, choose the right forum and file urgency applications where possible.
- When it comes to solvency and bona fides of parties, identify and ascertain these aspects before filing formal proceedings.
- Paper-heavy processes and formal signatures etc. are required. Businesses should put aside a significant amount of time for authorised representatives to complete filings. If possible, appoint someone in the country for the procedures.

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Dennis Boyle is an accomplished white-collar criminal defense and complex civil litigation attorney throughout the U.S. and internationally. Prior to founding Boyle and Jasari, he worked as an Assistant U.S. Attorney, a First Assistant District Attorney, and a Partner in an AmLaw 100 law firm. He concentrates his practice is helping corporations and individuals in the most complex civil and criminal matters.

Dennis is certified as a criminal trial specialist by the National Board of Trial Advocacy and is admitted to practice in Pennsylvania, New York, Maryland, the District of Columbia and Alaska as well as numerous federal courts. He is also admitted to practice before the International Criminal Court in the Hague, Netherlands and the Kosovo Specialist Chambers in The Hague, Netherlands.

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Belerina Jasari concentrates her practice in the areas of international criminal law, transnational criminal law and white-collar criminal defense. After obtaining her initial law degree in Germany and an LL.M. in French and European Union law in France, Blerina came to the U.S. to complete an LL.M. in International Legal Studies.

Blerina worked in the Prosecutor's Office at the International Criminal Tribunal for the Former Yugoslavia where she worked on the prosecution of Ratko Mladic. She worked as a White-Collar Associate for an AmLaw 100 law firm in Manhattan and clerked for a Judge of the Court of Common Pleas in Philadelphia, Pennsylvania, before joining Dennis Boyle in his practice. She is admitted to practice in New York and the District of Columbia.

QUESTION ONE

How swiftly are disputes handled in your jurisdiction's court system? Are there any common complications to cross-border resolutions that businesses should be aware of?

The timeframe for resolving a case in the U.S. is extremely variable and can only be determined on a case-by-case basis. For cases where liability is clear, such as breach of contract cases where the only issue involves payment, it is frequently possible to obtain a judgment in six to nine months.

For international cases involving complex legal and factual issues, it can take years to resolve a matter. The process of gathering evidence that would be admissible in a U.S. court can be complicated. The discovery process allows litigants in the U.S. to request documents and admissions from opposing parties, subpoena documents from third parties, and take depositions from witnesses. The Rules of Civil Procedure in most U.S. jurisdictions allow parties to seek evidence that may not be admissible in court. Objections to discovery can result in significant costs and delays.

The process becomes more complex when international litigants are involved. The Hague Convention on the Taking of Evidence in Civil and Commercial Disputes is an effective, albeit time-consuming, means of obtaining evidence; however, not all countries are a party to this Convention, and if a litigant in the U.S. is forced to use the Letters Rogatory process, the process can take much longer.

Often, non-U.S. litigants do not understand the technical Rules of Evidence that apply in U.S. Courts. While a foreign litigant may know certain facts to be true, in order to prove those facts in a U.S. court, they must be "admissible". Litigation always proceeds most smoothly when the evidence a party seeks to use in court is properly evaluated before a case is even instituted.

QUESTION TWO

Are there any cultural issues that businesses should be aware of when dealing with a legal dispute in your jurisdiction? How can working with a third party on the ground help to navigate these issues?

American courts have their own unique culture that frequently leads to costly misunderstandings by non-U.S. businesses. Bridging the cultural divide between foreign businesses and the U.S. legal system is essential to achieving a successful outcome in litigation.

From a purely legal standpoint, many non-U.S. businesses do not understand the limitations of the U.S. courts. The U.S. courts may or may not assume jurisdiction over a dispute that appears to have arisen outside the territorial jurisdiction of the U.S. based upon a variety of factors. These limitations stem from limitations in the U.S. Constitution and must be examined on a case-by-case basis.

The role of lawyers in the U.S. frequently differs from their role in other jurisdictions. U.S. lawyers cannot normally be compelled to testify against a client, and communications between a lawyer and a client are generally considered confidential. The rule does not exist, or is not enforced, in many other jurisdictions.

Very few cases in the U.S. are actually resolved by litigation. It is estimated that 97% of cases are resolved by settlement in the U.S., and the resolution of a dispute is frequently more about negotiating an acceptable agreement to resolve the dispute than it is about winning a victory in trial. For those businesses that come from jurisdictions where cases are typically resolved by a court judgement, the process of resolving a case between the parties without court involvement can be surprising.

Finally, mediation – the involvement of a third party – is frequently a cost-effective way to resolve a matter and help bridge cultural divides. Professionally trained mediators can help parties to understand the strengths and weaknesses of each party's position and help resolve cases faster.

TOP TIPS

Cost-effective and timely dispute resolution in your jurisdiction

- Understand the facts, the evidence, and the law before initiating legal action. Too often, litigants file suit without understanding what evidence they can marshal, what facts that evidence proves and the law that applies to the case. Understanding the case is the first step in the effective and timely resolution of the case.
- Initiate settlement discussions early. Settlement negotiations, when used in conjunction with litigation, can narrow the gap between the parties and result in a quicker settlement.
- Mediation. If the parties are agreeable to mediating their dispute early in the litigation, they can save a significant amount in attorney's fees. The savings in litigations costs, if done early, allows a plaintiff to settle for less than it might otherwise have settled and a defendant to offer a greater amount to settle.

QUESTION THREE

What are the most common challenges when dealing with disputes in your jurisdiction? What measures can businesses take to navigate these obstacles to secure a cost-effective, timely resolution?

The most common challenges come from a misunderstanding of the timeframe and costs involved. Litigation always lasts longer and costs more than most litigants expect, and although an issue may appear clear to one party, a creative lawyer on the opposing side will frequently raise unanticipated issues just to draw out and increase the cost of the litigation to obtain a more favorable settlement for their client.

One of the first things the business should do to mitigate this issue is involve litigation counsel early. This allows for an early analysis of the business' position and permits the attorney to develop a theory-of-the-case that will carry through if negotiations are unsuccessful. It also allows counsel to assemble the evidence necessary to prove the case should it proceed to trial. Counsel will then be in a position to vigorously pursue the case rather than waiting for the case to develop in discovery.

The business should also evaluate the strengths and weaknesses of its position and understand what will happen if the case goes to trial and it prevails. In other words, it should know what its "bottom line" is going to be.

In appropriate cases, the business may want to propose mediation even before a suit is filed. Mediation in these circumstances normally only works if both sides have analyzed their cases; however, if the parties are prepared, mediation may be a relatively inexpensive way to resolve the case. If the issues are limited and require a third party to resolve, arbitration may be another option.

Boyle and Jasari is a boutique national and international law firm with offices in Washington, DC, Baltimore, MD and Philadelphia, PA. It represents Fortune 500 corporations, privately held corporations, publicly traded companies, and individuals in complex legal issues inside and outside the U.S.

The firm advises companies and individuals in understanding U.S. criminal laws involving corruption, money laundering, sanctions, and a variety of other U.S. laws that apply internationally. Boyle and Jasari also represents these same clients in civil litigation and international or national arbitration in disputes arising out of commercial or investment agreements. The white-collar practice also includes conducting internal investigations, representing individuals in internal investigations, and negotiating with the U.S. government or at trial if a client is charged with criminal charges.

International Criminal Law and Transnational Crimes are also a major emphasis of the firm's practice.

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Klaus Oblin has been successfully representing prominent businesses and state-entities for many years.

He stands out in cross-border proceedings where politically sensitive issues meet commercial matters and has been consistently engaged as lead counsel and arbitrator in a number of high-volume arbitrations under various internationally acknowledged rules.

Drawing from both civil and common law practical experience, he is known for his ability to concurrently lead teams from multiple jurisdictions.

Specialisation:

- Litigation, especially commercial and civil law-related disputes
- Counsel and arbitrator in arbitrations e.g. under the rules of the International Chamber of Commerce (ICC), the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), Swiss Rules, UNCITRAL (focus: commercial law, supply contracts, M&A, joint ventures, construction)
- Advice with regard to various matters of commercial, contract and construction law
- Establishment of businesses and regular advice on partnerships and corporations
- Mergers and acquisitions

Our core focus is the management and resolution of commercial disputes. We represent our clients in all phases of domestic and international litigation and arbitration proceedings, from the initiation of the proceedings to the enforcement of court judgments and arbitral awards.

We also advise our clients in general business law matters including commercial and corporate law as well as real estate and construction law.

QUESTION ONE

How swiftly are disputes handled in your jurisdiction's court system? Are there any common complications to cross-border resolutions that businesses should be aware of?

The statement of claim is filed with the court and passed on to the defendant, along with an order to file a statement of defence. If the defendant replies in time (four weeks from receipt), a preparatory hearing will be held, which mainly serves the purpose of shaping the further proceedings by discussing the main legal and factual questions at hand as well as questions of evidence (documents, witnesses, experts). In addition, settlement options may be discussed. After an exchange of briefs, the main hearings follow. The average duration of first instance litigation is one year. However, complex litigations may take significantly longer. At the appellate stage, a decision is handed down after approximately six months.

QUESTION TWO

Are there any cultural issues that businesses should be aware of when dealing with a legal dispute in your jurisdiction? How can working with a third party on the ground help to navigate these issues?

The legal background of the tribunal, the parties and their counsel can influence the scope of disclosure and discovery, which is a major point of divergence between common and civil law. In Austria, the main types of evidence are documents, party and witness testimony, expert testimony and judicial inspection. Written witness statements are not admissible. There are no depositions and no written witness statements. Therefore, witnesses are obliged to appear at the hearing and testify. Witnesses are examined by the judge followed by (additional) questions by the legal representatives of the parties. Restrictions to this obligation exist (e.g. privileges for lawyers, doctors, priests or in connection with the possible incrimination of close relatives).

While the ordinary witness gives testimony concerning facts, the expert witness provides the court with knowledge that the judge cannot have. Expert evidence is taken before the trial court. An expert witness may be requested by the parties yet also called on the judge's own motion. An expert witness is required to submit his or her findings in a report. Oral comments and explanations must be given during the hearing (if requested by the parties). Private reports are not considered to be expert reports within the meaning of the Austrian Code of Civil Procedure; they have the status of a private document.

TOP TIPS

Cost-effective and timely dispute resolution in your jurisdiction

Lacking funds for hefty court fees (which can be 1-2% of the amount in dispute to be fully advanced), one might consider funding options, or contemplate a criminal complaint (plus joining the prosecution as civilly wronged party).

Alternatively, don't go legal at all. To prevent a dispute before it even arises, it's advisable to consult a lawyer who:

- Systematically analyses past disputes.
- Identifies similarities, repetitive patterns, vulnerabilities and potential improvements.
- Supplies easy-to-follow, step-by-step walkthroughs that can be implemented in any corporate or institutional environment.
- Conducts careful strategic planning and clearly defines the potential alternative to a negotiated outcome.

"In Austria, the main types of evidence are documents, party and witness testimony, expert testimony and judicial inspection"

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Jim Doyle is the Director of Doyles Construction Lawyers, established in 1991. Doyles Construction Lawyers acts for all construction industry participants and represents parties at all stages of project development.

Prior to qualifying as a lawyer, Jim worked in civil engineering construction and design and as a transport engineer/economist on major transport initiatives in Victoria.

Jim's commercial multidisciplinary approach to resolving challenges and delivering viable projects is a result of his qualifications and experience in Economics (Econometrics and Urban Economics), Engineering (he is a Chartered Professional Engineer with The Institution of Engineers Australia) and Law. Jim is admitted to the State Supreme Courts and the High Court and is an accredited mediator and Fellow of the Chartered Institute of Arbitrators. He has extensive local experience in Queensland, New South Wales, Victoria, and Western Australian jurisdictions in litigation and arbitration, as well as experience in international mediation and arbitration.

Jim has extensive experience in all sectors of the construction industry in contract documentation, contract administration and project delivery. In addition, Jim has a wealth of experience in the negotiation of complicated disputes and project re-boots and the deployment of multidisciplinary professional teams involving experts across many disciplines in complex litigation.

Jim regularly presents to industry conferences on topics of current interest and publishes a newsletter, Casewatch, which features recent Court decisions of specific relevance to the construction industry.

Doyles Construction Lawyers was established in 1991 by its Principal Lawyer, Jim Doyle, and has since grown expanded into four states with offices in Sydney, Melbourne, Brisbane and Perth. We are Construction Law specialists and our expertise includes construction contract reviews and amendments, drafting and structuring, building dispute resolution, construction negotiation, payment claims, litigation, arbitration, general advice and more.

Doyles Construction Lawyers act for a diverse range of clients in the municipal, construction, engineering, and development industries. From small residential projects to major civil and commercial developments, we are well equipped to handle all types of projects and represent parties at all stages of project development from planning, tendering, design and construction, to project delivery and dispute resolution.

We have a team of experienced and capable staff from multidisciplinary backgrounds having worked in legal services, building construction, engineering and related industries.

QUESTION ONE

How swiftly are disputes handled in your jurisdiction's court system? Are there any common complications to cross-border resolutions that businesses should be aware of?

Similar to comparable common law systems elsewhere in the world (e.g. the United Kingdom, Canada etc.), complex commercial disputes progressed in the Australian court system can often take approximately 12-24 months to be resolved, though they might be accelerated if one or both parties are well prepared.

Alternative dispute resolution mechanisms such as mediation or arbitration often present faster and more controlled options. These can be particularly effective where the parties agree an accelerated process in a disputes clause within the contract, and often allow the parties to engage in a stepped approach depending on the type of dispute encountered, e.g. senior executive negotiation, mediation, then arbitration. Arbitrations tend to be favoured for higher quantum and/or sophisticated disputes, due to the certainty of a binding determination being made.

Further, certain industries may be subject to specific legislation governing disputes, for example the construction sector, in which payment claim disputes may be escalated to statutory adjudication as a "rough and ready" form of interim justice.

Importantly, Australia is signatory to the New York and Singapore Conventions, allowing arbitral decisions and mediated agreements to be filed, recognised and enforced by the courts, thereby increasing the efficiency and efficacy of alternative dispute resolution mechanisms.

Cross-border disputes are often delayed by the formal procedural steps of service of documents and legal representative appearances to start proceedings, but can proceed quickly thereafter.

In addition, there may be local conventions within the court systems that should be discussed with local practitioners wherever possible, particularly in light of the recent Covid-19 pandemic which resulted in judicial systems adopting a number of virtual protocols, some of which may survive a return to pre-pandemic processes.

QUESTION TWO

Are there any cultural issues that businesses should be aware of when dealing with a legal dispute in your jurisdiction? How can working with a third party on the ground help to navigate these issues?

Generally, the Australian commercial landscape operates on a professional level and disputes tend to be handled through legal representatives, particularly in cases where the subject matter relates to high value claims and/or sensitive material.

It is important that a party notify any dispute clearly to the other side and to follow any procedure outlined in the contract. It is recommended that the notice be settled by a legally qualified advisor (solicitor or barrister) and that the advisor is briefed on the matter progressively for continuity of representation.

Contemporaneous documents, such as letters recording the dispute and resolving issues which would later be the subject of debate, are often invaluable. Materials related to the dispute should be preserved in their native format where possible and copies provided to a party's solicitors at the earliest opportunity.

Consideration must be given to the relationship between the parties and whether the business relationship is continuing or expected to continue following resolution of the dispute. In this regard it can be beneficial to engage lawyers on the ground as external advisors to manage the dispute on behalf of a party, leaving the company free to continue its relationship notwithstanding matters in dispute.

Further, it is often helpful to engage lawyers on the ground with local knowledge of the Court processes and arbitrator's preferences, which can smooth the way for complex claims or resolve them ahead of formal disputation. The lawyer may be able to advise on useful resources such as industry experts, to support and more effectively manage the dispute.

QUESTION THREE

What are the most common challenges when dealing with disputes in your jurisdiction? What measures can businesses take to navigate these obstacles to secure a cost-effective, timely resolution?

Unsurprisingly, a common challenge in dealing with disputes in Australia tends to be lack of contemporaneous evidence on or around the time of the subject matter of the dispute. A simple but effective tool to combat this challenge would be a competent document management system, e.g. online cloud storage, with all files including emails and documents able to be shared quickly with your legal advisors. Prompt dissemination of key information to legal advisors provides the opportunity for comprehensive review of relevant documents.

When identified early, tackling key issues allows the team to develop a strategy to drive the matter towards a mutually acceptable resolution, preserving commercial relationships so far as possible. Even if no resolution is achieved at that time, it is usually the case that much of that preparatory groundwork forms the basis for a later claim and/or defence. In the event of litigation, this work is likely to assist counsel and expert witnesses in analysing the real issues in dispute.

Undertaking detailed initial investigations often allows the dispute to be resolved on good terms between the parties, which results in better relationship management. These investigations may at times require specialist services, such as an expert requested to determine likely cause of delay.

Experienced lawyers can identify key issues prior to escalating the dispute. It is important that you periodically review your objectives against the employed strategy.

TOP TIPS

Cost-effective and timely dispute resolution in your jurisdiction

- Check which of the various jurisdictions apply to your matter. Note that a dispute might be capable of being filed in a number of forums e.g. state or federal court, administrative tribunal etc.
- Choose between state and federal courts depending on the remedy. Consider what your preferred resolution looks like and investigate the options that carry optimal chances of achieving that outcome.
- Establish and define contractual and other obligations. Ensure that contractual processes and obligations have been complied with including, where relevant, service of documents to initiate the dispute.
- Investigate prime witnesses early. Interview key contacts in the matter at an early stage and record recollections of the situation to allow comprehensive instructions to legal practitioners.
- Investigate and secure key documentary evidence (e.g. emails, letters etc.) Ensure that your company has a suitable document management process which retains copies of all project documents.

Rumberger|Kirk

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Berton Spence has a broad background in banking and financial services, product liability, and general commercial litigation. As the chief litigation counsel in the legal department for one of the top 10 financial institutions in the U.S., he handled disputes all over the U.S. and internationally including litigation and mediation/settlement disputes. In that role, he also supervised the development of eDiscovery policies and participated in responses to governmental investigations.

A partner in RumbergerKirk's Birmingham office, Spence counsels corporate clients in a wide range of litigation both in state and federal courts involving banking, consumer finance and consumer protection; class actions, insurance coverage and bad faith; workplace exposure, toxic tort, general tort issues; and product liability, including automobiles, motorcycles, ATVs, industrial equipment, tools, chemical products, and pharmaceutical and medical devices.

Beyond litigation, Spence has represented numerous lenders and special servicers regarding problem loans, with a particular emphasis on remedial issues in Commercial Mortgage-Backed Securitized lending (CMBS) including commercial real estate foreclosures, deed-in-lieu transactions, receiverships, loan modifications, guaranty claims and general issues concerning realisation on collateral.

RumbergerKirk represents companies across various industries and the nation providing litigation and counselling services in a wide range of civil practice areas including product liability, commercial litigation, construction, real estate, intellectual property litigation, securities litigation, labor and employment law, bankruptcy, insurance coverage, professional liability and administrative law.

Battle-tested, diverse litigators are dedicated to solving complex legal issues by learning the intricacies of the case, collaborating across teams, knowing opponents and jurisdictions and partnering to develop effective strategies that help businesses meet their objectives. Our team focuses on resolving cases efficiently and effectively bringing innovative legal services to the most challenging cases.

Offices are located in Orlando, Tampa, Miami, Tallahassee and Birmingham, Alabama. Visit www.rumberger.com to learn more.

QUESTION ONE

How swiftly are disputes handled in your jurisdiction's court system? Are there any common complications to cross-border resolutions that businesses should be aware of?

Dispute resolution in the U.S. takes longer than in many other places; often several years. There are two parallel court systems here: federal and state. Though procedural rules are facially similar in both, cases normally move more slowly in state courts for many reasons. Federal-court jurisdiction is limited, however, primarily to matters involving disputes between citizens of different states (or between a foreign citizen and a U.S. citizen) and disputes that involve federal law. State courts, conversely, have jurisdiction over all almost all types of disputes and litigants so long as there is a jurisdictional link to the particular state.

In both systems, disputes follow a pattern of (1) initial pleadings; (2) discovery (which is almost unlimited in comparison to most non-US jurisdictions); and (3) trial before a jury or in some instances only before a judge. The initial pleading phase is short in both systems, and the discovery period is often as brief as a year or less in federal court, but in state cases discovery involving document requests, interrogatories and depositions of potential witnesses can go on for years.

In both systems, appeals of trial-court judgments are available and tend to be resolved relatively quickly, almost always within one year, though the federal system tends to move faster. In states where there are intermediate appellate courts and final (supreme) courts, a second appeal obviously takes more time. Not all states, however, allow appeal by right to their Supreme Courts but instead follow the federal model where the Supreme Court takes only those cases it wishes to.

Final judgments obtained in one state are generally enforceable in any other U.S. state via relatively simple procedures, but enforcement outside the U.S. is a function of international agreements such as The Hague Convention.

QUESTION TWO

Are there any cultural issues that businesses should be aware of when dealing with a legal dispute in your jurisdiction? How can working with a third party on the ground help to navigate these issues?

The U.S. is a collection of 50 different states with different histories, ethnic and cultural populations, laws, methods of choosing judges, and procedural rules in their state courts. Though states' legal systems are superficially similar, there are vast cultural differences even between neighbouring states. Even within states, there can be significant differences in the legal culture between one court district and its immediate neighbour based on demographic diversities between the two.

There are "small town" judges who do not appreciate having "big city" lawyers tell them what the law is on a particular subject. Some brilliant legal scholars have become judges in federal courts who do not appreciate "small town" lawyers that are not familiar with the sometimes-more-technical procedural rules used in federal courts. Jurors in one state may be inherently suspicious of a lawyer who is from outside that state.

Dispute resolution is ultimately about persuading a neutral adjudicator (judge or jury) of the correctness and fairness of a client's position. Though studies show that most people try to approach their duties as judges and jurors objectively, those same studies show that cultural affinity works at a subconscious level. People simply put more trust in people they perceive to be like themselves than they do in outsiders. Because ordinary citizens have a large role in dispute resolution in the U.S. (most court litigation involves a jury), this "local prejudice" must always be considered.

Because of these considerations, it is absolutely essential, when litigating in the U.S., to have counsel that is aware of and experienced in navigating these cultural differences. For example, a lawyer in a smaller town will have practised before the local judge many times and will be particularly aware of how that judge likes things to be done. In the event of a jury trial, that local lawyer may be personally acquainted with or have friends in common with people on the jury. Though of course no extra-judicial communications can take place during a trial, there is nonetheless an inherent tendency of people to be more trusting of people they know and who are culturally similar to them. In larger cities, it may be more important to have counsel from a known and respected firm that has a general reputation for competence among the local judges.

TOP TIPS

Cost-effective and timely dispute resolution in your jurisdiction

- When making contracts, consider including arbitration, mediation, jury-waiver and/or forum-selection clauses to control where and how disputes will be resolved.
- The "default" rule in U.S. jurisdictions is that all parties bear their own attorneys' fees, win or lose, so to create a "loser pays" situation, it must be agreed to. Accordingly, consider including in contracts a provision that grants attorneys' fees and costs to the party that prevails. Such provisions are not right for every situation (they can incentivise a party to sue that might otherwise think it would be too costly), but in the right circumstances, they can also dissuade a potential litigant from "rolling the dice" in a lawsuit by creating a significant downside to losing.
- Hire local advocates with a strong background in the subject of the dispute. Such lawyers are better able to determine and achieve appropriate settlements.

"Dispute resolution in the U.S. takes longer than in many other places"

QUESTION THREE

What are the most common challenges when dealing with disputes in your jurisdiction? What measures can businesses take to navigate these obstacles to secure a cost-effective, timely resolution?

The most common challenges in most U.S. jurisdictions are hinted-at in the foregoing discussion; i.e., litigation in U.S. courts is expensive, time-consuming and can involve an incredible amount of disclosure of what would otherwise be private information along the way; something that often has a cost that is greater than the amount in controversy in the dispute.

The principal means of avoiding lengthy litigation in the American system is to include arbitration provisions in agreements with contractual counterparties and customers. Federal law in the U.S. makes properly constructed arbitration agreements enforceable in all matters that involve "interstate commerce", which effectively encompasses almost all commercial matters. Arbitration avoids arbitrary and excessive jury verdicts. Also, most states will enforce contractual waivers of the right to trial by jury. However, arbitration awards are not usually appealable so there is no opportunity to seek correction of an erroneous ruling.

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Marco Tulio Venegas Cruz is the Founding Partner of LITREDI, S.C. with 25 years of international experience. He is one of the most recognised attorneys in Mexico in the field of international commercial arbitration. He pairs his expertise in arbitration with a wide range of experience in administrative, commercial litigation and constitutional (amparo) litigation.

He has saved his clients billions of dollars and acted as counsel in several of the most complex litigation and arbitration matters for both multinational clients and governments around the world. His experience includes the successful participation as counsel in two of the largest commercial arbitrations in Mexican history, worth more than US$1.7 billion, as well as the most important infrastructure disputes ever with governmental entities.

He has international experience in the United States and France and has worked at law firms abroad as well as with the ICC Court in Paris.

Marco has published several articles related to arbitrations topics in national and international publications, such as Global Arbitration Review and Financier Worldwide. Marco is the chair of the ICC National Committee on infrastructure disputes.

“Many Mexican companies are family owned and do not have many assets to respond to adverse rulings”

LITREDI is a boutique law firm specialising in arbitration, litigation, and dispute resolution in general. It provides legal services at all stages of a controversy, including, of course, any potential settlement, to national and international clients, including corporations, governments, state-owned entities, private individuals, organisations and vulnerable groups.

LITREDI members together have more than 55 years of experience and throughout their professional careers have been successful in 91% of their cases. Our team has represented and advised in arbitration, administrative, civil and commercial litigation proceedings related to disputes in matters such as conflicts between shareholders, joint ventures, distribution and supply agreements, franchises, unfair competition, energy, construction and infrastructure, financial services, intellectual property, consumer protection and advertising, among other topics.

The firm seeks to make a positive difference and provides clients with the highest level of support and personal involvement at every stage, invariably, under elevated ethical and trustworthiness guidelines that are intended to reinforce the honour and integrity of the legal profession. The firm is also an expert in the design of tailor-made strategies for the prompt and efficient resolution of a dispute and, where possible, for the avoidance of future conflicts.

QUESTION ONE

How swiftly are disputes handled in your jurisdiction’s court system? Are there any common complications to cross-border resolutions that businesses should be aware of?

When initiating a lawsuit before Mexican courts it is essential to determine if the matter is civil or commercial, in order to know what laws will apply to the dispute. If the lawsuit is civil, the Civil Code of the respective state (or the Federal District) will apply. When the lawsuit is commercial, the Commerce Code (Código de Comercio) will apply and supplemental to that the Federal Civil Code (Código Civil Federal).

The competence of the courts that will hear the disputes are determined by territory, subject matter, amount and degree. Both the civil proceeding and the commercial proceeding can be processed and resolved before federal courts or state courts, without distinction. In practice, disputes are generally processed before the state courts and as an exception before the federal courts. The court proceedings will be carried out before a single judge and the hearings are public, except those dealing with family law matters. The resolutions issued in the first instance can be appealed when either of the parties decides to do so.

It has been established as a general rule relative to the jurisdiction of a claim that it must be filed before the court of the domicile of the defendant. It is also accepted that the parties can provide their consent choosing a different jurisdiction, which can be recorded in a contract.

The time for processing a civil or commercial proceeding is between one and five years, depending on the complexity of the matter, the procedural strategy of the parties and the workload of the courts. Normally, when multiple procedural appeals are pursued the time is prolonged.

The most common problem complication found in cross-border disputes is related to the solvency and ability to enforce a judgment against a Mexican company. Many Mexican companies are family owned and do not have many assets to respond to adverse rulings. Therefore, it is always recommendable to have solid bank guarantees in place.

QUESTION TWO

Are there any cultural issues that businesses should be aware of when dealing with a legal dispute in your jurisdiction? How can working with a third party on the ground help to navigate these issues?

Companies in Latin American countries such as Mexico have their own way of doing business that is based on a strange mixture of trust and wariness. In many cases, Mexican companies are focused on the present and do not plan much for the future. The absence of long-term business plans may usually result in conflicts when entering into agreements with a term of more than two years. Of course, having experienced local counsel in the corresponding industry or market is a must. A local counsel will serve not only to understand the business culture but also the legal landscape and the risks associated with each type of contract and its potential enforcement before Courts.

TOP TIPS

Cost-effective and timely dispute resolution in your jurisdiction

- Always ensure you have a proper and enforceable guarantee in your contract.
- If the value of the contract is worthy, include an arbitration clause from a renowned local or international arbitral institution.
- Take your time in hiring the proper local legal representation. Most of the cases are lost and/or complicated because of initial bad choices.

QUESTION THREE

What are the most common challenges when dealing with disputes in your jurisdiction? What measures can businesses take to navigate these obstacles to secure a cost-effective, timely resolution?

There are several challenges that a foreign company may face in a dispute in Mexico. The first one would be to obtain the proper legal representation. Many problems arise because companies choose attorneys that are not experienced enough in dealing with complex matters. Moreover, having attorneys fluent in both English and Spanish is essential to make sure that the communications between the client and the lawyer are conveyed properly. Other factors to consider are the places in which the dispute is being heard. Mexico has a centralist tradition in which the Courts in Mexico City are usually the best prepared, while the Courts in other States of the Mexican Republic have a very uneven quality.

Considering the duration of a case before Mexican Courts it is recommendable to include arbitration clauses in all contracts that have a value of more than US 1,000,000.00 dollars. Commercial Arbitration in Mexico works efficiently, and the local forum has enough professionals to assist sophisticated clients in this type of dispute. Moreover, Mexican Courts have adopted a friendlier approach towards the enforcement of arbitral awards.

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Joanna provides comprehensive legal advice and represents clients in the field of broadly understood economic crime, corruption and fraud leading to exposing business entities to losses. She participates in conducting audits, including due diligence of business partners, individual transactions and adopted procedures and solutions in terms of compliance thereof with the law.

She provides comprehensive legal advice in the field of customs law and customs procedures. She advises entrepreneurs on the transit, import and export of goods to/from Poland and European Union countries, as well as the classification of goods. She supports clients during customs control and represents clients in proceedings before administrative courts, providing legal support at every stage of the customs proceedings.

Joanna supports clients in transactions with a particular focus on mergers and acquisitions. She advises in complex restructuring projects of companies, including mergers, transformations and divisions. She also provides appropriate support and represents clients during business negotiations leading to the conclusion of a contract.

QUESTION ONE

How swiftly are disputes handled in your jurisdiction's court system? Are there any common complications to cross-border resolutions that businesses should be aware of?

The Polish judicial system is unfortunately inefficient. In simple cases, it takes at least a year in the first instance and about seven months in the second instance. In cases with a more complicated state of facts and more evidence, cases in the first instance can take about three years. The rule is that the case is heard by a court of second instance. In Poland, there is a tendency to use the right of second instance even when objective reasons indicate that there is little chance of a positive outcome

It should be borne in mind that the hearing of a case by a court of second instance is not merely a formality. The court of second instance may conduct its own additional evidentiary proceedings and on its basis completely change the judgment, which is very often incomprehensible for clients, especially from the common law system.

It is also a big challenge for foreign entities to submit company registration documentation, which would show the persons authorized to represent the entity and the rules of representation. Polish registration documents provide such information, so judges expect this from foreign documents as well, which sometimes requires the submission of extensive documentation, even the articles of association. Additionally, any documents in a foreign language submitted to the court should also be certified and translated into Polish, which generates additional costs.

KW KRUK and Partners is an independent law firm that has provided legal services to Polish and foreign corporate clients, financial institutions, and public administration bodies (state and local government) for more than 20 years.

A team of our lawyers has knowledge of the specificity of operations, problems and legal aspects of individual sectors of the economy, which enables our correct assessment of a business situation our clients are in and allows us to adjust legal solutions to attain the intended objectives.

We operate throughout Poland, cooperating with lawyers and renowned law firms from other Polish cities.

Our main practice areas include:

- Negotiation and mediations
- Court and arbitration disputes
- Business crimes
- Asset tracing and recovery
- Corporate law

QUESTION TWO

Are there any cultural issues that businesses should be aware of when dealing with a legal dispute in your jurisdiction? How can working with a third party on the ground help to navigate these issues?

Poland is classified by theorists as a moderately pro-transaction jurisdiction, and one must agree with them. This means that Polish negotiators are characterised by being goal-oriented and paying less attention to the relationships they have with their business partners. In many Polish proceedings, the facts of a dispute are very often extended by the parties to include facts that from a legal point of view are not relevant to the case, but are important for the personal satisfaction of the party. That is why very often evidence proceedings in cases become very extensive, which translates into the duration of such a dispute. The courts, especially due to the large volume of cases, are not able to control this artificial growth of cases. It is therefore important to have someone in place who can keep the proceedings under control and not allow the conflict to escalate.

Polish law, especially procedural law, is very often amended, and it is possible to deal with a situation in which two different legal states apply in one proceeding.

When starting negotiations in Poland, it is not necessary to conduct small talk or build a personal relationship with a business partner. The main part of the arrangements is made by exchanging electronic messages. Personal meetings usually end the negotiation process and serve to clarify minor issues and summarise further actions.

Very often there is also a language barrier. Many entrepreneurs, especially senior entrepreneurs, do not speak English, and even if they do they usually refuse to conduct personal negotiations in a foreign language, so it is important to have a person on site who speaks Polish. It's worth noting that all Polish courts and other authorities are obliged to use Polish, so when dealing with foreigners they use translators, the quality of which can vary, especially when dealing with specific legal language. Something may be easily lost in translation.

"Polish negotiators are characterised by being goal-oriented and paying less attention to the relationship they have with their business partners"

TOP TIPS

Cost-effective and timely dispute resolution in your jurisdiction

- Before litigation, it is advisable to try to resolve the dispute amicably. In most cases, this is quicker and less costly than litigating for years.
- All documentary evidence must be gathered before litigation commences; Polish law prohibits the expansion of evidence after a particular stage of litigation has been reached. It would be also easier to prepare all necessary translations for the proceeding.
- Always have the support of a local attorney. The substantive and procedural laws in Poland change frequently, and often even lawyers have trouble keeping up.
- Any settlement agreement should be consulted with a Polish lawyer to minimise the risk of its ineffectiveness under Polish law.

QUESTION THREE

What are the most common challenges when dealing with disputes in your jurisdiction? What measures can businesses take to navigate these obstacles to secure a cost-effective, timely resolution?

Time is of the essence. The Polish judicial system is not efficient and proceedings are highly formalised. That is why court proceedings may last for years. We recommend that each of our clients first try to settle the dispute amicably, and although this may involve concessions on the part of the client, in the end, taking into account the costs of proceedings, translation, travels to Poland, etc., this may prove to be more advantageous for the client.

Each agreement ending a dispute should be reviewed for effectiveness under Polish substantive and procedural law. It is not uncommon for waivers contained in such agreements – which are the rule in common law countries, for example – to be ineffective or even invalid under Polish law.

Many legal concepts used commonly in other jurisdictions are not familiar to the Polish system, such as trusts. As a result, it is often necessary to simply explain how such a mechanism works. A similar situation applies to new technology solutions, which may be incomprehensible to Polish courts. In Polish courts, but also in prosecutors' offices, cases are, as a rule, assigned at random, so a case that requires an understanding of a new technology issue may be assigned to a person who has no experience in this area, even if there is a competent person in the institution to resolve such a dispute.

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Daniel Fleming is IR Global's designated representative for commercial litigation in New Jersey and Pennsylvania. He has conducted over 100 jury trials and 100 bench trials throughout a legal career spanning over 35 years, has obtained multi-million dollar recoveries for Fortune 100 companies and successfully defended against high value claims. He is the co-founder of Wong Fleming, a 45-lawyer law firm headquartered in Princeton, New Jersey, with offices in Philadelphia, Pennsylvania and elsewhere. He serves as national counsel for several multinational companies. He is Chairman of the Board of Directors for Asian Bank in Philadelphia and serves on its audit committee. Daniel's pro bono activities include membership on the Program Committee for the Philadelphia Chinatown Development Corporation (PCDC) and the board of directors for ETCC, PCDC's non-profit owner of its community center and residential tower. He is a graduate of Villanova University (B.A.) and the Columbus School of Law, Catholic University of America (J.D.). He is admitted to the bars of New Jersey, Pennsylvania, New York, Maryland, Washington, DC, Ohio and California. He is married to fellow IR Global Member and co-founder of Wong Fleming, Linda Wong.

QUESTION ONE

How swiftly are disputes handled in your jurisdiction's court system? Are there any common complications to cross-border resolutions that businesses should be aware of?

The Pennsylvania courts, once notoriously slow in resolving disputes, now generally meet the American Bar Association guidelines for resolving cases within two years of filing. A 1995 study of the 45 largest state trial courts in the country concluded that the courts in Philadelphia were the second worst in the country for the amount of time it took to conclude a civil case dispute. By 2004, a National Center for State Courts study found that Philadelphia's courts were "arguably the best-managed large urban civil trial court operation in the nation," a trend that continues today.

The New Jersey courts continue to take longer to resolve disputes in comparison. State court rules generally require discovery be completed within 300 days of filing for personal injury actions, and 450 days for civil cases involving medical malpractice or other complex claims. Judges often extend these deadlines. As a result, New Jersey's timeframe for resolving civil disputes is closer to three years, or even longer.

However, federal courts in both New Jersey and Pennsylvania usually resolve their civil docket faster than the state courts. The U.S. District Court for the Eastern District of Pennsylvania is one of the busiest federal courts in the nation, but is often viewed as a model of case docket management.

Daniel Fleming and Linda Wong co-founded Wong Fleming in 1994, a national and international law firm consisting of 45 attorneys. The firm concentrates its practice for the business community in commercial, bankruptcy, employment, insurance coverage and defense, personal injury, product liability and intellectual property litigation. It is headquartered in Princeton, New Jersey, and is AV-rated by Martindale-Hubbell. Forbes has called it a "go to" firm for contract litigation. It is counsel for many Fortune 500 companies and maintains an active litigation practice for them, including serving as national counsel for litigation matters in all 50 states. Wong Fleming also provides critical transactional and immigration services for the business community. The firm is guided by its core values: (1) an absolute, irreproachable sense of integrity, without compromise to the interests of the firm's clients, (2) strong and effective advocacy, while maintaining the highest standards of professional conduct, (3) the vigorous pursuit of client interests, while maintaining civility to the bench and bar, (4) the promotion of diversity in the legal profession, and (5) a commitment to community activities.

The U.S. District Court for the District of New Jersey is the busiest federal court in the nation, but is currently dealing with a failure by Congress to confirm necessary judicial appointments, which is most apparent in its backlog in dispositive motions. A motion to dismiss can commonly take as long as six months, if not longer, for a judge to decide.

QUESTION TWO

Are there any cultural issues that businesses should be aware of when dealing with a legal dispute in your jurisdiction? How can working with a third party on the ground help to navigate these issues?

In Pennsylvania, businesses should be aware that the state conducts unrestrained, partisan elections of its judges. Judges run as candidates listing their party affiliation, with most voters never having heard of the judicial candidates. To campaign, judges raise large sums of money from lawyers, businesses and special interests. For this reason, corruption has sometimes taken place within the judiciary. On occasion, judicial decisions in Pennsylvania have unfortunately been influenced by money, with some judges going to prison. It can affect the quality and independence of the bench in Pennsylvania, and businesses should be mindful of other options (if eligible), such as removing a state court case to federal court or otherwise choosing federal court as the first choice, especially if the dispute is complex or controversial.

In New Jersey, no elections are held and instead, the governor nominates judicial candidates and the state senate confirms them. While this helps reduce the risk of corruption, and can enhance judicial independence, New Jersey state judges nevertheless have a history of favoring the "home team" and displaying hostility toward out-of-state counsel. Out-of-state counsel barred in New Jersey used to have to maintain a bona fide office in New Jersey. They could not maintain a mail drop or conduct business from their out-of-state office. This virtually guaranteed that a New Jersey barred attorney who was located outside the state had no choice but to hire a New Jersey barred attorney with offices in New Jersey. That archaic rule has since been abolished, but the bias against out-of-state counsel, even if barred in New Jersey, remains. Use of New Jersey counsel with offices in New Jersey can help reduce the risk of this unwarranted bias.

QUESTION THREE

What are the most common challenges when dealing with disputes in your jurisdiction? What measures can businesses take to navigate these obstacles to secure a cost-effective, timely resolution?

For Pennsylvania and New Jersey, the most common challenge to resolution of a dispute is the inordinate time clients must wait for a judicial resolution. Litigants must also deal with the proportionally exorbitant cost of litigation while waiting for a resolution. Litigants have no choice but to go through the time-consuming and costly gauntlet of discovery, which can take on a life of its own. Some large multi-national American companies even retain so-called "discovery counsel" in an effort to employ a uniform, and hopefully cost-effective, procedure for discovery.

The scope of discovery is broad and, consequently, potentially extensive and expensive. The cost of completing the exchange of paper discovery and oral deposition testimony can result sometimes in shutting the courthouse doors to litigants. Sometimes, the cost to complete discovery can exceed the amount in dispute, making litigation a poor option.

The state courts in Pennsylvania and New Jersey do have arbitration panels, some of which are mandatory to participate in, but they are often feckless and ineffective. We have seen too many arbitrators who display a bias in favor of one of the litigants. The only redeeming feature is that litigants can reject the arbitration panel award and proceed with the litigation. A more effective option is often the use of private mediators who focus their practice on alternative dispute resolution. Mediation is non-binding and its only downside is the cost of hiring a mediator. Both New Jersey and Pennsylvania have an excellent ADR bar and it is money well spent. One tactic to consider is to agree to an adversary's choice of mediator; half the battle in mediation is persuading the mediator you are right. It can be a powerful weapon to have the adversary's choice of mediator tell that party that they are wrong and likely to lose.

TOP TIPS

Cost-effective and timely dispute resolution in your jurisdiction

- Be mindful of New Jersey's Entire Controversy Doctrine. New Jersey is one of the few states in the country with such a draconian rule. An equitable doctrine, its objectives are to encourage comprehensive and conclusive litigation determinations, to avoid fragmented litigation and promote party fairness and judicial economy and efficiency. However, New Jersey case law is littered with examples of out-of-state litigants who were not aware of the rule, and innocently brought subsequent actions like insurance subrogation and legal malpractice lawsuits, only to find out they are barred forever.
- Take advantage of Pennsylvania's confession of judgment rule. Pennsylvania is one of the few states that permits a party to enter into an agreement to "confess" to a money judgment. It's a great tool to use for banks and anyone else advancing credit.
- Avoid the slower state courts and choose the federal courts, when possible. Federal courts are courts of limited jurisdiction, but if your dispute is eligible, choose federal court for a faster result.

"The U.S. District Court for the District of New Jersey is the busiest federal court in the nation"

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Stephen Wilson QC is a partner and heads the Litigation and Dispute Resolution practice group in the Turks and Caicos Islands ('TCI').

Stephen has appeared in many of the TCI's headline cases involving disputes in the tourism and hospitality, banking, real estate, insurance and construction sectors. He has a broad range of experience with matters in the admiralty, shipping and aviation, banking and finance, corporate and commercial, employment, insurance, intellectual property, real property and development sectors.

Stephen's corporate and commercial work has included complex disputes comprising multi-jurisdictional claims, multi-party actions, contract breaches, insolvencies and liquidations involving local and international parties, shareholder disputes, and corporate reorganisations and restructurings.

Stephen is recognised by the prestigious London-based Chambers and Partners as a top ranked attorney in the Chambers Global General Business Law – Dispute Resolution sector. He holds the distinction of a Band 1 ranking, which is the highest individual ranking. He has also been recognised by Chambers Global with their rankings for "Foreign Expertise" and "Expertise Based Abroad".

"Stephen Wilson QC ... is regarded as a stellar litigator with a broad-ranging practice which sees him handle cases in the real estate and tourism sectors, with further expertise in banking, corporate, employment and IP disputes. He continues to represent Bahamas entities in disputes from his Turks & Caicos base."

GrahamThompson (GT) prides itself on its unique combination of expert legal skills and real-world experience in working out effective solutions to complex problems. With 70 years of continuous history and a first-rate balance between seasoned practitioners and dynamic young lawyers, GT is excellence-driven in every way.

Producing and sustaining clientele drawn locally and from across five continents is the focal point of the firm's efforts. Integrity, hard work, understanding the "bigger picture" that frames the specific legal needs of clients, creativity, rigorous ethical restraint in the charging of fees, and uncompromising loyalty to the client, are key ingredients of the GT ethos.

GT, well known as the largest commercial law firm in the Bahamas, has successfully expanded from its main downtown Nassau location to better serve its broad range of corporate and private clients. In 2000, the Freeport, Grand Bahama office was opened, followed by the launching of licensed affiliate GTC Corporate Services in 2001, and the Lyford Cay, New Providence office opened in 2011. In December 2012, GT expanded to Providenciales, in the Turks and Caicos Islands, where it enjoys a reputation as one of the leading firms for civil and commercial litigation, and more recently, for transactional real estate matters.

GT has an enviable reputation both domestically and globally in a variety of important legal disciplines. Its attorneys are sought after by leaders in the real property, resort development, banking and capital markets, and domestic tax and regulatory sectors. The firm is highly regarded for its expertise in trust and estate planning, commercial matters, civil litigation, family law, securitisation, employment and immigration matters.

GT is consistently ranked a tier one law firm by the leading international ratings publications, including Chambers & Partners, IFLR1000, and City Wealth Leaders List, among others.

QUESTION ONE

How swiftly are disputes handled in your jurisdiction's court system? Are there any common complications to cross-border resolutions that businesses should be aware of?

Relative to big international cities and other Caribbean jurisdictions, disputes can be handled quite quickly in the TCI court system, though the Covid-19 pandemic has increased the time it takes for actions to pass through the system. New civil rules are being drafted with a view to moving the system towards a more case-managed and thus court-controlled system.

Cross-border disputes do not generally produce their own unique complications. The days of foreign plaintiffs having, as a matter of course, to post security for the entirety of the anticipated costs of the litigation, appear to have been consigned to history, save in respect of those plaintiffs residing in territories with notoriously difficult legal systems and which present problems for successful defendants enforcing orders for costs. Instead, any security for costs ordered is likely to be limited to an amount representing the anticipated additional cost (if any) of enforcing in the plaintiff's jurisdiction an order to pay the defendant's costs, over and above the cost to be expected by enforcement in the TCI.

The move towards online hearings and recognition that virtual or hybrid hearings are likely to remain part of the future means that many of the drawbacks associated with parties being in foreign countries are no longer of such concern.

QUESTION TWO

Are there any cultural issues that businesses should be aware of when dealing with a legal dispute in your jurisdiction? How can working with a third party on the ground help to navigate these issues?

Although disputes can be resolved relatively quickly, it should be taken into consideration that the TCI is a very small jurisdiction, with small law firms but still a high volume of disputes. As such, many attorneys are overworked and have access to limited resources in terms of the number of personnel they employ. This can lead to longer response times than many are used to both in terms of attorney/client communications and interparty correspondence.

In terms of its legal system, the TCI operates as a common law jurisdiction and disputes are handled by the courts through an adversarial system, such as one would find in England & Wales, Canada and the USA.

It is always advisable to take advice from local lawyers before entering into business in a foreign country such as the TCI and to engage local lawyers as soon as possible if a dispute arises.

QUESTION THREE

What are the most common challenges when dealing with disputes in your jurisdiction? What measures can businesses take to navigate these obstacles to secure a cost-effective, timely resolution?

One of the most common challenges is that the relatively small number of law firms specialising in commercial dispute resolution leads to the more popular firms being conflicted from acting. This is another reason why it is advisable to engage a local law firm before entering into business with a contractual counterparty.

TOP TIPS

Cost-effective and timely dispute resolution in your jurisdiction

- Do your homework before entering into any contract. Ensure that the terms of any contract you enter into are clear, unambiguous and appropriate from the outset and are regularly reviewed and updated. Ensure your contract makes provisions for how you will handle any disputes. It is always a good idea to have a litigator assist in the contract drafting.
- Be organised during the performance of your contract. It is often said that "documents win cases" or "if it isn't in writing, it didn't happen". Maintaining a clear and complete record of communications with the other party or parties to your contract can be invaluable in the event of a dispute.
- Keep all lines of communication open. Open and frank communication can often help prevent disputes or lead to amicable solutions. If the key persons with the day-to-day relationship can no longer communicate without hostility, consider moving the discourse to more senior personnel. If that fails....
- Consider mediation or other non-litigious dispute resolution. Involving a professional, trained, neutral third party (or parties) can bring an objective view to bear on the dispute and allow both sides to air their views without necessarily directing hostility at each other. From 15 October 2021, the TCI's Court Connected Mediation Rules 2021 come into effect and apply to disputes other than insolvency proceedings and non-contentious probate proceedings.
- Take legal advice early. Understand your contractual obligations, how disputes should be dealt with and how to preserve your rights. Do not be put off by an attorney's hourly rate. Experienced attorneys often take less time to handle issues and can be more cost-effective than someone charging a lower rate.

Cherry Bridges

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Cherry Bridges is the Managing Partner of Ritch & Conolly LLP, a law firm in the Cayman Islands established in 1983. Her partners in the firm are Angus Charlton and David Collier.

Cherry was educated in England and called to the Bar of England and Wales in 1982. She did her pupillage at 1 Essex Court, London and Temple Chambers, Hong Kong and was called to the Hong Kong Bar in 1983.

Cherry was a Barrister-at-Law in Temple Chambers, Hong Kong until late 1986 when she relocated to the Cayman Islands and was admitted as an Attorney-at-Law there in 1987.

Cherry has 39 years' experience acting in a wide range of civil commercial litigation with particular expertise in litigation relating to insolvency, restructuring and corporate recovery, funds, corporate and shareholder disputes, contentious trusts matters, tracing actions, enforcement of judgments, fraud and asset tracing, property, contractual and tortious claims, employment and insurance. Her list of reported cases may be found at www.rc.com.ky.

She has acted in many complex cross border matters for clients from all over the world, including the Dominican Republic, USA, Canada, Mexico, Uruguay, UK, France, Germany, Switzerland, Spain, Russia, Norway, Singapore and Hong Kong.

QUESTION ONE

How swiftly are disputes handled in your jurisdiction's court system? Are there any common complications to cross-border resolutions that businesses should be aware of?

Disputes can be handled very swiftly in the Cayman Islands when all parties to the litigation act professionally and efficiently. Our firm has dealt with numerous cases expeditiously, though parties do adopt delaying tactics as part of their litigation strategy. Access to the Courts is not generally an issue – there are delays sometimes in getting Court dates, but the Court always makes time for necessary and urgent hearings.

There are no insoluble "complications" as such, but any litigant must understand the various procedural, interlocutory, jurisdictional and conflict of law matters which often arise in cross border litigation and which may be different in the litigant's home jurisdiction. For example, it is necessary to understand:

- The nature and importance of the pleadings in our legal system.
- Potential jurisdictional challenges and/or forum challenges.
- The requirement to give full and frank disclosure of all relevant facts and matters on ex parte applications and the consequences of failing to do so.
- Orders for security for costs which may be ordered and may need to be fortified by a Bond or bank guarantee, or payment into Court.
- The process and reasons for making payments into Court.
- Notices to Admit and the consequent adverse costs order if a party fails to admit facts which ought to be admitted to saving costs.
- The requirement to give proper disclosure/discovery of all relevant documents per the test in the Peruvian Guano case.
- When expert evidence is required, and the neutral role of an expert and the expert's duties to the Court.
- The methods by which parties may adduce their evidence in Court and when witnesses must make themselves available for cross-examination.
- The risks of adverse costs orders being made against an unsuccessful litigant

Ritch & Conolly LLP has a respected international commercial litigation practice with extensive experience in cross-border litigation in trusts, corporate disputes, insolvency and asset recovery, enforcement of foreign judgments and conflicts of law.

Other areas of our litigation practice include banking, commercial fraud, anti-money laundering, contract, negligence, construction, administrative and public law, shipping, property, employment and arbitration.

We also undertake extensive non-contentious work including company, insurance, banking, real estate development and structuring, conveyancing, wills and estates, licensing, immigration and trademarks.

The firm has established links with other law firms and institutions worldwide. Company formation and administrative services are provided by the firm's affiliated corporate administration company, Foreshore Corporate Services Ltd., which may be contacted at the law firm's address or by e-mail at ebyrnes@rc.com.ky.

> **"Whilst relatively small, the Cayman Islands is a sophisticated financial centre"**

QUESTION TWO

Are there any cultural issues that businesses should be aware of when dealing with a legal dispute in your jurisdiction? How can working with a third party on the ground help to navigate these issues?

Whilst relatively small, the Cayman Islands is a sophisticated financial centre with a bench of capable judges who are experienced in efficiently handling complex commercial matters. The Court of Final Appeal in the Cayman Islands is to the Privy Council in England, because the Cayman Islands are a British Overseas Territory.

The Cayman Islands is a common law jurisdiction premised on the doctrine of stare decisis – where the law is developed through court decisions instead of legislative statutes alone, and legislation is interpreted by the court compared to a civil law jurisdiction in which governments create complete codes of law and government legislation is the primary source of law. Litigating in the Cayman Islands is similar to litigating in any other common law jurisdiction, though there are differences because the Cayman Islands has its own laws and Grand Court Rules, and each country has different procedures and rules of evidence.

With our guidance, clients and instructing foreign lawyers, including those from civil law jurisdictions, quickly understand our legal system and procedures. As a jurisdiction, we are very close geographically to the United States and many matters which are the subject of litigation here also have a US aspect, though litigation in the Cayman Islands generally involves clients from all over the world. The Grand Court will also assist foreign jurisdictions and those involved in foreign proceedings (for example, allowing recognition of foreign appointees).

There is a real advantage in having experienced local lawyers involved at the outset in any litigation matters in the Cayman Islands. Our attorneys have many years of experience in the most complex and high-value cross border disputes and insolvency matters which have been brought before the Grand Court, the Court of Appeal and the Privy Council, as is evidenced by the significant number of our cases that have been reported in the Cayman Islands Law Reports and listed on our firm's website.

TOP TIPS

Cost-effective and timely dispute resolution in your jurisdiction

- Do research before engaging an attorney to find an experienced local attorney by searching the Cayman Islands judicial website to identify a list of the attorney's reported and unreported cases in the Cayman Islands Law Reports.
- Consider fee rates charged by the large, medium and small-sized firms for each fee earner on the legal team. You will be surprised at the considerable variation of rates between firms and at the fact that you will often find the more experienced attorneys in the smaller or medium-size firms. Inquire which attorneys and support staff will be deployed on the case and what their respective roles will be.
- In the interests of saving costs, keep potential settlement options in mind at all stages of the litigation.

QUESTION THREE

What are the most common challenges when dealing with disputes in your jurisdiction? What measures can businesses take to navigate these obstacles to secure a cost-effective, timely resolution?

There are no major challenges when dealing with disputes in the Cayman Islands, except when litigants adopt delaying tactics, and those cases that do not settle but go to a full trial, which is expensive as witnesses are usually required to appear for cross-examination. Witnesses have to incur the costs of flights and expensive hotels, especially in the high tourist season. For complex and high-value cases, Queen's Counsel from London will usually need to be instructed and this is very expensive as, apart from their fees, the client has to cover the expense of flights, hotels, their work permit and temporary admission to appear for that case before the Cayman Court.

Practical solutions might include:

- Making good use of the Court by making an application at an early stage of the proceedings for a strict timetable for the various stages of the case and obtaining unless orders for failure to comply promptly.
- Asking the Court to agree to video link hearings for all or part of the proceedings (this was particularly useful during the 2020 Covid-19 lockdown in the Cayman Islands).
- Setting the substantive trial down for hearing in the low tourist season between April and October when flights and hotels are generally much cheaper.
- Instructing Queen's Counsel who are living in the Cayman Islands and are generally admitted to practice in the Cayman Islands, as this saves paying for flights, accommodation and the fees for a work permit and temporary admission.

Harry A. Payton

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Upon graduating from Georgetown University Law Center in Washington, D.C., Harry Payton began a successful career in commercial litigation in Miami, Florida. Harry is Board Certified by the Florida Bar in Civil Trial and Business Litigation, an accomplishment of less than 100 Florida attorneys state-wide. He is recognised for his high standards of professionalism, and has received the highest "AV Preeminent" rating from Martindale-Hubbell for more than 30 years.

Since 2005, he has been named in Florida Super Lawyers as a top-rated business litigation attorney. Harry was an active participant in the Managing Litigation as a Business initiative. He was a leader in the American Bar Association's effort to create a uniform system of billing and budgeting, which serves as a platform for assessing the productivity and efficiency of outside counsel and law firms.

Payton & Associates, LLC is a boutique law firm located in Miami, Florida that specializes in complex commercial litigation. The firm represents clients in both state and federal courts, as well as in arbitration proceedings, throughout the State of Florida.

Typical cases include breach of contract, shareholder derivative actions, international trade disputes, commercial foreclosures and leasehold disputes, misappropriation of confidential business information, business torts such as fraud and misrepresentation, conversion, defamation, and enforcement of non-compete agreements. The firm provides the highest calibre of services at the highest level of professionalism.

QUESTION ONE

How swiftly are disputes handled in Florida's court system? Are there any common complications to cross-border resolutions that businesses should be aware of?

Like every state, Florida has two court systems: the federal system and the state system. The federal system will entertain cases where the plaintiff and the defendant are of diverse citizenship and the amount in controversy exceeds $75,000. The federal system also entertains cases based on federal law. The state court system entertains all cases of every nature exclusive of those that are required to be filed in federal court. There is no impediment in either the federal court system or the state court system to the prompt filing of claims. Cases can be filed as soon as the papers are prepared. For matters that are very complex and that meet the federal jurisdictional standards, it may be advisable to file in federal court because the judges are generally better prepared and have assistants that the state court judges do not have.

A common complication to cross-border resolutions is the need to translate foreign language documents into English, which may delay the process of preparing the suit for filing. Florida requires every foreign language document to be translated by a certified translator if the document is going to be filed in court and be the basis for or related to the claim. Failure to file the translation of the documents on which the case is based is grounds for dismissal of the action. For cases filed in federal court, the translator should be a certified federal court translator.

QUESTION TWO

Are there any cultural issues that businesses should be aware of when dealing with the legal dispute in Florida? How can working with a third party on the ground help to navigate these issues?

Florida is the gateway in and out of Central and South America. South Florida, in particular, is a very multi-cultural community. Many people from Latin America are unable to understand our system of discovery, the inquiry directed to the adversary and non-party witnesses to learn as much as possible about the claims or the defenses raised by the opposing party. It is, perhaps, the most liberal discovery of its kind. The guidelines for discovery are very broad. All discovery is permissible providing it is relevant or likely to lead to the discovery of admissible evidence.

Discovery takes several forms in both the federal and the state court systems. In the federal court, the rules require voluntary disclosure of pertinent documents. This, even before the parties make demands upon each other. The process of discovery is governed by Florida's rules of procedure, which are very similar to the rules of procedure in federal court. The most common forms of discovery are interrogatories, requests for admissions and requests for production of documents. In written discovery, one party may ask another to answer written questions under oath. These questions are referred to as interrogatories. Another form of discovery is a request for admissions of fact wherein the requesting party asks the opposing party to admit stated facts and/or the authenticity of documents. Finally, the parties may request documents relevant to the claim or defense. Following written discovery, the parties have the opportunity to interrogate opposing parties and non-party witnesses in the presence of a stenographer/court reporter who administers an oath and records the questions and answers. This process is known as a deposition. In addition to having a court reporter present, the party taking the deposition may choose to record it on video for later use in court, including at trial.

The discovery process is the most time consuming, expensive part of preparing a case for trial.

> **"Florida requires every foreign language document to be translated by a certified translator if the document is going to be filed in court"**

QUESTION THREE

What are the most common challenges when dealing with disputes in Florida? What measures can businesses take to navigate these obstacles to secure a cost-effective, timely resolution?

The most common challenges involve time and money. In both court systems, the disposition of the bulk of the cases filed is between one and two years. The more complex the case, the longer it will take to resolve. Access to the courthouse is readily available. Some Florida counties have adopted a business court for handling commercial disputes. The business courts are patterned after the federal court system of oversight and case management. The following counties have adopted business courts: Miami-Dade County (Miami); Orange County (Orlando); Hillsborough County (Tampa); Broward County (Fort Lauderdale). Cases filed in the business courts tend to move faster than in other court divisions.

The cost of litigation has been a paramount issue for corporate America since at least the early 1990s, when the American Bar Association Section of Litigation undertook a study of the rising cost of legal fees and the creation of a uniform system of billing and budgeting. A comprehensive review of the facts giving rise to a case should occur very early in the case. From that comprehensive view, witnesses should be identified and a budget should be drawn according to the litigation codes adopted by the ABA.

As an alternative to litigation, the parties could select mediation as the first step in dispute resolution and/or arbitration. Arbitration could be binding and non-binding according to the agreement of the parties. Arbitration was designed to be economical, efficient and expeditious. If the parties treat arbitration as it was intended, it can accomplish its objective. If the parties treat arbitration as another form of litigation, in effect you would have litigation with a private judge or judges, as the case may be. An effective arbitration can be had with one arbitrator applying the substantive law of the state, permitting one deposition of a party on each side and one expert and an exchange of documents relied upon. In that way, arbitration can be more cost-effective than litigation.

TOP TIPS

Cost-effective and timely dispute resolution in your jurisdiction

- Put an effective arbitration agreement in your contracts. Determine how much money you can afford to lose before feeling deprived of the right of appeal, and above that sum of money provide an option for the parties to elect litigation.
- In your contracts, select a forum for the resolution of disputes: private arbitration under state or federal arbitration rules; AAA or Jams arbitration or litigation in federal and/or state court and the location.
- Identify the best mediators in the jurisdiction in which you choose to resolve your dispute and decide whether to require mediation before any other form of dispute resolution.
- Get your arms around a comprehensive set of facts before taking further action.
- Insist counsel provide a budget that both parties can agree upon.

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The Managing Director and founder of Wolfs Advocaten, John Wolfs, is a thoroughbred entrepreneur. He has worked as an attorney for 26 years, initially for leading firms in Washington DC and Rotterdam, before founding Wolfs Advocaten in Maastricht 20 years ago.

John is well known for his creativity, specialist sector knowledge and the top quality service he provides. He is direct, proactive, constructive and able to analyze situations quickly. He is also pragmatic. John Wolfs often lectures in the field of international transport and customs law, as well as international commercial law and insurance law.

With offices in Maastricht, Amsterdam and Venlo, Wolfs Advocaten specialises in legal solutions for entrepreneurs in the Netherlands and abroad. Wolfs Advocaten is a so-called full-service firm, where all areas of (civil) law are covered. The firm is mainly specialised in the field of corporate advice and litigation, (international) transport law, international commercial law, customs law and insurance law.

Wolfs Advocaten now consists of a young, dynamic team of around 20 attorneys, lawyers and support staff. Wolfs Advocaten employs true team players, who make efficient and optimum use of each other's expertise. You know and will otherwise find that we are business-like, realistic, effective and accessible, as well as being experts in 'our' legal areas.

Our clients often choose to enter into a long-term business relationship with our firm. Many of our clients are logistic, industrial and trading companies, as well as insurance companies, insurance intermediaries, foreign lawyers, housing corporations and care providers who value the services provided by Wolfs Advocaten.

The firm operates in Dutch, English and German if needed. Check out our website www.wolfsadvocaten.nl for news items. Follow us on LinkedIn. And last but not least: feel free to contact us for an introduction.

QUESTION ONE

How swiftly are disputes handled in your jurisdiction's court system? Are there any common complications to cross-border resolutions that businesses should be aware of?

One should distinguish in civil matters between regular Court decisions, urgency proceedings and provisional measures.

For example, a regular proceeding for the collection of debt may take nine months, including one obligatory Court hearing, if the amount exceeds 25,000. Thereupon the Court will render a final judgement or an intermediate e.g. to hear witnesses have an expert opinion. The intermediate judgement usually extends the proceeding by at least one year.

However, proceedings involving the dismissal of employees are usually dealt with in a shorter time (around two months). Generally, an urgency proceeding is started, since a regular proceeding would take too long and lead to uncertainty on both sides. Upon any decision appeal, an appeal with the Supreme Court is possible and extends the proceeding with at least one year per instance, if not more.

If a decision is needed quickly, Dutch courts can decide in an urgency proceeding. This usually only takes two months, also if it relates to disputes between shareholders. The urgency needs to be strongly motivated; if not, the judge dismisses the claim for lack of urgency. Appeal is possible and takes one third of the running through time as stated above.

A conservatory arrest may serve as a possibility to freeze assets. A judge may render a decision to freeze assets within 24 hours upon the request of the claimant. Take a look at our vlog on conservatory arrest in The Netherlands at www.wolfsadvocaten.nl. Appeal is possible, as in an urgency proceeding.

Enforcement of a judgement within the European Union and European Economic Area countries is easy. Judgements from abroad are usually recognised under Dutch law if minimum requirements are met as to notification and impartial judging. However, legal claims that are not possible to request under Dutch law, like punitive damages, are not recognised. Parties from abroad may have to provide security for Court fees and possible forfeited lawyers' fees up to a certain amount.

QUESTION TWO

Are there any cultural issues that businesses should be aware of when dealing with a legal dispute in your jurisdiction? How can working with a third party on the ground help to navigate these issues?

Only lawyers of the Dutch Bar Association are entitled to represent parties in disputes relating to civil matters unless the amount is less than €25,000. Judges are impartial so discrimination is a no-go area.

Some judges are very active in the debate and even try to find solutions providing some insight into a possible decision, thereby stimulating parties to solve the matter in a break of the hearing.

And last but not least: Dutch people are usually direct, which may be considered a little bit rude for some foreigners.

Dutch lawyers guide you and can explain what is said and also what is not said by a judge or an opponent. This reading between the lines and a generally pragmatical approach of most lawyers is considered an asset and of value to foreign clients.

QUESTION THREE

What are the most common challenges when dealing with disputes in your jurisdiction? What measures can businesses take to navigate these obstacles to secure a cost-effective, timely resolution?

One of the most common challenges when dealing with disputes in the Netherlands is that the court fees to start proceedings are relatively low, as a result of which an opposing party sometimes starts proceedings already for a relatively minor (financial) interest. It is also possible to present new evidence or to hear witnesses/experts during the proceedings, which makes the threshold for starting proceedings (while the evidence is not yet complete) low.

If proceedings have been initiated against one, one will be obliged to put up a defence; otherwise, the claim will be granted. However, Dutch lawyers generally (and are required by their Code of Conduct) to avoid proceedings by reaching a settlement with the opposing party (which is also still possible after the proceedings have been initiated, although the court fees paid cannot be reclaimed with the court anymore) but this will not always be accomplished.

To avoid lengthy and costly proceedings, a settlement is usually always better from a cost perspective, as the legal costs incurred in litigation are only partially (about 20%) reimbursed in the Netherlands if you win the case. If you lose, you have to pay part of the litigation costs of the opposing party but full court fees. Litigation in the Netherlands is therefore relatively expensive, even if you win.

TOP TIPS

Cost-effective and timely dispute resolution in your jurisdiction

- Make sure that the file is complete and that the relevant documents including an outline are presented to the lawyer. Pay attention to the burden of proof!
- It may also be worthwhile when a dispute arises, to already estimate the amount for which you are willing to settle the case.
- Always ask your lawyer for sufficient step-by-step insight into the costs of the proceedings/settlement. In the Netherlands, a 'no cure, no pay' agreement is not possible. However, a hybrid agreement is possible, for example, a lower hourly rate than usual, which only increases if a certain positive result properly described will be achieved.
- Make sure that you have your general terms and conditions that you (hopefully) use when contracting with a (foreign) opposing party checked on consistency with Dutch law by a lawyer.
- Make sure you have your contracts checked on consistency with Dutch law. Having a contract drafted or reviewed will incur costs, but these costs are much lower than the costs involved when you need to litigate because a dispute has arisen afterwards.

"Only lawyers of the Dutch Bar Association are entitled to represent parties in disputes relating to civil matters unless the amount is less than €25,000"

Accountancy & Corporate Services

IR Global's Accountancy & Corporate Services members are carefully vetted on their firm's expertise and experience. They are proud to hold the highest ethical standards as part of IR's cross border network and are fast becoming the 'go to' global alternative for business requiring international support. They are ideally placed to assist you in achieving your global expansion plans, ensuring compliance, and securing plans for growth.

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Paul Beare founded his practice following years of experience working at an accountancy firm, which came after his involvement in a successful merger and acquisition in 2014.

Having created an extensive support network of international providers over the years, clients and potential UK in-bound start-ups regularly approach Paul for UK and international expansion support. He is referred by many clients as their trusted advisor.

"It always helps to talk to those in the business that have already made some progress as a UK-inbound setup"

Paul Beare and his team support the needs of overseas companies setting up and operating in the UK.

One element is paramount with every client: they all need support and expert guidance. Paul and his team advise clients on the appropriate legal entity, payroll, VAT, banking and company secretarial services. Clients range from publicly quoted companies through to owner-managed businesses.

Paul travels frequently to Australia, New Zealand and the US, and has been heavily involved in IR Global for seven years. He uses this support network for clients when they are focusing on expanding their UK company. Clients can use this as a foundation for further expansion into Europe and beyond. Paul has particular expertise in helping clients decide on the best structures to use when setting up and growing a business in the UK: for instance, guiding clients towards the right choice between using a UK branch or a UK subsidiary.

QUESTION ONE

What are the most common accountancy pitfalls your clients have encountered upon entering a new market – such as tax duplications or failing reporting criteria – and how did you help them to overcome them?

A typical pitfall can relate to VAT, which is often referred to as GST in a client's own territory. We often see mistakes made in this area. So, for instance, if the client manages their own bookkeeping, they may hold the common misconception that the same rules apply internationally as in their home territory. Take insurance: in New Zealand this is subject to GST; in the UK, however, it is exempt.

We would say that the key questions to consider with VAT are: when do I need to register? What goods and services are subject to VAT? How do I need to report it?

We advise clients to be aware of the VAT registration threshold, because once they exceed that, they will need to go on to the VAT system (currently, you must register for VAT if your VAT-taxable turnover goes over £85,000).

Typically, we advise clients to register upfront if they know that they are likely to be exceeding that threshold soon. Up to the £85,000 point registration is voluntary, but if they are selling a product that was valued at 100K per product, they will hit it quickly. Clients may want us to do their bookkeeping, but even if they don't, we would still do a thorough review of the transactions before we file the return in any case.

It's also worth knowing that whatever payment and filing schedule you choose – and there are several – the payment date is always the seventh of the second month after the period ends. If the period ends December 31st, payment must be in by 7th February.

QUESTION TWO

Effective pricing and cost calculation are key to successful entry into a new market. What due diligence should businesses do before they enter your jurisdiction to ensure their business model is a good financial fit for the local market?

Pricing and cost calculations are massively important to understand, no matter what business you're in. In the UK, if you're selling to the consumer, you should adjust the end price to include VAT. If you're selling business to business, then it's perfectly acceptable to add VAT to any rack rate you might charge.

From a broader perspective, I think it always helps to talk to those in the business that have already made some progress in their journey as a UK-inbound set-up. Also, talk to other bodies that might be able to help you. That might be AusTrade, NZTE or the UK's Department of International Trade (DIT). Their services are largely free and they can introduce you to local partners like us, along with lawyers, market entry consultants, sales professionals and the rest. They can all help you land and expand as quickly as possible.

Finally, keep a watchful eye on your sales and pricing as you begin to grow. We'd advise putting the 20% VAT away in a separate account or perhaps make a watchlist in your accounting system's dashboard to ensure you haven't spent the VAT that you will owe over the reporting period. You don't want to be caught out, unable to pay your VAT liability.

There is a range of VAT schemes available to use: you can find more details online.

QUESTION THREE

What do businesses need to do to effectively adapt their reporting practices to local accounting standards in your jurisdiction?

The date of the company's formation will dictate when the company's accounts must be filed. There are different rules around different taxes (such as corporation tax that might have multiple reporting periods). It is your responsibility to make sure you're properly registered.

Under current rules, accounting reference date is automatically allocated to a year after incorporation, i.e. a company formed on 5th January 2020 will have the year-end date of 31st January 2021 for the first accounts to be made up to.

After incorporation we tend to file an AA01 form with Companies House to change the date to another that the company may prefer - they may want the same year-end date as the parent company, perhaps 31st December.

You can extend this date up to 18 months once every five years. Alternatively, we can shorten the date as sometimes you can't extend as the period may be more than 18 months due to the first accounts needing to be filed within 18 months of incorporation (see example below). We need a company resolution to amend the date before we file the change at Companies House.

For example, a company formed on 5th January 2020 will have the year-end date of 31st January 2021. If, for whatever reason, they want 31st December instead, we are not allowed to extend to 31st December 2021 for the first accounts, because it would be over 18 months from the date of incorporation. Instead, we bring forward the date to 31st December 2020 for the first accounts, then 31st December on a yearly basis moving forward. If we did that, then HMRC would need to be advised to align the CT (Income) tax return.

TOP TIPS

Mitigating accountancy risks when entering a new market

- Set up a Government Gateway account to access all of your company's relevant financial and tax obligations.
- Think carefully about what cloud accounting system you want to use: ask your accountant about which ones are the most user friendly for your business as it grows.
- Seek out good advice! The UK has some of the best small business advisers in the world, so use them!

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Glenn Harrigan, BSc, ACA is a UK trained Chartered Accountant who qualified in 1989. He has since amassed extensive experience in the fields of auditing, accounting, financial services, company management, compliance and insolvency.

He is a part-owner and serves as the Managing Director of CCP Financial Consultants Limited, a company management firm duly regulated and licensed by the BVI Financial Services Commission to provide company management and related services to local and international clientele.

Among his other interests, he has served as treasurer of the British Virgin Islands (BVI) Investment Club since its inception in 1992 and has been primarily responsible for creating loan proposals and offering documents which have raised over US$ 60 Million in financing. He also served on two occasions in the past as Chairman of the BVI Airports Authority and currently serves as the Chairman of the Board of Immigration for the Government of the BVI. He is also an avid entrepreneur who loves to help others achieve their business goals.

CCP Financial Consultants Limited is a multi-disciplinary financial services firm based in the British Virgin Islands. Its stated mission is to provide premium financial solutions to clients both in the British Virgin Islands and around the world via its established contacts and network affiliations. Our primary areas of business are company incorporation and management, post incorporation services, corporate governance services, ship registration, solvent and insolvent liquidations, bookkeeping and accounting services, economic substance services, trademark registration and assistance with the opening of bank accounts.

Our well-trained staff pride themselves on providing prompt and efficient service and a high level of customer satisfaction.

We are fully licensed and regulated by the British Virgin Islands Financial Services Commission and have been providing services in the BVI since 1991.

QUESTION ONE

What are the most common accountancy pitfalls your clients have encountered upon entering a new market – such as tax duplications or failing reporting criteria – and how did you help them to overcome them?

We now live in a world where business without borders is commonplace. This refers to the practice of entrepreneurially minded people resident in one country, not allowing themselves to be restricted in their business outlook by the geographical borders of their home country. Instead, they actively search out and seize opportunities to do business in foreign countries.

This is often best achieved by establishing structures in so-called "offshore jurisdictions" that have developed and streamlined legislation and solutions to make this process relatively simple and tax advantageous. Despite the mainstream media in recent releases, such as the Pandora Papers, seeking to condemn and place a smear on anything "offshore", the proper use of trusts and companies formed in offshore jurisdictions to conduct global business and minimise tax liabilities is not illegal or immoral in any way. Of course, there are always a few bad apples, but we daresay that the overwhelming majority of people who use offshore structures are not involved in money laundering, tax evasion, corruption, financial wizardry, terrorist financing, proliferation or any of the other sensational terms that are commonly associated with the offshore industry.

For persons who desire to do business in new markets, we strongly recommend that they seek external counsel to help them navigate uncharted waters and avoid some of the common pitfalls and delays experienced when undertaking such endeavours.

Furthermore, given the British Virgin Islands' (BVIs) standing as one of the most popular and well-regulated offshore jurisdictions, we strongly recommend BVI as the domicile of choice. This is supported by numerous precedents which confirm that the use of a British Virgin Islands Business Company (BVIBC) in global corporate structuring affords significant benefits such as:

- Flexible and efficient corporate structure
- Minimal capitalisation requirements
- Tax neutrality
- Low cost
- Swift company formation
- Sound post incorporation services
- Confidentiality, as opposed to secrecy
- Updated regulations in adherence to best international standards

Most potential clients who approach us on their own have no appreciation for the nuances of the above and lack some of the critical information required to properly implement such solutions. Their predominant focus is usually seeking to understand what the tax implications of using a BVIBC are from a BVI perspective. However, with a zero rate of corporate income tax, no withholding taxes on dividends and no capital gains or wealth transfer taxes, the truth is that there are no BVI implications.

Instead, the focus should be on first obtaining a clear understanding of their home country tax laws and ensuring full compliance when establishing an offshore structure. This is where the benefits of working with external counsel are most often realised; hence our standard recommendation to clients is to step back and complete this very important process before coming to us.

Another reality in setting up offshore corporate structures is that the process is prone to delay unless handled by experienced counsel who diligently commit to moving the ball forward until completion is achieved. For example, a primary cause of delay is a lack of appreciation and understanding of the due diligence standards in the offshore world.

In most onshore jurisdictions, the formation of a company is a swift and simple process. In the USA, for example, in states such as Delaware or Wyoming, a person can register on a formation agent's website and start to complete a simple application form. Ten minutes later, without having to submit a passport or any other proof of identification, proof of physical address, a source of funds declaration, or any references, they are providing credit card details. Before you know it, they are the proud owner of a USA based company.

Contrast that with the requirements for doing the same in the BVI where, firstly, the process cannot be completed online. Secondly, the following information must be provided and reviewed before a decision to incorporate is taken.

- A comprehensive application form detailing the Ultimate Beneficial Owners (UBOs), Shareholders and Directors.
- Certified proof of identity of all relevant individuals.
- Certified proof of address of all relevant individuals.
- Professional and/or bank references for key individuals when deemed necessary.
- A source of funds and tax residence declaration from all UBO's.
- An agreement to be subjected to onboarding checks using World Check or a similar compliance evaluation and monitoring program.

It's like chalk and cheese and, to be frank, many onshore persons consider the offshore requirements to be excessive and intrusive, and are therefore hesitant or unwilling to provide the information required. This leads to bottlenecks and delays in the formation process. Again, consultation with external counsel well versed in offshore requirements and standards can help expedite such matters.

Another typical cause for delay in setting up offshore structures is when persons in an attempt to reduce costs, circumvent external counsel and try to do it themselves. In many cases, they unknowingly end up dealing with a foreign based online intermediary as opposed to establishing direct contact with a local provider. As a result, the process becomes over-complicated with multiple layers and points of contact separating the client and the local provider, with each layer representing additional time and hidden costs. So, for example, a request for a certified copy of a document required to open a bank account, which could be provided within one day at the cost of $150.00 with direct contact, could instead take 2 weeks to filter through the various intermediary layers and end up costing $400.00.

So here again, the benefits of using external counsel are evidenced.

TOP TIPS

Mitigating accountancy risks when entering a new market

Firstly, seek advice from knowledgeable and experienced external counsel who can ensure full compliance with onshore requirements when deploying the BVI structure.

Secondly, avoid foreign intermediary scenarios and seek external counsel who can establish direct contact with local providers.

Finally, do not be swayed by the noise from other jurisdictions purporting to offer less expensive and better solutions than the BVI. The advantages of BVI corporate structures are world renowned and have stood the test of time. So, take the flight to quality and stick with BVI.

"The advantages of BVI corporate structures are world renowned and have stood the test of time"

Sousana Patsoumi Kalfa

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Sousana Patsoumi Kalfa is the Chief Business Officer of Atlas Consulting and a certified tax accountant, a certified financial consultant and an international business development expert. She is also a speaker, author, a visionary and experienced business strategist and consultant. She has been fostering and building businesses for almost 20 years. Her Masters from Essex has stood her in good stead to advise businesses on an international scale, yet it is her natural flair for nurturing that has been key to her success.

Sousana approaches business holistically and organically, guiding them through their first steps until they can run on their own legs. Her business consultancy guides SMEs through market entry strategies, corporate planning, business development and culture development, so that they can get on with doing business. She helps startups and established companies to grow, innovate and sustain themselves in Greece. She is an experienced international business consultant that support foreign companies and investors to raise the appropriate funds for market entry strategies.

She also provides expansion strategy solutions to local companies that want to grow internationally by using Atlas Consulting's extensive international network. She is an active member of International tax accounting and business associations and ecosystems.

"Before expanding to a new market, companies must do due dilligence around the application of their business model in the new market"

With five decades of market experience, Atlas Consulting is a reliable provider of BPO, financial and consulting services for SMEs and individuals, including company incorporations, accounting and tax compliance, payroll and HR, international tax planning, business administration services, and immigration strategies and expatriate solutions.

Since 1972, we have been making companies and individuals feel at home when they want to start and grow their business in Greece. We know and understand the challenges, the difficulties or issues that must be addressed. We bridge all of them in a holistic approach with high-quality solutions and services provided by our experienced team of tax advisors, lawyers, accountants and business consultants.

We help private clients to comply with Greek tax, property and employment regulations and settle all immigration and relocation issues .

With the motto "Global Vision, Local Action", we do not consider ourselves a conventional Tax Consultants and Accountants company. We go a step further, providing business solutions that help SMEs and individuals to grow and thrive within the Greek, as well as the international, market.

QUESTION ONE

What are the most common accountancy pitfalls your clients have encountered upon entering a new market – such as tax duplications or failing reporting criteria – and how did you help them to overcome them?

One of the most common pitfalls is their ability to understand the regulations under which they need to comply. They cannot easily comprehend that operating a business in Greece might be different in terms of monthly, quarterly or annually obligations; local accounting standards; or the way that they interact with local public authorities. Another pitfall is the lack of understanding regarding the necessity of preserving safe and secure storage of all the accounting information and archives, when other countries are not obliged to do so.

Local regulations and requirements are often overlooked because it may be hard to interpret the impact that they might have in the operations of the business, given that the cost of failing to keep up with regulations can be high.

It's essential to be aware of and comply with the local laws in your chosen market. To help clients overcome those pitfalls, we provide e-books that offer guidance and necessary information about running a business in Greece. We also organise training calls and are always there to provide answers to their questions.

QUESTION TWO

Effective pricing and cost calculation are key to successful entry into a new market. What due diligence should businesses do before they enter your jurisdiction to ensure their business model is a good financial fit for the local market?

For international companies, pricing is one of the most important elements of the marketing product mix, generating cash and determining a company's survival and the effectiveness of their business model. Before expanding to a new market, companies must do due diligence of the application of their business model in the new market. To avoid unnecessary discrepancies and inefficiencies, there are three basic steps that need to be done before entry:

- Do extensive market research about the products/services that the company wants to provide to the new market, including general business environment information; Political, Economic, Social, Technological (PEST) factors; competitors' products, services and pricing; the market readiness to welcome new products; logistics and the delivery of goods etc.
- Investigate taxation, employment and HR costs the company will incur in the new country.
- Firms must think beyond their domestic markets to survive and prosper in another market. They must think globally and act locally. For that reason, they need to explore and understand the local market culture and behaviors, the business culture, and etiquettes of each country.

There is no perfect way to set prices and to budget costs, but a smart pricing strategy involves knowing what factors to pay attention to, and what information to gather before entering the new market.

TOP TIPS

Mitigating accountancy risks when entering a new market

Greece is a beautiful country, but there is a lot of bureaucracy and a complex tax and accounting environment. Before entering the Greek market, research the market thoroughly. Seek advice on accounting standards and statutory obligations before forming companies.

You should also find an experienced and well-established accounting company to put together a list of policies and procedures regarding your business's accounting processes, including:

- If you use cloud accounting, how records will be kept
- How accurate documentation of financial transactions and records will be delivered
- How often accounting reports must be generated
- How security controls will be carried out
- The practical safeguards that should be considered to mitigate the risk of financial accounting and records being misused (e.g. for corruption)

QUESTION THREE

What do businesses need to do to effectively adapt their reporting practices to local accounting standards in your jurisdiction?

Financial reporting is a necessary component of sustained local and international companies. Greece, as a member of the European Union (EU), is subject to the accounting, auditing and financial reporting requirements established in EU Regulations and Directives as transposed into national laws and regulations. The requirements for the preparation of financial statements are established in Law 4308/2014, which was issued to adapt to the EU Directive 2013/34. This law introduces differentiated financial reporting requirements for different types of companies, depending on their size in terms of annual turnover, number of employees and total assets, specifying applicable accounting standards.

Since the Greek General Accepted Accounting Principles (Greek GAAP) are different from the IFRS or other Accounting Principles and Standards, a company that wants to enter the Greek market needs to follow three basic steps:

- Find an experienced accounting firm and cultivate a long-term relationship with them to stay informed about statutory obligations.
- Understand and adapt to Greek statutory accounting standards and statutory reporting requirements.
- Specify and consolidate internal reporting needs.

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Andrea started working for FRTG Group during her studies in business administration and switched to a full-time position in 2012. In 2017, Andrea acquired the title of tax consultant and has become the team leader of the tax department at the head office in Düsseldorf.

During her long affiliation with the company, she has driven the digitalisation of the firm and its services. In her daily work, she mainly advises small and medium-sized corporations in business and tax issues and prepares annual financial statements as well as business and private tax returns, covering a broad field of services.

She assists in designing the digital renewal of processes at the client's premises to enable ideal and modern cooperation and thus combines daily practical work with the necessary expertise for a fully comprehensive consultation. She aims to advise each client tailored to his or her needs and to offer support in all aspects of their daily undertakings.

The FRTG Group is an association of five tax-consulting companies. This means the Group can draw from a pool of experts who can provide their clients with qualified, comprehensive and personalised advice in different areas. FRTG Group provides clients with individual solutions tailored precisely to their needs, from a single source, for national and international companies of any legal form and size, entrepreneurs, associations, foundations and private individuals in the following areas:

- Auditing
- Tax consulting
- Services
- Business management consulting
- Restructuring

We offer well-suited solutions through our individual consulting. While we advise each client with a qualified team of experts, who each have different backgrounds and areas of expertise, there is only one personal advisor, who is responsible for the communication and completion of the tasks. However, by working as a team, every team member can be substituted for your personal advisor if necessary.

Independent institutes and magazines have awarded the FRTG Group several times in previous years. This year, FOCUS named us "TOP tax advisor 2021", Manager Magazin awarded us as "Germany's best auditors 2021" and we are certified as a "digital consulting firm" by DATEV.

QUESTION ONE

What are the most common accountancy pitfalls your clients have encountered upon entering a new market – such as tax duplications or failing reporting criteria – and how did you help them to overcome them?

For some reason, many clients make five-year business plans but lack the planning for the start-up process because they underestimate the effort required to set up a company in Germany. As a result, even the simplest obligations cannot be fulfilled, i.e. the assignment of a tax number or of appropriate business permits.

Opening a bank account can be time-consuming, due to extensive verification processes. Not all banks want to work with international investors and some even require a German national as a managing director. The selection of the right credit institution for the individual requirements is essential to avoid investing time and effort unnecessarily.

Due to our international experience, we can help clients with all those steps promptly. The takeover of a shelf company has proven to be particularly effective. The capital is paid in full; it is registered with the tax offices and has a company bank account. Those shelf companies can be taken over from our affiliated company and a new managing director can be appointed immediately.

Although the changes in representation, corporate purpose, etc. must also be completed in a lengthy process, the company is immediately ready for business, as it is already fully registered. In addition, we support our clients with office services via FRTG Office Service GmbH. This means that no valuable time is lost in the start-up process and market opportunities can be exploited from the outset.

"We recommend clients prepare a multi-year business plan before entering a new market to avoid serious mistakes"

QUESTION TWO

Effective pricing and cost calculation are key to successful entry into a new market. What due diligence should businesses do before they enter your jurisdiction to ensure their business model is a good financial fit for the local market?

We recommend clients prepare a multi-year business plan before entering a new market to avoid serious mistakes. That includes investigating the local competition and the price situation in Germany. Entrepreneurs must be aware of the type of market form: will their product or service be offered in a monopoly, oligopoly or polypoly? They cannot influence such external factors, but they can certainly influence their pricing. In addition, internal factors must be known and checked – how high are production, material and personnel costs? Depending on the sector, a customer survey can help.

Due to our extensive client base, we establish contacts who can familiarise our clients with market conditions through information exchange. Our affiliated company FRTG AG Wirtschaftsprüfungsgesellschaft assists in the preparation of a business plan, provides information and establishes contacts. If we do not have matching clients from the respective industry, or if we do not have the competence ourselves, we recommend companies that have the appropriate expertise in this area. Through our wide network, we are always able to point the client in the right direction.

TOP TIPS

Mitigating accountancy risks when entering a new market

- Choose the right accountant and tax advisor, not the cheapest. Whether in business, tax advice or insurance, you only appreciate the value of a good partner when you do not have one. Omitted or incorrect advice can have long-lasting and expensive consequences. No investment leads to an immediate return, so why expect it from consultancy services?
- Comply with the accountancy and tax regulations from the beginning; a later repair will be expensive and is sometimes associated with irreparable damage.
- Failure to comply with legal requirements could be a criminal offence, which could severely disrupt market entry and future plans. Make sure to obtain comprehensive advice. Our network can also provide legal counsel to protect you against unpleasant surprises in an unknown environment.

QUESTION THREE

What do businesses need to do to effectively adapt their reporting practices to local accounting standards in your jurisdiction?

Our self-image as economic and tax advisors is that it is not the client who has to adapt to German standards, we do that for them. Our goal is to provide the customer with an infrastructure and workflow that maps all the necessary processes, shows the customer precisely what information and documents are required, and allows us to process them accordingly.

Our main goal is to connect our client's reporting tools with our own IT landscape in a relatively lean and effective way, so that we can exchange information and reports digitally. This might take a little more time during the setup process, but it will save plenty of time in the aftermath of daily business.

Especially when dealing with international clients, it is essential to be able to communicate fast and under high safety standards so that, together, we can meet Germany's extensive regulations and requirements.

Particular attention should be paid to the declaration obligations for value-added tax (VAT). Despite the supposed equality of legislation across Europe, VAT is the tax with the highest risk factor in each country. Mistakes that are made once are often not correctable and can lead to an additional payment in the course of a tax audit. That is why we work with our customers to establish correct reporting concerning sales tax.

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Nevin is the President and co-founder of Sanli Pastore & Hill, Inc., a financial consulting firm that creates custom expert testimony and litigation opinions; forensic finance and economics; business, brand and IP valuation; forensic accounting; fairness and solvency opinions; transactional advisory services; and solutions to complex problems for businesses, families, and individuals. Nevin has been running SP&H for nearly 30 years and the firm is one of the largest and most respected premier boutique firms, with a combined experience of over 150 years in valuations and financial opinions. Nevin has nearly 40 years of experience in financial consultancy, valuation, expert witness testimony, investment, and accounting analysis. Nevin is a member of many local business organisations including ProVisors, All Cities and ACG OC. He strongly believes in and supports continued growth and fostering of solid business relationships. Additionally, Nevin is fluent in English, French and Turkish and conversational in Spanish.

"It is always advisable that businesses consult with and hire local experts that can accurately tailor services to their needs"

Sanli Pastore & Hill, Inc.'s principals and senior professionals have over 100 years' combined experience with offices in Los Angeles, Sacramento, San Diego, and Chicago. Our partners have been named as expert witnesses in over 1,200 court proceedings and have provided over 4,000 financial opinions and testimony for shareholder disputes, marital dissolution, intellectual property litigation, mergers and acquisitions, fairness and solvency situations, and other advisory services.

Each year, SP&H works on over 150 matters, which include forensic accounting and litigation support matters, valuations of business brands, patents and intellectual property for businesses ranging from startups to Fortune 500 companies and Forbes 400 members, US government agencies, and foreign governments. The industries we cover include high technology, entertainment and media, medical and life sciences, consumer products, manufacturing, telecommunications, software, energy, defense and service.

Our team is sought-after for special situations requiring expert financial opinions in high-stakes circumstances. We provide expert testimony and opinions in both transactions and disputes. Our financial opinions include valuations for shareholder buy-outs/disputes and company reorganisations; contentious divorces; fairness and solvency opinions; business succession and planning for large estates; litigation support; economic and forensic analysis; damages/lost profits calculations; and special situations requiring company financial analysis.

QUESTION ONE

What are the most common accountancy pitfalls your clients have encountered upon entering a new market – such as tax duplications or failing reporting criteria – and how did you help them to overcome them?

While we are not an accounting firm, my firm provides forensic accounting services in support of damage calculations, fraud investigations, and valuations. The greatest pitfall we have come across is the difference in accounting standards between different jurisdictions and the lack of supporting documentation for privately held businesses.

QUESTION TWO

Effective pricing and cost calculation are key to successful entry into a new market. What due diligence should businesses do before they enter your jurisdiction to ensure their business model is a good financial fit for the local market?

We have seen that it's different for each market and one must exercise caution and diligence.

Since we specialise in business valuations, damage calculations, litigation support and expert testimony, it is essential that we understand the local laws and practices on valuation standards, due diligence, compensability of damages, court rules and other applicable customary practices.

QUESTION THREE

What do businesses need to do to effectively adapt their reporting practices to local accounting standards in your jurisdiction?

It is always advisable that businesses consult with and hire local experts that can accurately tailor services to their needs.

Legal counsel is always of great assistance in entity formation, building relationships and meeting new people as their business clients can potentially also become our clients. We also appreciate introductions to their colleagues in the legal, accounting and investment banking world.

TOP TIPS

Mitigating accountancy risks when entering a new market

- Learn the local tax, compliance and accounting rules.
- Hire a local expert.
- Seek guidance and cooperation from local firms and associates. Understand the complexities of multi-jurisdictional taxation.

Gregory Colomé

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Gregory has provided tax, transfer pricing and corporate financial advisory services to various multinational enterprises within a broad scope of industries. He has advised clients on matters relating to transfer pricing planning; risk assessment reviews; documentation; compliance; and dispute resolution. He has also advised clients on a full spectrum of international transactions, including the purchase and sale of tangible products, the development, licensing or sale of intangible assets and intellectual property; the provision of management services; the provision of contract services (manufacturing, R&D and other); cost contribution and/or sharing arrangements; financial transactions; and cost reimbursements.

His specialities are local taxation, valuation and financial advisory services.

We provide high-quality tax, financial and audit consulting services, our pillars being quality, timely delivery and commitment, aimed at exceeding our clients' expectations.

Our firm has extensive experience in various areas where we are confident that we can support your company. The experience of our partners amounts to more than 38 years dedicated to excellence with solid preparation and expertise.

We have a multidisciplinary team of professionals, which helps us to have various perspectives and consider the different scenarios that guarantee the smartest way to manage risks.

QUESTION ONE

What are the most common accountancy pitfalls your clients have encountered upon entering a new market – such as tax duplications or failing reporting criteria – and how did you help them to overcome them?

When a client tries to access new markets, a complex chain of compliance begins that includes several aspects that must be considered in order to have a successful venture in the target market. Within our experience, we have advised several clients in operations related to establishing themselves in the Dominican Republic. We have determined that they can generally present problems in two main aspects:

- Fines for mishandling of permits and regulations: Depending on the client's industry, it is necessary to have certain operating permits for products, services and registration formalities that force us to rethink the best market entry strategy, as well as the most beneficial way to incorporate the business and consider the intellectual property to develop the brand successfully and without obstacles.
- Penalties for ignorance of the financial structure of the business: When making a foray into a market, the entity must consider re-evaluating its financial plan, considering the fiscal costs associated with the undertaking. The Dominican Republic is a signatory of double taxation treaties and exchange of information. In addition to this, it applies the OECD guidelines, so sensitive aspects in taxation (such as transfer prices, BEPS and country-by-country reports) must be considered to measure the impact and make cost-beneficial decisions. These pitfalls can represent a high fiscal cost for the venture if they are not dealt with by experts.

As a multidisciplinary firm, our team of professionals were able to contribute to these aspects by evaluating the venture and its potential risk factors, to be oriented towards a restructuring that allowed optimising market entry in such a way as to: reduce the costs associated with tax compliance; increase profitability; and reduce wait time for permits and approvals. We are a guaranteed option for those who want to expand their operations to the Dominican Republic.

QUESTION TWO

Effective pricing and cost calculation are key to successful entry into a new market. What due diligence should businesses do before they enter your jurisdiction to ensure their business model is a good financial fit for the local market?

This factor is extremely important. Companies must consider several aspects in their cost structure to determine the return they will obtain when carrying out a venture in our jurisdiction. The factors that we can cite are the basic components of the cost of products and the factors that affect it:

- Regulations and protection: It should be considered if there are tariffs or special rates for products, which are aimed at saving or protecting local production. This factor can contribute to raising the final sale price if it is not contemplated in the structure pricing.
- Raw material and materials: Analyse the convenience of supplying raw materials at the local, regional or related entity level, considering the levels of fluctuation in their prices and the logistics cost, which is currently a headache in our country for importers.
- Workforce analysis: Currently, our jurisdiction provides facilities for foreign capital to settle in the free zone park. These parks have characteristics of preferential tax regimes aimed at ensuring that these foreign capitals employ local labour. Therefore, it is essential to know what type of labour will be employed, considering the percentage limitations of local labour established by the Ministry of Labor of the Dominican Republic.
- Analysis of the tax regime to be used: It must be considered which is the most beneficial tax regime for the entity in order to operate with tax benefits that can translate into savings for customers through price reduction.
- Analysis of key suppliers: the structure of the value chain must be analysed to determine the impact on its cost by the actors that operate in said chain.

TOP TIPS

Mitigating accountancy risks when entering a new market

- Consider the fiscal effect in the local jurisdiction, in order to analyse the tax structure of the fiscal cost and optimise it under a detailed analysis of different scenarios. In this way, the management will have several scenarios in which it can decide on the undertaking.
- Consider entry regulations, operating permits and protection of the company's brand or intellectual property.
- Analyse the value chain and determine the benefits and opportunities that local or regional suppliers can provide, taking into account the logistics and associated costs.

QUESTION THREE

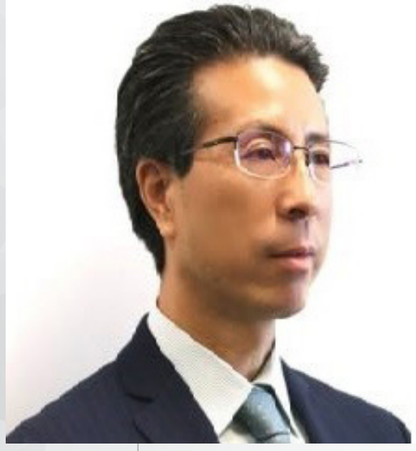
What do businesses need to do to effectively adapt their reporting practices to local accounting standards in your jurisdiction?

Companies should consider that operations are reported in the Dominican Republic based on the complete international financial information standards for SMEs. These apply depending on whether the entities have public responsibility before third parties or have an obligation to render accounts (regulated sectors).

Basically, they must adapt the financial models in compliance with the standards used in the country. In our country the following sectors are considered regulated:

- Banking
- Insurance
- Obliged subjects of the non-financial sector (money laundering)
- Obliged subjects of the financial sector

"Companies must consider several aspects of their cost structure to determine the return they will obtain when carrying out a venture in our jurisdiction"



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Jason joined Sino Corporate Services (China) Limited as Managing Director in May 2017. His expertise includes greenfield FDI projects, M&As, corporate taxation, PE taxation and expatriate taxation.

Jason has more than 20 years of experience in the financial service sector. Aside from his work in trust companies, Jason also worked as an auditor, an investment banker, and a chief financial analyst.

At Sino, Jason offers extensive tax consultancy to multinationals, especially in areas of PE taxes, expatriate tax, and withholding taxes. Jason is also well experienced in negotiating on behalf of clients with local governments for fiscal supports.

The Sino Group is a high-quality provider of fund, trust and corporate services located in Hong Kong and China. Our expertise and focus is the Greater China market but our strong relationships in the other major financial centres of Asia enable us to provide a seamless service to clients operating throughout the region.

We are an independent professional team of practitioners with over 30 years of experience in our industry. We are not owned by a Private Equity firm: the people who own the company actually run the business and do the client works. We are not motivated by our results, but rather by the best interests and results for our clients.

In these turbulent times, we seek to provide clients with a safe pair of capable hands.

QUESTION ONE

What are the most common accountancy pitfalls your clients have encountered upon entering a new market – such as tax duplications or failing reporting criteria – and how did you help them to overcome them?

Accounting is a regulated activity in China. It is easy for the Chinese operations of multinationals to fall into the following pitfalls:

- **Choice of accounting software and parallel accounting**

Multinationals prefer centralised accounting control, by using the ERP system of the group to do the accounting and reporting of their Chinese subsidiaries. However, due to differences in accounting rules, tax regulations, and accounting language, most of these subsidiaries have to keep two sets of accounting books, one done in the group ERP system for group reporting, and one done in locally approved accounting software for statutory reporting. Due to differences in both accounting and tax rules, an almost inevitable result of such parallel accounting is the perpetual work of difference reconciliation.

- **Invoicing**

Invoicing in China differs sharply from western practices. Commercial invoices can be used for international transactions, such as imports and exports, but transactions within China (except for special customs supervision areas) must be accompanied by official VAT invoices referred to as Fapiaos. Companies have to purchase blank Fapiaos and the device to print information on blank Fapiaos from tax authorities. Blank Fapiaos are serially numbered by tax authorities and experienced accountants can easily tell bogus Fapiaos from real Fapiaos. Issuing or using Fapiaos not supported by underlying transactions can lead to tax adjustment, penalty or even criminal prosecution.

Local expenses not accompanied by Fapiaos are generally not tax deductible. Quite some companies book expenses (mostly in the form of staff expense claims) perennially as assets (usually in other receivables) because they cannot obtain Fapiaos.

Tax authorities also restrict the number of blank Fapiaos a company can purchase each month and the amount each Fapiao can carry. At present, a newly established company can usually purchase up to 50 Fapiaos with each limited to RMB 10,000. A million-dollar sale of a company means several applications of Fapiao purchases and hundreds of Fapiaos being issued. Purchases of additional Fapiaos can be rejected if tax officials do not believe a new company can do such a large amount of business. The customer can be very unhappy about high numbers of Fapiaos being received.

- **Withholding income tax**

Withholding income tax on non-resident companies is applicable only to certain income, such as licensing fees or when the relevant temporal threshold is met. For example, if a non-resident enterprise provides services to a Chinese entity or individual, the service fees are subjected to Chinese income tax only when the duration of the service project is no shorter than 183 days or 12 months, depending on the relevant tax treaty. In practice, tax officials tend to levy income tax at a uniform rate of 10% on all fees, regardless of the nature of services, and local accountants usually feel obliged to comply. Actually, only licensing fees are taxed at 10% (but can be lowered by tax treaties) while other fees are taxed between 3.75% and 12.5% if the threshold of a permanent establishment is triggered, or if there is no tax treaty between China and the home country of the non-resident company.

TOP TIPS

Mitigating accountancy risks when entering a new market

- Try to be as practical as possible when aligning local accounting with group reporting, especially when the operations in China are small. Costs of centralised accounting can easily exceed the benefits.
- Set up clear rules about when to receive and when to issue Fapiaos, and instruct staff from the very beginning that expense claims must be accompanied by Fapiaos.
- Not all tax officials are versed in the withholding regime in China. It is important to look at the relevant clauses of the tax treaty before accepting the tax assessment from the in-charge tax bureau.
- Ask about tax implications if a certain business model seems to be unusual in the jurisdiction where the model is to be carried out.

"Foreign companies find it hard to appreciate that they can negotiate for government subsidies and for a refund of taxes they have paid"

QUESTION TWO

Effective pricing and cost calculation are key to successful entry into a new market. What due diligence should businesses do before they enter your jurisdiction to ensure their business model is a good financial fit for the local market?

A significant risk multinationals tend to ignore is currency control in China. An agreed-upon deal can collapse or see its cost dramatically increase due to this control. For example, when a foreign company sources goods from a Chinese supplier and then sells the goods to a Chinese customer, the issue of currency control becomes critical. Without using a special customs supervision area (SCSA), the supplier cannot receive payment from the foreign company and the customer cannot make payments to them. If an SCSA is used, the supplier will have to export the goods to the SCSA and the customer will have to import the goods from the SCSA. This will lead to deadweight costs such as customs duty, warehousing and logistics.

Meanwhile, a significant benefit foreign companies find hard to appreciate is that they can negotiate, both before and after entry into the Chinese market, for government subsidies and for a refund of taxes they have paid. Subsidies and tax refunds offered by local governments were in limbo in the past, but China's Foreign Investment Law, taking effect on 1st January 2020, requires that commitments made by local governments should be fulfilled.

QUESTION THREE

What do businesses need to do to effectively adapt their reporting practices to local accounting standards in your jurisdiction?

Since China requires accounting to be done in Chinese on the basis of the Chinese GAAP by means of locally approved accounting software, the use of the group ERP for local accounting is strongly recommended against, unless a high degree of localization or thorough mapping can be done so that the Chinese accounting can be directly done in the group ERP, or it can be easily done from the data exported from the group ERP.

For smaller operations, a more efficient solution is to do accounting in local accounting software, but reports can be separately prepared in a format suitable for group consolidation. Detailed GAAP mapping is also necessary if this process is to be done efficiently.

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Alex joined Sino Corporate Services Limited as CEO in 2016 and provides a full range of services to corporate clients, private clients and fund managers, and business advisory services to business owners from different jurisdictions.

Alex worked for Intertrust Group for 25 years from 1990 to 2015 and was the Managing Director of the Hong Kong and China offices.

Alex was frequently invited by Hong Kong Trade Development Council, InvestHK and CCPIT as a speaker on different topics such as cross border investment structuring, China business set up, China outbound Investments, the use of Hong Kong as the investment holding company and regional readquarters, and how to utilise a trust structure as a wealth planning tool in Hong Kong, China and various countries in Asia and Europe.

The Sino Group is a high-quality provider of fund, trust and corporate services located in Hong Kong and China. Our expertise and focus is the Greater China market but our strong relationships in the other major financial centres of Asia enable us to provide a seamless service to clients operating throughout the region.

We are an independent professional team of practitioners with over 30 years of experience in our industry. We are not owned by a Private Equity firm: the people who own the company actually run the business and do the client work. We are not motivated by our results, but rather by the best interests and results for our clients. In these turbulent times, we seek to provide clients with a safe pair of capable hands.

QUESTION ONE

Effective pricing and cost calculation are key to successful entry into a new market. What due diligence should businesses do before they enter your jurisdiction to ensure their business model is a good financial fit for the local market?

Hong Kong has been the world's freest economy in the Index of Economic Freedom for more than two consecutive decades. Hong Kong continues to rank top in "Freedom to Trade Internationally" and "Regulation". A free trade and investment regime will continue to provide a conducive environment for businesses to thrive and strengthen their competitiveness, thereby enabling our economy to prosper.

Most foreign investors prefer to form a private limited company for business purposes because the formation of a Hong Kong company is simple and fast. Besides, the maintenance costs are relatively low, with limited filings to the Hong Kong Inland Revenue Department and the Companies Registry annually.

There is no capital requirement for forming a new company. It can be incorporated with as low as one share at $1 in any currency. It is required to keep at least one shareholder and one individual director, who does not need to be a Hong Kong resident. Any additional director can be either an individual or a corporation. To enhance Privacy Rights of Directors and Other Officers in respect of their particulars, some enhancement shall gradually be effective from 2021. The director's HKID/passport number and their residential address are protected information. The HKID/passport numbers shall not be disclosed in full and the residential address shall be replaced by a correspondence address for public search purposes. A position of company secretary and a registered office address are also required. With sufficient information, the new Hong Kong company can be formed in one working day.

As we know, keeping a bank account is important to the business. It has become more difficult to open a new bank account following the launch of the Anti-Money Laundering and Counter-Financing of Terrorism Ordinance. To comply with this ordinance, some banks will charge a fee and have tightened their due diligence procedure for accepting new clients. Apart from verifying the background of beneficial owners and directors of the companies, the banks also review the legitimacy of their business and operation.

In normal circumstances, a newly incorporated company may take two to three months to open a new bank account in Hong Kong. In a few cases, the banks may reject the bank account application for those companies with an abnormal organisational structure or if its nature of business is classified as "high" risk.

QUESTION TWO

What are the most common accountancy pitfalls your clients have encountered upon entering a new market – such as tax duplications or failing reporting criteria – and how did you help them to overcome them?

Hong Kong's tax regime is highly competitive, simple and transparent, with the profits tax rate for the first HK$2 million profit at a mere 8.25%, and the relevant rate for the remaining part of the profits only at 16.5%. Hong Kong has no VAT and no sales tax. There is no tax on dividend income and capital gain. Trading profits, service income, interest income and royalty income arising from offshore transactions would be exempted for Hong Kong Profits Tax as long as the transactions are well supported with valid documentation. As always, we suggest our clients plan their tax strategy before commencing business. Thus, it would greatly help the companies to manage the tax risk effectively and pay tax as low as possible.

On the other hand, Hong Kong has been signing for Double Taxation Arrangements (DTAs) with 46 jurisdictions. With the DTAs, Hong Kong can enjoy concession tax rates on various incomes in other jurisdictions. However, as far as we know, almost all tax authorities of other jurisdictions require HK companies to present a Certificate of Resident Status, issued by the Inland Revenue Department (IRD), for the purpose of claiming tax benefits under DTAs. To issue the certificate, the tax officer of IRD has to believe that the place of management and control of the companies is in Hong Kong, which is the most challenging question to our clients, especially those for whom their Hong Kong companies are solely investment holding companies. Some clients may seek our professional advice and we can act for our clients to liaise with the tax officer in order to obtain the certificate.

QUESTION THREE

What do businesses need to do to effectively adapt their reporting practices to local accounting standards in your jurisdiction?

By law, a first set of accounts has to be prepared within 18 months after the date of incorporation and the accounts must be audited by a Hong Kong Certified Public Accountant.

The Hong Kong Institute of Certified Public Accountants issues three sets of financial reporting standards for preparing the accounts. They are the Hong Kong Financial Reporting Standards (HKFRS), the Hong Kong Financial Reporting Standard for Private Entities (HKFRS for PE) and the Hong Kong Financial Reporting Standard for Small and Medium-sized Entity (HKFRS for SME).

Both applications of HKFRS and HKFRS for PE can give the users a "true and fair view" of financial statements. Meanwhile, HKFRS for PE eliminate some accounting treatments permitted under HKFRS, remove topics and disclosure requirements that are not generally relevant to private entities, and simplify requirements for recognition and measurement. In addition, to be more simplified, the company can choose to adopt HKFRS for SME if they fall within the business size tests and other requirements. Simplified financial statements are exempted from the requirement to give a true and fair view, where the accounts are being prepared on a historical cost basis and its disclosure notes are also less informative.

One of the common principles of the aforementioned HKFRS is that the company prepares its financial statements, except for cash flow information, using the accrual basis of accounting. Under the accrual basis of accounting, the effects of transactions and other events are recognised in the financial period when they occur. Financial statements prepared on the accrual basis of accounting inform users not only of past transactions involving the payment and receipt of cash, but also of obligations to pay cash in the future and of resources that represent cash to be received in the future.

TOP TIPS

Mitigating accountancy risks when entering a new market

- To expedite process of bank accounts opening, Know Your Client (KYC) documents should be prepared well in advance. Most of banks require a face to face meeting with directors, we suggest to open bank account for a new Hong Kong company with the bank you already have connection in your home country.
- In order to proof all business activities are rendered outside Hong Kong and to support the claim of offshore profits, all trading documents have to be well retained, including all correspondence of negotiation and conclusion of transactions.
- Most jurisdictions require to present a Certificate of Resident Status for a Hong Kong company eligible to enjoy tax benefits under the DTA. Hong Kong companies needs to show their place of management and control being in Hong Kong with sufficient evidence in order to obtain the certificate. Evidence can include local director, employee and rental of office etc.
- There is no any restrictions on a financial year end date, Hong Kong companies can select any date which is in line with the group's policy or preference.

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Martín is an international accounting partner at Zirkzee Group accountants and tax lawyers, a top 75 firm in the Netherlands, with five equity partners and 60 professionals working from three branches in Noordwijk and Gouda.

Martín has about 20 years of working experience in the international accounting arena. Martín is also responsible for the robotisation of administrative processes (for both clients and internally), corporate ID and HRM within Zirkzee Group. Together with Peter he is responsible for the (international) accounting department and IT.

Martín obtained his Bachelor in Business Economics at Hogeschool Holland Amsterdam and completed several relevant masters thereafter.

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Peter has extensive experience in auditing and advisory practice across various sectors, profit and not for profit, including business services, trade, childcare, welfare and care, cultural sector, etc.

His challenge is to be really involved with his clients and to know what is going on in their industry and their organisation. Peter feels at home in SMEs where more than shareholder value counts.

Specialties:

- executing various consultancy assignments in the field of company valuation, planning & control, forecasting, valuation issues, organisation of administrations, reporting models and information provision
- various assessments of internal controls related to IT (general controls), financial administration.
- pension funds and pension issues

QUESTION ONE

What are the most common accountancy pitfalls your clients have encountered upon entering a new market – such as tax duplications or failing reporting criteria – and how did you help them to overcome them?

The time it takes to open a bank account should not be underestimated. This is becoming harder for entrepreneurs across the world, and the Netherlands is no exception. It is important to allow for enough time to be able to meet all requirements. Zirkzee can set out in advance precisely what clients need to take into account. First off, we would like to point you to this publication in IR Global.

For over thirty years, Zirkzee has worked for businesses that operate internationally, both inbound and outbound. We still often see businesses taking on local accountants who lack international experience, requiring significant damage control down the line. Another pitfall that leads to the need for damage control is businesses not using professional online accountancy software right from the outset. They may even fail to set up timely and adequate accountancy at all, doing their accounts only after the event.

Formal requirements around preparing and publishing financial statements are a blind spot for companies setting up business in the Netherlands. Late publication of financial statements is something we see regularly. Such errors increase the risk of directors' liability.

Another frequently seen pitfall is the failure to meet invoicing requirements. These requirements are largely the same across the EU, although with slight variations in each country. For our tax authority it is, of course, essential that businesses meet all requirements. In view of this, we recommend using a tax adviser's address (e.g. Zirkzee's) as a company's fiscal correspondence address in the Netherlands.

Every company and every entrepreneur is different. For that reason, the services we offer to our clients are customised based on their desires. Zirkzee Group's clients consist mainly of internationally operating companies, start-up companies and entrepreneurs who are excited about working within our network. We offer services for all of our clients in the following areas: accounting, payroll services, tax and expat services.

Being located in the SBIC-building in Noordwijk, the Netherlands, Zirkzee Group is part of a community involving lots of techno starters from the ESA-BIC incubation program. In this community, companies can experience to the fullest how assistance, learning and contagious enthusiasm from each other can be an inspiration and will lead to better results. For this reason, Zirkzee Group does not consider you or your company as customers.

Doing business with Zirkzee Group means we will become your business partner. Our entire approach is therefore focused on getting the best out of your company. Besides our passion for entrepreneurial work and sharing our knowledge, we also have a broad network we share with our business partners. Bringing people together and contributing to their success is what gives us a purpose.

> **"The question to ask is this: do the local and national tax rates and tax incentives allow for sufficient profit margins? "**

QUESTION TWO

Effective pricing and cost calculation are key to successful entry into a new market. What due diligence should businesses do before they enter your jurisdiction to ensure their business model is a good financial fit for the local market?

For a start, before a business can register in the Netherlands it is crucial to determine which legal form is the most appropriate for it. You also want to know the cost of starting up and maintaining activities. Building a production site or renting an office is also a considerable investment for any business. It is important to anticipate costs and contract negotiations.

It should also be kept in mind that a business, once established in a given location, is interwoven with the local tax system in a local as well as a national sense. The question to ask is: do the tax rates and tax incentives allow for sufficient profit margins?

The Netherlands does, in any case, offer a broad network of tax treaties and special arrangements for highly educated expats. Moreover, multinationals can get advance assurance about future tax positions. Our country also promotes active participation in R&D by way of a favourable corporation tax structure and specific R&D incentives to promote innovation.

Another major focus area is labour law. It is important to know up front what rights and obligations employees have, which social obligations and forms of social insurance exist in the Netherlands, what it means to have foreign employees on the payroll and what the rules are concerning work permits for them.

What we also encounter a lot is that people who are intended to go on the payroll have already emigrated to the Netherlands. Unfortunately, in this case it is not possible, for instance, to make use of certain favourable arrangements, such as 30% of gross salary being exempt from taxation. It is, of course, a waste to miss out on this.

All of these individual considerations will help, when expanding abroad, to create a clearer picture of a destination's financial viability.

TOP TIPS

Mitigating accountancy risks when entering a new market

- Engage the right adviser: one who has international experience and a quality national and local network.
- Inform yourself about local circumstances such as legislation, regulations, infrastructure, the geography, the labour market and the culture.
- Prepare your own team well and have your staff meet the local adviser: ensure short lines of communication and clear agreements.
- Free up sufficient time, people and budget for all of the above.
- Do not underestimate this step: study it and do not expect matters to take care of themselves.

QUESTION THREE

What do businesses need to do to effectively adapt their reporting practices to local accounting standards in your jurisdiction?

The main reporting practices in the Netherlands are, for a start, to draft, adopt and publish a financial statement. Filing a variety of declarations in time as well as paying money owed is essential to avoid fines and liabilities. This includes VAT (turnover tax), corporation tax and payroll tax. These are all matters that Zirkzee can take care of for your clients via automatic links, ensuring they never miss a deadline.

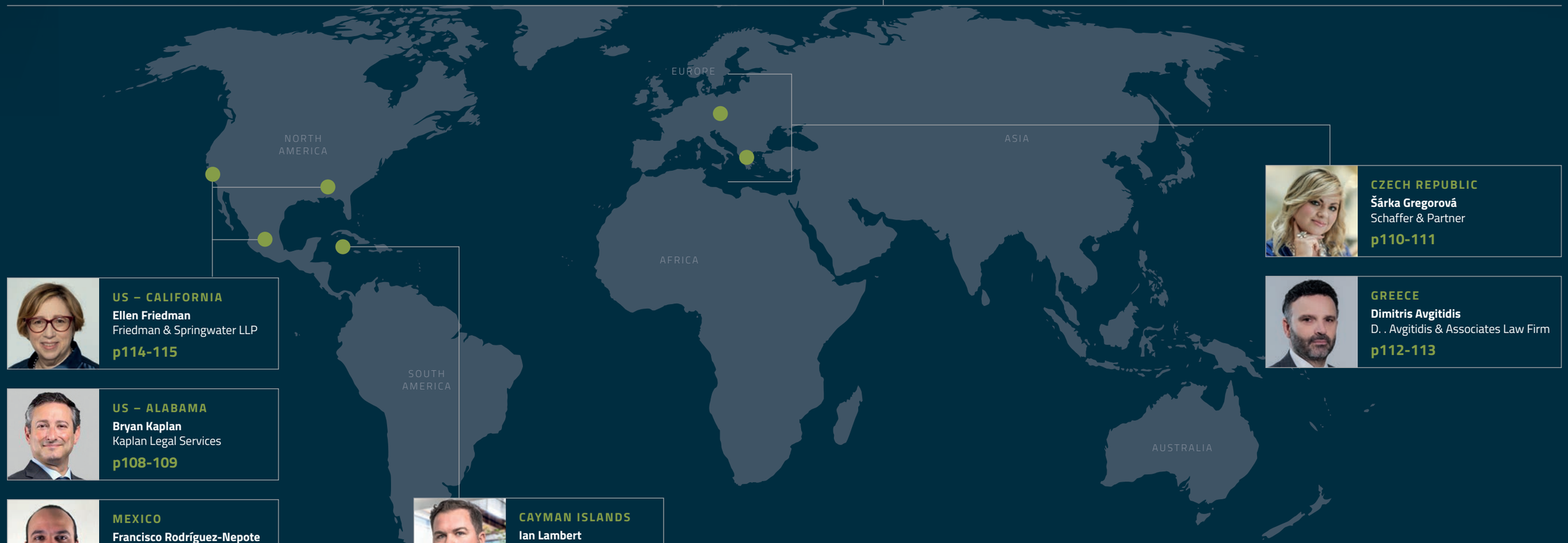
With this in mind, it is important that your clients hire the right local adviser (with international experience) and have a designated member of staff at the finance and control department liaise with the adviser. However much it remains the case that many matters require human skill, the key to an effective adaptation to local accounting standards is professional, future-proof accounting software. This software can be the company's own or the assigned adviser's. It should use cloud processes linked to the requesting institutions, such as the Chamber of Commerce, the Tax Administration and Statistics Netherlands.

At Zirkzee, all processes are interlinked to the maximum extent, allowing us to work highly efficiently. Our strength is that we can unburden our clients of all formalities when they establish themselves in the Netherlands. They will not need to worry about these ancillary matters and be able to focus entirely on their core business instead.

Insolvency

Our cross-border insolvency group offers a full global service offering including bankruptcy, insolvency, and litigation / dispute services. They have unrivalled experience and expertise at all stages whether it be restructuring & crisis management, mediation or through the liquidation process. First and foremost, each member of the IR Global Insolvency Group is a leading authority in their country, ensuring clients receive the highest quality specialist advice.

For more information visit:
www.irglobal.com/working-groups/insolvency



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Born in Guadalajara, Jalisco, Francisco received a Law Degree from the Universidad Panamericana Campus Guadalajara. He is the founding partner of Corona & Nepote, a law firm located in Mexico City and Guadalajara.

Rodríguez-Nepote has represented clients in matters of civil, commercial, and Amparo litigation, litigating before federal and local courts since 2005. His practice has specialised in contentious matters of bankruptcy, civil and commercial litigation, and commercial arbitration.

He is the author of "The reorganisation plan under the Bankruptcy Law; Bankruptcy Law in Mexico" and "CROSS-BORDER INSOLVENCY: Recognition of foreign proceeding under the Mexican Bankruptcy Law", available free for download at https://works.bepress.com/francisco-rodrigueznepote/

Corona & Nepote is a law firm specialising in civil-commercial litigation, arbitration and bankruptcy.

Among our clients are multinational companies, financial institutions, family offices, local companies and individuals.

We work together with other national and international law firms whose clients need a solution in cases of our expertise.

Corona & Nepote Abogados is appointed the exclusive IR Global member for Insolvency in Mexico. IR Global is a multi-disciplinary professional services network that provides legal, accountancy, and financial advice to companies and individuals around the world.

QUESTION ONE

What should every business know about insolvency laws in your jurisdiction before exploring market entry?

Mexico is a federal state. Insolvency of merchants, companies, and businesspersons is governed by federal law, while insolvency of non-merchants is governed by the local civil code of each of the states. Mexico is not a country acquainted with the use of insolvency proceedings, and non-merchant debtors rarely use an insolvency proceeding. Merchant debtors – legal entities for the most part – are not attracted by this way of resolving their insolvency problems. This is illustrated by the fact that each year, approximately 40 cases are filed, despite Mexico being a country of 125 million inhabitants and approximately five million businesses, 99.8% of which are micro, small and medium-sized, while the remainder are big businesses (about 10,000). Contrary to what everyone expected, during the Covid crisis, the number of insolvency cases dropped to 32 in 2020 and 23 in 2021 so far.

In terms of federal insolvency issues – that is, the insolvency of merchant debtors – the purpose of a bankruptcy proceeding is either to reorganise the debtor's liabilities through a reorganisation plan, or to liquidate the estate and pay the creditors with the proceeds. General default triggers bankruptcy adjudication. A bankruptcy case may commence voluntarily when the debtor files the petition, or involuntarily when a creditor does.

After the claims are definitively allowed, the case may be closed: 1) by the approval of the reorganisation plan; 2) by a unanimous agreement during the liquidation stage; 3) by payment of the creditors; or 4) lack of sufficient assets.

Reorganisation through a bankruptcy proceeding leaves several stakeholders at risk. In effect, the approved reorganisation plan binds only the debtor and its creditors, not everyone (labour creditors, for instance, fall outside of the plan). Furthermore, the approved plan benefits only the debtor, not the obligors or guarantors. That, and the fact that bankruptcy proceedings are lengthy and costly, are some of the reasons why bankruptcies are not the first choice for restructuring in Mexico.

QUESTION TWO

Covid has prompted both short-term and long-term changes to local and cross-border insolvency practices – what are the key changes in your jurisdiction and how are they likely to influence businesses considering market entry?

Unfortunately, Mexico did not change its insolvency laws as a result of the Covid pandemic. More than one million businesses have closed due to the pandemic, yet the Mexican government did not show any effort to change insolvency laws.

QUESTION THREE

What are the biggest risks to entrepreneurs and business owners in your jurisdictions' insolvency regulations, and how can they protect themselves against them at point of market entry?

Entrepreneurs and business owners require certainty in the scope of their liability when entering new obligations, as well as effective mechanisms for the collection of debts.

In Mexico, shareholders cannot be held liable for the company's debts and vice-versa. There are no cases recognised on a legal statute that permit the piercing of the corporate veil. Hence, from the debtor's standpoint, there is a certainty that if the business fails, the shareholders cannot be held accountable for the company's debts. However, shareholders are in last place when paying creditors in a corporate liquidation case.

A creditor can collect a debt only through a jurisdictional process. Outside bankruptcy, the "first in time, first in right" rule applies. Nearly all of the debtor's estate is non-exempted, and very few exemptions are governed by state law.

The most common way to secure debt is through a mortgage, pledge, and deed in trust. Secured creditors' rights are unimpaired by the debtor's bankruptcy unless they were conceived fraudulently. Once a bankruptcy case is open, the rules to determine fraudulent conveyances in bankruptcy are broader than outside.

Pledge and mortgage creditors have priority over any other creditor, except for labour claims consisting of severance and past wages for the last year. The creditor has a super-priority even vis-à-vis labour claims through a deed in trust, since the entrusted estate is no longer the debtor's property.

TOP TIPS

Protecting yourself against personal liability in your new market

- Directors and officers must avoid adopting resolutions in case of conflict of interests.
- They must avoid favouring a certain group of shareholders to the detriment of others.
- They must comply with the shareholders' resolutions and the company's bylaws.

"In Mexico, shareholders cannot be held liable for the company's debts and vice-versa. There are no cases recognised on a legal statute that permit the piercing of the coprate veil"

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Ian Lambert is a partner at Broadhurst LLC in the Cayman Islands with more than 18 years of experience in complex contentious matters. Ian has a wide range of expertise and experience in the financial services and offshore environment, with a significant concentration in the areas of multi-jurisdictional commercial litigation, insolvency, restructuring, asset recovery, contract disputes, fraud litigation and trust litigation.

Ian advises and appears in all levels of the Courts in the Cayman Islands on behalf of provisional and official liquidators, receivers, creditors, shareholders, directors and other professionals in relation to a wide variety of disputes. Ian is rated as a "Global Leader" in restructuring and insolvency by Who's Who Legal.

Ian obtained his LL.B from the University of Windsor Law School (Ontario, Canada) and in 2003 was called to the Bar of Ontario as a solicitor and barrister. From 2003 to 2009 he practised in the dispute resolution teams of two prestigious law firms in London, Ontario and Toronto, Ontario. In 2009 Ian moved to the Cayman Islands and was called to the Cayman Islands Bar.

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Kyle is the Managing Partner of Broadhurst LLC. He possesses considerable experience in resolving complex commercial disputes in the Cayman Islands having practiced law in Cayman for more than 20 years. His areas of expertise include insolvency, bankruptcy, fraud, commercial disputes, shareholder rights and judgment enforcement.

Kyle is regularly instructed in high value matters with multi-jurisdictional elements. A highly experienced litigator, Kyle has appeared in nearly 50 reported decisions.

Kyle received his Bachelor of Arts from Queen's University in Canada and his Bachelor of Laws from the University of Liverpool in the United Kingdom. He has been called to the Bar of England and Wales (non-practicing) and the Cayman Islands. He is an accredited mediator and Notary Public. He is a qualified trust practitioner having obtained his STEP Diploma in International Trust Management and TEP qualification.

Broadhurst LLC is a Cayman Islands offshore specialist litigation and corporate boutique law firm advising both local and international clients. Our areas of expertise include: litigation & dispute resolution; corporate & commercial; insolvency & restructuring; trusts; compliance & regulatory; private client; personal injury; family & children; insurance; and conveyancing.

As a client focused law firm, we work closely with our clients to identify and resolve their legal issues with practical and creative solutions. We are frequently engaged in local and international disputes and transactions by multinational institutions, high-net-worth individuals, creditors, debtors, directors, officers, shareholders, liquidators, receivers and other professionals. We frequently handle Cayman litigation and transactions on behalf of non-Cayman law firms and in-house counsel.

As a client first law firm, we apply our extensive knowledge and experience to vigorously represent the interests of our clients while at the same time providing them with the highest standard of professionalism through our exceptional responsiveness, service, and approachability. As we are one of the largest Cayman only law firms, we maintain independence as lawyers and very rarely encounter conflicts of interest.

QUESTION ONE

What should every business know about insolvency laws in your jurisdiction before exploring market entry?

The Cayman Islands are a trusted, professional and tax neutral jurisdiction that supports efficient free flow of trade, investing, capital, financing, and services globally. Cayman is continuously evolving in the face of increased global regulatory changes to maintain the highest international standards. To address the needs of Cayman as a top-ranked international financial centre, it has developed a modern and comprehensive insolvency and restructuring regime.

The insolvency regime allows insolvent Cayman companies to be wound up in an orderly, transparent and cost-effective manner to the benefit of its creditors. Unsecured creditors in insolvency proceedings are treated equally sharing in the available assets of the company in proportion to the debts due to each creditor regardless of their domicile or nationality subject to limited exceptions. Valid security interests are recognised and generally secured creditors remain entitled to enforce their security outside of the liquidation.

Insolvent companies will be wound up by Official Liquidators who are appointed by the Court and act under its supervision. The Official Liquidators, are provided specific powers to enable them to locate and collect the assets of the company and to investigate its affairs. The Official Liquidators have a duty to act in the best interest of the creditors and can take several actions for the benefit of creditors including the ability to challenge pre-insolvency transactions if they are found to be a voidable preference, a disposition at an under value, or fraudulent dispositions or trading.

Anyone claiming to be a creditor of a company and wishing to recover the debt must submit their claim to the liquidator. A foreign creditor has the same rights as a domestic creditor. Generally, foreign debts will be recognised provided they do not relate to foreign taxes, fines or penalties, or any other debts whose enforcement might offend Cayman Islands public policy.

QUESTION TWO

Covid has prompted both short-term and long-term changes to both local and cross-border insolvency practices – what are the key changes in your jurisdiction and how are they likely to influence businesses considering market entry?

Insolvency practices and legislation have not significantly changed in Cayman in response to Covid-19, however, the Cayman Islands remains a popular restructuring jurisdiction with the Cayman Courts having demonstrated an ability to efficiently manage large debt restructurings. Commonly this is done through a scheme of arrangement supported by a 'soft touch' provisional liquidation. This provides for the company to remain under the day-to-day control of its directors but for it to be protected against actions by individual creditors. The purpose being to allow the company to restructure its debts, or otherwise achieve a better outcome for creditors than what would be achieved by a liquidation. Typically, such restructurings involve cross-border issues, and recognition through Chapter 15 proceedings in the United States is common.

TOP TIPS

Protecting yourself against personal liability in your new market

- Utilise a corporate structure. Cayman has modern laws which allow for most well-known structures including limited companies, limited partnerships, trusts and foundations.
- Any director, manager or individual involved in the operation of the business should stay informed and ensure that they remain cognizant of important matters such as the entities solvency and compliance with its regulatory obligations.
- Maintain good corporate records. All transactions should be appropriately documented, and proper financial records maintained. Do not mingle your personal assets with those of the business.
- Take advantage of the ability to obtain indemnifications. Obtain director and officers insurance.
- In the event it appears the entity may become insolvent or may be in breach of any regulatory requirement seek professional advice promptly.

QUESTION THREE

What are the biggest risks to entrepreneurs and business owners in your jurisdictions' insolvency regulations, and how can they protect themselves against them at point of market entry?

Business owners need to be aware that in the event of an insolvency, while shareholders are protected from liability for the company's debts, the insolvency process provides that creditors are paid in priority to shareholders. In the event of a shortfall, any equity held by the shareholders will likely be extinguished.

In a business owner's capacity as a director, it is important to understand that Cayman law impose duties on directors of Cayman companies, and business owners should become well versed in them. A director of a Cayman company owes both fiduciary and non-fiduciary duties to the company. Fiduciary duties include: acting in good faith in the best interest of the company, not making a secret profit, exercising independent judgment and avoiding conflicts of interest. Directors also have a duty of skill and care. In determining the scope of that duty,

the Court will consider the director's knowledge and experience. While a director's duties are generally owed to the company, when a company becomes insolvent those duties extend to the interests of the creditors: a director has specific obligations to assist the liquidators in providing information. In addition to potentially facing liability for breach of any of the above duties, directors may find themselves labile to third party creditors in certain specific instances. Liability can also arise for failure to adhere to regulatory requirements.

It is important for anyone entering the Cayman market to get professional advice so that they are aware of their obligations.

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Bryan Kaplan is a commercial litigation and creditor's rights attorney based in Atlanta, GA with more than fifteen years' experience in the federal and state courts of Alabama and Georgia. Kaplan advises and represents a range of clients, from multi-national businesses to single member limited liability companies faced with contract, lending, real estate, and insolvency matters throughout Alabama and Georgia. Kaplan's creditor's rights law practice is national in scope, and he frequently calls upon his network of colleagues throughout the U.S. to assist with insolvency matters facing his clients that include manufacturers, distributors, wholesalers, and professional service firms.

In addition to the representation of creditors in insolvency matters, Kaplan represents clients holding secured and unsecured commercial claims against businesses and individuals. Due to his extensive experience handling consumer credit claims, Kaplan frequently serves as local counsel for single claims and class actions in connection with violations of the Fair Debt Collection Practice Act, Fair Credit Reporting Act, and Telephone Consumer Protection Act.

QUESTION ONE

What should every business know about insolvency laws in your jurisdiction before exploring market entry?

As Hemmingway once wrote, insolvency happens "gradually, then suddenly." The slide into insolvency generally does not happen overnight; rather it is a culmination of events. Upon learning of an insolvency, 11 U.S.C. § 362 acts to stay all causes of action including lawsuits, foreclosures on real and personal property, levy, and garnishments.

U.S. insolvency laws are complex, even for attorneys. Run your business normally, but if an insolvency issue arises, be prepared to hire quality legal counsel to assist the business. It is often best to dedicate an employee in your business who can quickly identify potential insolvency and undertake mitigating action (for example, monetary default under loan agreements, past due receivables, or requests to restructure deals). Again, take a deep breath and focus on running your business, because the vast majority of your customers and vendors will pay their bills.

People and businesses may file bankruptcy in the U.S. In addition, insolvency proceedings are available in the U.S. in which debtors, claimants, assets or other parties of interest are located in more than one country. In general, a primary proceeding is filed abroad in the insolvent party's home country before proceedings in the U.S. occur.

Kaplan Legal Services, LLC primarily represents businesses in disputes arising from commercial loans (secured and unsecured), leases, real estate, and other credit relationships. Our practice spans many industries with disputes in connection with secured and unsecured debt collections, real estate leasing and title, and business torts. Our clients are distributors, suppliers, landlords, financial institutions, contractors, staffing firms, professionals (architects, engineers, lawyers and accountants), insurance carriers, transportation brokers and carriers, and individuals. Kaplan Legal Services, LLC assists clients facing Chapter 7, 11, 12, and 13 bankruptcy issues with proof of claim, defense of preference actions, voidable transfers, lien priority, and discharge objections. Finally, Kaplan Legal Services, LLC vigorously enforces clients' post-judgment rights in state/federal courts through liens, garnishment, levy, depositions, subpoenas, and charging orders.

Kaplan Legal Services, LLC also prides itself on timely, thoughtful service. Clients can expect comprehensive updates regarding their case's status throughout the representation. We will also return communication as soon as possible. We will prepare you prior to any hearing, deposition or trial.

QUESTION TWO

COVID has prompted both short-term and long-term changes to local and cross-border insolvency practices – what are the key changes in your jurisdiction and how are they likely to influence businesses considering market entry?

The pandemic's immediate impact was felt by businesses that were already struggling and in poor financial positions. While this led to increased bankruptcy filings, the widely expected tidal wave of filings did not occur. People are resilient, even to struggles caused by pandemics, and they, like the U.S. and state governments, adapted. Although the pandemic has certainly brought a host of challenges, it has also given businesses opportunities to reassess their needs and find new efficiencies, such as more remote hearings and conference calls, or reduced office space.

One reason that the full financial impact of the pandemic has not yet been felt by the U.S. is because the numerous programs and executive orders provided lots of liquidity in the market and breathing room for consumers. However, those programs are soon coming to an end. As the programs and executive orders end, there will be issues with housing (both temporary and permanent). Businesses focused upon multi-family housing, hospitality, and residential housing will be faced with positive and negative impacts as people are displaced. Businesses in these sectors must be acutely aware of insolvency issues, and how to best tackle them, to avoid costly mistakes.

Additionally, there is a shortage of workers throughout the U.S. This is an ongoing problem whereby many employees have left entire sectors of the job market. As a result, retail, hospitality, indoor recreation, transportation and logistics, construction, and manufacturing will continue to face hurdles. This does not mean insolvencies will rise; rather, entrepreneurs and business owners in the aforementioned sectors must be prepared for interruptions and ensure their contracts allow for them. Overall, the pandemic has not caused key changes to U.S. insolvency laws.

QUESTION THREE

What are the biggest risks to entrepreneurs and business owners in your jurisdictions' insolvency regulations, and how can they protect themselves against them at point of market entry?

The first thing to consider is whether a loan is actually necessary or even advisable. Loans and extensions of credit remain relatively easy to access for entrepreneurs and business owners in the U.S. The sugar-high of a loan always comes with a price, so counsel your clients to read the fine print of those deals, get the lenders to compete, and give consideration to the needs of the business versus the return on investment from the loan. Accordingly, entrepreneurs and business owners should do their best to establish lines of credit with traditional sources, avoid personal guarantees of payment on high interest rate loans, and acknowledge the risks inherent in the marketplace. Your accountant or business advisor is probably the best person to assist with the pros and cons of a loan or extension of credit. U.S. insolvency laws are geared towards the honest entrepreneur or business owner that fails.

Entrepreneurs and business owners should consider engaging an accountant to assist with bookkeeping and taxes. U.S. and state tax laws and regulations can be extensive, and the delegation of this aspect of the business to an accountant or lawyer can remove a lot of the stress on the business. Indeed, a well-organised set of books and records is commonly requested by insurance carriers, lenders, vendors (that extend credit), and landlords. Your ability to have these records available will allow those counter-parties to make faster decisions related to credit risks, but it will also save you an immeasurable amount of time.

TOP TIPS

Protecting yourself against personal liability in your new market

- Structure or organise the business as a corporation or LLC. The company's liability shield may turn out to be your most valuable asset.
- Read all contracts with vendors/suppliers carefully and avoid signing personal guarantees unless there are no other alternatives.
- Obtain general liability and workers' compensation insurance coverage.
- Keep your business and personal assets separate; no commingling. Mixing personal and company money could allow creditors to come after your personal assets.
- Document in writing all business transactions.
- Taking on business partners requires a written operating agreement.
- Taking on investors requires a subscription agreement or similar agreement.

"Although the pandemic has certainly brought a host of challenges, it has also given businesses opportunities to reassess their needs and find new efficiencies"

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Šárka Gregorová is a partner of the legal department of Schaffer & Partner. She joined Schaffer & Partner in 2008 after she graduated from the Law Faculty at Charles University, Prague, and obtained an LL.M. at LMU, Munich, Germany.

Šárka Gregorová primarily specialises in general commercial law and corporate law, contract law, M&A, litigation and insolvency law (a committee member for insolvency).

The Prague office of Schaffer & Partner international advisory group has been active on the Czech market since 1997 and is as one of the few international offices in the Czech Republic offering a variety of services comprising tax, legal and auditing services. We are a boutique firm with extensive international experience and coverage.

We represent our clients individually with everyday concerns as well as long-term strategic planning. Close co-operation between experts from various fields and careful assessment of problems has helped us to build trust and long-term successful relationships with our clients. Our advisors are highly motivated to follow clients' needs and each can offer a wide range of expertise.

Aside from being a long-term member of IR Global, we belong to some German speaking networks, such as CBBL and WIRAS Verbund International, thus we are closely connected to law and tax advisory offices throughout the world. We use this experience to offer our clients expert assistance with a global outlook.

Our Prague office renders services in Czech, Slovak, German and English.

QUESTION ONE

What should every business know about insolvency laws in your jurisdiction before exploring market entry?

The Czech Insolvency Act is a very complex regulation, which reflects on several areas, from pre-insolvency restructuring to moratorium.

The initiation of insolvency proceedings always starts with the filing of an insolvency petition (either by the debtor or by a creditor). Commencement of the insolvency proceedings is published within a very short time – usually hours – after filing the petition to the court; the insolvency register is publicly accessible and contains the whole file of the commencing proceedings. This speed and accessibility is also reflected in various deadlines, which are usually rather short and often connected to publishing some decision in the insolvency register.

After the petition has been filed, the court will check if the conditions for initiating insolvency are fulfilled. These can be either:

- Inability to pay due debts. The debtor has multiple creditors and payment obligations are overdue for more than 30 days, which the debtor is unable to settle).
- Over-indebtedness. The debtor's assets – considering its market value – can no longer cover all its existing (not only overdue) liabilities.

If the conditions are fulfilled, entrepreneurs are obliged to file an insolvency petition. Failure to do so can lead to personal liability of the management; they can face civil, but also criminal, legal action. Each representative can be held personally liable for damages resulting from the late filing of an application for insolvency.

The types of insolvency proceedings for entrepreneurs or companies are:

- Bankruptcy/involuntarily liquidation, which leads to the liquidation of the insolvent debtor. Essentially, the insolvency administrator assumes powers from management and sells the assets of the debtor. Secured creditors have a right to instruct the administrator when it comes to sale of assets.
- Reorganisation or restructuring, which enables the debtor's management to remain in charge of assets, under the supervision of the insolvency trustee. Both creditors and debtors can prepare the restructuring plan and there are no restrictions on the methods of reorganisation, from a sale of the debtor to a new investor, to a payment schedule while waiving part of the debt, or the restructuring of the company as a whole.

QUESTION TWO

Covid has prompted both short-term and long-term changes to both local and cross-border insolvency practices – what are the key changes in your jurisdiction and how are they likely to influence businesses considering market entry?

Lex Covid Justice and Lex Covid II Justice were new regulations introduced in the Czech Republic in response to the pandemic. Effectively, the Czech Covid legislation prevented a spike in insolvencies. A legally authorised period of delay was put in place, which allowed debtors who encountered problems in connection with Covid-19 to file a petition for judicial protection against creditors. This "extraordinary moratorium", once granted, meant that the basic obligation of the debtor's management to file an insolvency petition was suspended and some deadlines were extended. For example, reorganisation plans could be implemented without the threat of bankruptcy, and banks were offering some time extensions for lines of credit.

At the moment, protection under this special legislation is no longer applicable, therefore we may see some insolvencies in the near future. Nevertheless, this could be a good opportunity for both debtors, who would get a chance to restructure their old liabilities and prevent themselves from "drowning", as well as investors, who can enter a market with great opportunities at more favourable conditions.

> **"Czech legislation follows the business judgement rule, giving management leeway to handle things carefully and safely"**

QUESTION THREE

What are the biggest risks to entrepreneurs and business owners in your jurisdictions' insolvency regulations, and how can they protect themselves against them at point of market entry?

Every business is associated with risk, but it is not true that its statutory body is responsible for every possible failure, as long as it does not violate due managerial care. Czech legislation follows the business judgement rule, giving management leeway to handle things carefully, with professional assistance, and safely, in terms of their potential liability.

TOP TIPS

Protecting yourself against personal liability in your new market

Consult a Legal Advisor. This is one of the best steps to limit personal liability as a business owner. A specialised insolvency attorney can help to avoid personal liability and also protect your interest as a creditor if your debtor becomes insolvent.

Structure the Business as an Limited Liability Company (LLC). The requirements for LLCs are less strict, but still safeguards business owners against certain types of personal liability. LLC management can still be held liable, but only if it breaches its management duty.

Document all business actions and maintain complete financial records. Maintain excellent records of business dealings and document any business transactions. In case of a dispute – insolvency included – evidence is essential, and it can help you to mitigate the loss.

Monitor the insolvency register. Keep track of your debtors actions in the public register: the deadline for claim registration is very short, and late registration cannot be accepted. Timely registration can also be beneficial from a tax point of view, by writing off the receivable or claiming the VAT where possible.

On the other hand, management should act on risky situations accordingly. Timely, professional advice can be priceless when it comes to insolvency. Insolvency is not an easy area and expertise in accountancy and legal matters is essential. In our experience, if the tax advisor and lawyer work closely together, they can potentially seize the moment and salvage the situation to benefit the business.

In terms of personal liability, the insolvency court will assess whether the statutory body knew (or at least, could have known) that the company was in danger of going bankrupt and whether, in accordance with its duty of care, it had made all necessary and reasonably foreseeable steps to avert it.

To avoid such insolvency consequences and take steps to protect your business, we highly recommend:

- Getting local legal and financial advice on how to manage your debts, including tips and ideas on how to cut unnecessary costs and reduce expenses.
- Negotiating with creditors, to get more time to pay debts or discuss potentially lowering penalties.
- Considering a debt management plan or proposing such a plan to creditors.
- Always engaging a lawyer to coordinate with your tax/financial advisor, to keep you in the loop regarding potential risks.
- Being prepared. Monitor your debtors, so that in case of their insolvency you can register the receivable within the two-month deadline, and if your receivable is substantial, engage in the insolvency proceedings (creditors' committee) to secure your interest.

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Dimitris Avgitidis s Professor of Commercial Law at Democritus University of Thrace Law School and a Professor at the National School of Judges, where he teaches Modern Business Transactions and Insolvency Law. Dimitris Avgitidis studied at the Law Faculty of the University of Athens and holds a Master's Degree (Master of Laws) in International Business Law from London School of Economics, a Master's Degree in Economics from the Guildhall University of London (Master of Economics) and a Stockbroker Representative Diploma in London Stock Exchange (Certificate of Registered Representative). He received the title of Doctor of Philosophy (Ph.D.) in Law at King's College, University of London.

Dimitris Avgitidis acted as representative of the Greek State (Ministry of Justice) in UNCITRAL (Working Group V, Insolvency). He has also had several leading roles in Working Groups for European Council directives and regulations.

He has been a member of the Hellenic Competition Commission and a member of the Board of Directors of the Hellenic Capital Market Commission. He is the author of several books, numerous studies and articles with an emphasis on insolvency law and capital market law.

QUESTION ONE

What should every business know about insolvency laws in your jurisdiction before exploring market entry?

The Insolvency Code in Greece was drastically revised in 2020 with the introduction of Law 4738/2020, "Debt settlement and second chance arrangement" (the IC) and amended again by Law 4818/2021.The revised legal framework, apart from being extended to non-merchants, signified a shift in the purpose of bankruptcy from collective satisfaction through reorganisation procedures (if the interests of the creditors are not prejudiced), to collective satisfaction through rapid liquidation (without any possibility for a bankruptcy to end up with reorganisation). The new law retains in force, with a varying degree of amendments, both out of court mechanism as well as the commonly used restructuring procedure.

Possible measures under the insolvency framework for viable businesses are:

- Early warning mechanism
- Out of court debt settlement, to be implemented under specific conditions;
- Restructuring procedure, which includes the drafting, signing, ratification (by the Court) and implementation of a restructuring agreement, aiming at the avoidance of insolvency and maintenance of viability.

For non-viable businesses, the available measure is bankruptcy procedure, applicable to both legal and natural persons, leading to liquidation of the debtor's assets. It includes automatic contract termination and, in certain cases, simplified verification procedures. The framework also provides for the possibility of liquidation of the business as a whole or in parts and a simplified regime for small-sized business bankruptcies and special treatment of vulnerable debtors, instead of the already abolished protection of main residence for non-merchants.

It should be noted that a discharge procedure is available for release from the debtor's personal liability. It is possible for natural persons to be relieved of debts within three years from the declaration of bankruptcy, unless they are being investigated for fraudulent acts or they refuse to cooperate with the insolvency practitioners. In the case of natural persons whose insolvency estate consists of items of significant value, such as their main residence, this discharge occurs faster, namely one year after the declaration of bankruptcy.

The new framework does not provide for reorganisation and special administration procedures.

QUESTION TWO

Covid has prompted both short-term and long-term changes to local and cross-border insolvency practices – what are the key changes in your jurisdiction and how are they likely to influence businesses considering market entry?

During the Covid-19 pandemic, nations across Europe made an effort to adjust their insolvency procedures in response to the unforeseen circumstances that occurred, by freezing all or some bankruptcy procedures, extending the time period after which a debtor is presumed to be in cessation of payments and other measures to enable debtors to adapt and revamp following the pandemic crisis (e.g. facilitating rescue procedures and introducing milder provisions for directors' liabilities).

In Greece, no such measures were introduced, presumably under the consideration that a similar protective result might be ensured under general social measures, providing for suspension of immediate payments or standstill periods.

QUESTION THREE

What are the biggest risks to entrepreneurs and business owners in your jurisdictions' insolvency regulations, and how can they protect themselves against them at point of market entry?

Pursuant to IC the Restructuring Agreement is entered into between the debtor and its creditors. However, the IC provides also for the possibility that the Restructuring Agreement is entered into only between the creditors, without the consent of the debtor, if the latter is in cessation of payments. Similarly, application for the declaration of bankruptcy may be submitted by creditors with legitimate interest.

Even when the debtor is in cessation of payments, the debtor may not identify the situation of cessation of payment on time, in order to seek a solution under the available rescue procedures. It is rebuttably presumed that the debtor is in cessation of payments if the debtor fails to repay its due and payable obligations towards the State, the social security authorities or the financial institutions amounting to at least 40% of its total due and payable obligations, for a time period of at least six months, given that its total non-performing obligation exceeds the amount of EUR 30,000.

Civil Liability of company's management in case of cessation of payments applies in two cases (additionally to other sources of liability provided in Greek Civil or Company Law): if application for the declaration of bankruptcy is not submitted within the prescribed period, or cessation of payment has been caused intentionally or with gross negligence by the members of the management body.

In the above cases, the managerial body is jointly and severally liable against company creditors for any loss resulting from the above actions.

The IC provides criminal liability in three instances:

- For bankruptcy by elimination or concealment of assets; cancellation of the obligations towards third parties; entry into harmful, speculative or risky contracts contrary to the rules of prudent management; procurement of goods or securities on credit, which are disposed or conceded at prices significantly below their value; falsely presenting to be a debtor of third parties, or acknowledgement of non-existing rights of third parties; failure to keep, maintain or submit mandatory commercial books, tax returns or other data for the correct duration, in order to obstruct the verification of property status; failure to prepare the balance sheet in accordance with the law; or reduction of the property status in any other way.
- For causing the cessation of payments.
- For failure to provide assistance and supply the required information by the debtor or – in the case of a legal entity – by its representatives, in accordance with the procedure of the IC.
- For the beneficial treatment of creditors.

In the case of legal persons, criminal liability applies to their managers, members of the board of directors and officers who committed the above acts.

The debtor is under the obligation to cooperate and participate in insolvency procedures. Should the debtor not cooperate, penalties and criminal sanctions may be imposed.

Beyond Insolvency Law, article 50 Law 4174/2013 Code of Tax Procedure and article 31(1) Law 4321/2015 as replaced by article 64 Law 4646/2019, provides for the joint and several liability of a company's officers, directors and administrators for the company's obligations towards the State and the Social Security Authorities. Despite the fact that the above persons are not subject to bankruptcy under such capacity, they may be declared bankrupt as natural persons.

TOP TIPS

Protecting yourself against personal liability in your new market

- Enter into timely negotiation with banking institutions on their debts before they fall due.
- Seek to apply for restructuring as soon as possible, when risk of insolvency is identified.
- Cooperate throughout the insolvency procedure in order to establish good faith and benefit from the provisions on discharge of the debtor.
- Compliance with applicable laws and regulations

D.K. Avgitidis & Associates Law Firm is a boutique law firm specialised in insolvency and restructuring law, corporate law, capital markets law, competition law, M&As and regulated markets.

The law firm was established in 2010, emerging from the law office of Dimitris K. Avgitidis, Professor of Commercial Law in the Faculty of Law of Democritus University of Thrace.

We provide a complete and thorough range of high-quality legal services, including advisory work, day-to-day consulting, legal opinions, litigation, arbitration and business negotiations.

Our team consists of skilled professionals with academic and post graduate specialisation and extensive work experience.

We strive to respond directly and quickly to our customers' needs, build strong relationships based on trust and provide pragmatic, business-oriented and effective solutions to complex legal issues.

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Ellen Friedman is a founding partner of Friedman & Springwater LLP and practices in the areas of insolvency and commercial transactions. Ellen has extensive experience representing secured and unsecured creditors in workouts and bankruptcy cases. Ellen has represented many companies in out-of-court restructurings and liquidations. Ellen also has decades of experience in commercial finance transactions, including asset-based lending, security interests and personal property, and the sale of receivables and other financial assets.

Ellen Friedman was voted Best Lawyer's 2021 "Lawyer of the Year" for Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganisation Law in San Francisco.

Ellen has written extensively on bankruptcy and secured transactions (Article 9 of the Uniform Commercial Code). She is the author of Secured Transactions in California Commercial Practice (CEB 2001) and its yearly updates since 2001. She is a featured speaker and lecturer on bankruptcy, distressed businesses, secured transactions, and creditor/debtor rights.

Ellen is admitted to the Bar in California and New York.

QUESTION ONE

What should every business know about insolvency laws in your jurisdiction before exploring market entry?

Businesses should understand laws that affect creditors of insolvent entities. One of the most important is the automatic stay under the United States Bankruptcy Code. Generally, once a bankruptcy petition is filed, no action can be taken against the property of the bankrupt debtor's estate or the debtor with respect to the collection of a debt.

The automatic stay serves to stop existing lawsuits, foreclosure sales and other actions a creditor may take to collect debts or seize property. Actions to collect overdue trade debt, such as sending a letter demanding payment, are violations of the automatic stay. There are exceptions to the automatic stay, and it is possible to seek relief from the automatic stay in bankruptcy court. However, for the unwary creditor, a violation of the automatic stay can mean damages and penalties.

Contract rights can also be affected in a bankruptcy case. If a contract provides that it may be terminated upon the insolvency or bankruptcy of the debtor, Section 365 of the United States Bankruptcy Code prohibits the non-debtor party from terminating the contract based upon the debtor's bankruptcy. In addition, under Section 365 a debtor-in-possession or trustee has the right to assume and assign contracts to a third-party, even if there is an anti-assignment clause in the contract. Breaches will need to be cured by the debtor or the new party to the contract for the contract to be assigned, but if the assignee can demonstrate adequate assurance of future performance, it is likely that the contract can be assigned. As with the automatic stay, there are exceptions to the basic rules, including with respect to the assignment of certain intellectual property licenses.

QUESTION TWO

Covid has prompted both short-term and long-term changes to local and cross-border insolvency practices – what are the key changes in your jurisdiction and how are they likely to influence businesses considering market entry?

The Paycheck Protection Program under the CARES Act provided relief to large and small businesses adversely affected by COVID that might have closed, filed a bankruptcy petition, or made an assignment for the benefit of creditors. Once the support of the PPP Loans and other benefits of the CARES Act are no longer available, we may see more COVID-related liquidations, bankruptcies, and assignments for the benefit of creditors. Subchapter V of Chapter 11 of the Bankruptcy Code became effective in February 2020, prior to COVID becoming a widespread concern in the United States. Subchapter V was designed to make the Chapter 11 process more affordable and streamlined for small businesses.

No creditors committee is appointed in a Subchapter V case, and the debtor is required to file a plan of reorganisation within 90-days of the commencement of the case (unless the court extends the deadline). These special provisions can greatly reduce the duration and cost of a bankruptcy proceeding. To assist more small businesses during COVID, the debt limit to qualify for Subchapter V was temporarily increased from $2,750,000 to $7,500,000.

QUESTION THREE

What are the biggest risks to entrepreneurs and business owners in your jurisdiction's insolvency regulations, and how can they protect themselves against them at point of market entry?

Entrepreneurs and business owners need to understand that in a bankruptcy, assignment for the benefit of creditors and liquidation, all creditors are paid before equity holders are paid any distributions or dividends. Often, shareholders find that their equity interests are wiped out.

In addition, if an owner makes an inter-company loan, that loan can be subordinated to other creditors or treated as equity, if the transaction is not properly documented, or if the debtor affiliate was not adequately capitalised. Owners should also make sure that the inter-company loans are recorded as a loan on the books and records both the owner and the entity receiving the loan. If entrepreneurs are making a loan, they should understand that secured lenders are better protected in insolvency situations than unsecured creditors.

By obtaining a security interest in the assets of the debtor at the time a loan is made, an entrepreneur may be able to get paid in full, rather than on a pro rata basis with other creditors and avoid preference liability. Also, entrepreneurs and owners should be careful to observe corporate formalities, including not commingling funds and assets and keeping separate books and records, to make sure that the owner and the borrowing entity are clearly separate. Otherwise, owners may increase their risk that creditors or a bankruptcy trustee will try to pierce the corporate veil and claim that the owner is liable for the insolvent entity's debts.

TOP TIPS

Protecting yourself against personal liability in your new market

- Officers and directors should make sure that their company pays all payroll taxes for employees. The company's failure to pay could result in personal liability for the officers and directors.
- If you are serving on a board or as an officer of a company, make sure that the company has director and officer liability insurance.
- Officers and directors must act consistent with their fiduciary duties of care and loyalty, particularly when their company is insolvent and considering adding indebtedness, or selling the company, to avoid liability for breach of fiduciary duty.
- In a bankruptcy, certain transfers are avoidable as preferences and fraudulent transfers. Company executives are not immune to this liability and can be sued in connection with payments received under severance agreements and employment contracts. Large payments out of the ordinary course of business should be carefully considered when structuring employment contracts and severance arrangements.

Friedman & Springwater LLP (F&S) is a certified woman-owned firm that has been dedicated to providing clients with exceptional legal representation since its founding in 2003. Primary practice areas are bankruptcy and insolvency, commercial transactions, civil litigation, energy and utilities regulatory litigation & appellate litigation.

Based in San Francisco, F&S has represented creditors in bankruptcy cases all over the United States, including serving on unsecured creditors' committees. F&S has represented secured lenders in a variety of workouts and bankruptcy cases, including real estate and retail. The firm has participated in financial restructurings and liquidations ranging from small companies to large companies, implementing solutions for businesses in troubled debt situations inside and outside of bankruptcy courts. F&S has also represented intellectual property licensees and licensors in bankruptcy cases.

F&S has handled a wide range of commercial transactions, including asset-based financing, and the sale of financial assets.

Our lawyers have extensive experience representing parties before the courts as well as before the California Public Utilities Commission and in related appellate proceedings. We have in-depth experience handling regulatory proceedings relating to renewable energy matters, "green" systems and other environmental impact cases.

"Businesses should understand the laws that affect creditors of insolvent entities. One of the most important is the automatic stay under the United States Bankruptcy Code"

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Our Commercial group offer a full global commercial law service offering including general commercial, company formations, contract, trade, and in/outbound investment.
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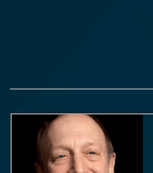

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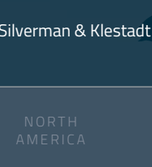

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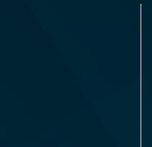

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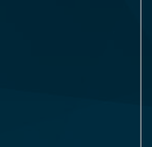

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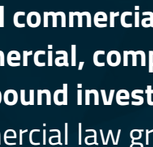

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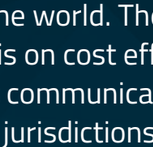

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Nicholas Hammond is a qualified English solicitor and lawyer registered with the Romanian bar. He has been working in Romania since 1990, advising and assisting clients in developing their business in the Romanian market. He worked for many years running a practise in London until deciding with his partners to open an office in Romania. This was successful, and the firm was approached to transfer the new business to a well-known City international practise who wished to open an office in Bucharest. As part of the transaction he agreed to transfer to Romania full time to develop the Romanian business. He has worked with and trained a number of Romanian lawyers who are now acknowledged experts in their own fields with their own law firms. Trained as a commercial and property lawyer in the City of London, he brings his clients his knowledge of Romania and a pragmatic approach. He prides himself on not only being able to advise on legal aspects but also how the law in Romania is applied and can be utilised to his client's advantage. His legal/commercial approach is appreciated by clients as they navigate the complex and sometime unintelligible results of Romanian law.

QUESTION ONE

What are the most important steps to identifying commercial opportunities before entering a new market – and what are the most common commercial mistakes you have seen businesses make?

Have a clear understanding of the company's goals for the business in Romania. Will the investment be done by way of a joint venture or will it 'go it alone'? This will depend on the company's future intentions.

Often, companies appear to leave their brains at head office when coming to Romania, and what is seen initially in Romania is not always the reality: everything can appear to be easy, whereas in reality it is very different. Companies should look for difficulties rather than just seeing the upside. Choosing an advisor who tells you bad things as well as good things can save you money in the future. Romanians tend to want to please: because of this they may avoid telling you bad news.

When hiring, companies often make the mistake of believing what they are told by an applicant without checking the position from another source. It is best to use an authorised agency or a recommendation from a trusted source when hiring, and take up references. The market in Romania is still developing and expanding and therefore decisions are sometimes made by investors for emotive rather than sound commercial reasons.

Hammond, & Associates can trace its origins back to 1990 when Nicholas Hammond became the first foreign lawyer to open an office in Romania after January 1990.

Hammond, & Associates brings the experience of lawyers from different legal disciplines to provide a full service commercial law firm in Romania for foreign and Romanian clients. With international and Romanian lawyers, they are able to anticipate obstacles, seize opportunities and resolve cases or complete transactions. The senior lawyers of the firm have many years combined legal experience in Romania and the United Kingdom gained through involvement in transactions of all sizes and nature, both in the private and public sector.

We assist small and medium size enterprises as well as advising major multinational companies. We foster amongst partners and staff a collaborative culture. The Firm stands for a commitment to the highest standards in everything that it does. We balance the two major legal disciplines, the Common Law and the Code Law, with a thorough understanding of the law and an innovative and entrepreneurial spirit. The practice is constantly adapting in response to client's needs and the demands of the evolving market in Romania and the emergence of new technologies.

QUESTION TWO

Local market intelligence is vital to exploring commercial viability in a new market. How has Covid impacted access to this information, and how can businesses make fully informed market entry decisions as Covid disruptions continue?

Romania is a country with considerable online resources. This information is constantly being updated by commercial organisations. Covid has not affected the level of information being posted, but any information should be confirmed by more than one source. There are Government websites which dispense commercial business information as well as Ministries. Unfortunately, this information can be delayed, but can often be found elsewhere.

Laws and regulations only become effective when published, so in this regard relevant information will be up to date. There are also news agencies which supply information (including www.medifax.ro). As mentioned, the hiring of your first employee and advisor is important in Romania. Hire staff and advisors based not on salary or fees, but rather on their approach and attitude. If they will tell you the downside as well as the upside, then they are probably the best person for you. Local staff will also be able to source information that you will not have access to.

> **"Decisions are sometimes made by investors for emotive rather than sound commercial reasons."**

QUESTION THREE

How can businesses identify and evade barriers to commercial success in a new market – from cultural and language differences to competitors and other new market entrants?

The first step is to have an advisor that you trust, who will tell you the truth, which may not always be what you want to hear. You can find this advisor through your normal resources or by carrying out research in directories and associations. As a first step, you should ask them what is bad in Romania rather than what is good. Have they advised companies in a similar position? Are they able to really assist you rather than just seeing you as yet another fee?

Once you have chosen an advisor then choose the right employee. Again, look for someone who is sceptical but ambitious, knowledgeable, and educated. Preferably they should have had exposure in the past to non-Romanian companies and management. There are many people now returning to Romania who have seen what it is like in other countries and now want to invest in their own country. Another note of caution is that you should be careful that the employee does to want to take the business from you. You should therefore take your time in hiring your first employee, especially if they will be dealing directly with other Romanian businesses or individuals. An indication of an issue would be if they recommend friends or relatives to work for you.

Communication is not often a problem in Romania. Many Romanians speak at least one other language. but you need to be aware that the foreign language will not be their first language and there may be problems in nuance. If the employees are truly interested in you and your business, they will also be aware of what is happening in your market and able to advise you of trends, threats and opportunities. Let them do the research for you. They will be able to talk to other Romanians and will understand the undercurrents of what is happening both in your business and what your competitors are doing. You may also note in your dealings with Romanian companies that there are many executives and managers in Romania who are women. This should be taken advantage of: often, they are more conscientious and loyal to the business.

Invest in your people. In Romania, there is currently not too much job fluctuation, as Romanians look for security, training and advancement. Take advantage of this and develop them, but at the same time be aware that they may treat the business as their own. Proper supervision is necessary and unfortunately there are many examples of businesses being ruined by Romanians who have not been properly supervised. If possible, put someone in place to work alongside them to ensure everything is done correctly. Despite all the above, Romania is still a great, but difficult, place to do business.

TOP TIPS

Scoping a new market for commercial threats

- Approach the Romanian legal and business environment with an open mind. Romania has a different set of rules of application of law and procedures. This can be frustrating, especially when dealing with people who appear to have no concept of time.
- Do not make business or legal assumptions based on your experience in your own country. Listen to what is being said and ask questions. Romania is a developing economy and many business and legal concepts are not fully understood. Romania is still learning how a commercial economy works in practice.
- Have a clear idea of what you are trying to achieve, but be prepared to alter your approach as the matters unfold. Ensure that your business model can be used in Romania and be flexible in your approach and its implementation.
- In Romania, things can take longer to achieve than you estimate. Be prepared for delays and frequent changes in the Romanian legislation. Officials and counterparties may not immediately know the answer and will need time to consider. Be careful of the expression "it is not a problem". It often is!
- Keep things in perspective. In Romania most problems can be resolved, it just takes longer.

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Vo Huu Tu is the co-founder and partner of TND Legal. He has been working in the legal profession for more than ten years, and used to work for LuatViet Advocates & Solicitors and Indochine Counsel before co-founding TND Legal. Tu specialises in corporate and commercial transaction, M&A, and dispute resolution.

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Nguyen Quoc Bao (LLB, LLM) has more than five years of experience in assisting and advising a wide array of foreign investors doing business in Vietnam. Bao started his legal career with his expertise focusing on M&A, inward investment, real estate and corporate and commercial. Recently, Bao advised numerous clients on a wide array of legal issues, ranging from daily operation to market entry feasibility, within the burgeoning FinTech sector in Vietnam. Bao is also an active contributor to various online legal journals.

Founded in 2015, TND Legal is a commercial law firm based in Ho Chi Minh City. The firm is driven by a philosophy of clear pricing and defined outcomes.

TND Legal is a young law firm but our experience in advising and assisting international clients is unquestionable. Our team is a perfect mix of experienced and younger lawyers with a combination of expertise in law and finance. We take pride in our members, who are business-savvy and equipped with academic and ethical qualifications.

TND Legal offers its clients a wide array of legal services, including: inward investment/foreign investment; corporate & commercial; M&A; banking & finance, property & construction; taxation; labour & employment; international trade; dispute resolution; and legal translation.

TND Legal renders legal solutions at international standards and directly addresses the rising need of local, regional and international clients.

At TND Legal, we analyse each request, ensuring that our focus is in line with the actual and fundamental need of the client to avoid irrelevant or unnecessary legal costs. Consequently, our clients achieve a defined outcome at a reasonable price.

QUESTION ONE

What are the most important steps to identifying commercial opportunities before entering a new market – and what are the most common commercial mistakes you have seen businesses make?

The most important steps to preparation are: (i) to study a new market by conducting market research or due diligence; (ii) to structure a proper commercial presence in the new market, considering whether it should be in the form of incorporating a new legal entity or through an M&A transaction; (iii) to have an overall understanding of licensing procedures in correlation with the selected structure (licensing procedures/transaction process shall vary and be subject to how the investor plan to enter the market); (iv) to be aware of post-license compliance requirements (e.g. statutory reports needed to be taken during the course of the business operation). All of which are purported to keep the business out of trouble. Having a local counsel to guide the investor on market access requirements and perform licensing procedures is essential.

During the course of our professional law practice, common mistakes that a foreign investor usually make are, firstly, failing to make a timely capital contribution (local laws require charter capital of a company to be contributed in full within 90 days of obtaining the Enterprise Registration Certificate (Certification of Incorporation) for that company). Therefore, a failure in making a full capital contribution will trigger adverse legal consequences, which would take the investor's time and effort to deal with. Secondly, investment capital is not remitted into a designated account opened by the foreign-invested company as required by forex control regulations. Failing to procure the legitimate cash flows in most cases will cause difficulty, or even an outright rejection by the bank, for profit repatriation. Thirdly, partnering with an unreliable local partner is another common mistake, especially for certain sectors where Vietnam has yet to open its market for foreign investors. This may give rise to lengthy and costly disputes with an unpredictable outcome. Lastly, failure in making statutory reports during business operation (lodging various reports is part of compliance obligations that one has to obey during its term of operation, and failing which might lead to an imposition of an administrative monetary penalty, alongside potential interruptions in respect of subsequent licensing procedures.

QUESTION TWO

Local market intelligence is vital to exploring commercial viability in a new market. How has Covid impacted access to this information, and how can businesses make fully informed market entry decisions as Covid disruptions continue?

Covid-19 has given rise to information asymmetry when accessing a new market. While a great number of market insights nowadays can be obtained digitally, physical contact such as on-site visits or direct communication remain a significant means of collecting valuable and unique information. This is even more prevalent in the context of Vietnam, where physical dealings and communication are often more common than virtual. Considering the real estate sector, site visits and interviews with the stakeholders (i.e. property managers, government officials and local communities) are among the most effective means of obtaining market intelligence. With social distancing in force, in-person site examination and interviews are drastically reduced. In some countries, "windshield" analysis and virtual meetings are considered as an alternative. Nonetheless, these strategies may be less effective in Vietnam. On the one hand, social distancing measures in Vietnam during intense periods are limited to restriction of physical contact but also extend to severe constraints on domestic travel. Second, the willingness and readiness of government officials at local level and the surrounding community to take on non-physical forms of interraction remain largely in doubt.

As always, crisis triggers innovation and breeds opportunities. Sooner rather than later, the market will adapt itself to a new normal. In the meantime, investors are advised to make the best use of their existing resources. Thanks to globalisation and technological development, one can access a multitude of information simply and efficiently. The key problems with this source of information are that it may not be reliable and project-centric. Such problems, however, can be dealt with by engaging trusted local counsels, who understand the mindset and expectations of the investors and are equipped with a set of localised skills, to provide sophisticated commercial and legal feasibility entry reports. In industries that require substantial dealings with government authorities, partnering up with a well-versed local entity is also frequently suggested. A logical combination of different sources of information and methods of collecting them will give investors the ability to deliver informed market entry decisions despite these unprecedented times.

TOP TIPS

Scoping a new market for commercial threats

- Never underestimate local business culture: a strong understanding of the business culture with mutual respect will create a better work environment, smarter decisions and improved products and services.
- Understand local licensing requirements: numerous licences and approvals are required to be implemented by a foreign investor for doing business in Vietnam.
- Be prepared for post-closing integration when entering the market by way of joint venture or M&A transaction: it is vital for a foreign investor to get to know its counterparties in order to build up and incorporate an effective corporate governance strategy into the definitive investment agreements.

QUESTION THREE

How can businesses identify and evade barriers to commercial success in a new market – from cultural and language differences to competitors and other new market entrants?

Barriers to commercial success in a new market range from regulatory hurdles to commercial difficulties, which have been discussed vividly amongst both scholars and practioners. In this section, we would draw your attention to a new perspective of market barriers: the business mindset. This is an abstract concept made up of an uncountable number of factors, including (but not limited to) culture, language, business habits, practices, educational background, commercial senses and social factors. Business mindset plays a vital role explaining the failure of many businesses to replicate a successful outcome in the new market that they otherwise achieved on their home ground. When entering new markets, the investor tends to bring along their well-established business mindset. While this can add value and promote their products/services, it could also be the primary cause for their failure. The question is how the investor can accommodate their mindset to fit in the intrinsic characteristics of the new market.

One solution is to seek a local scout to connect and integrate the underlying principles embedded in investors' business mindset with those traditionally being attached to the new market. Such a local scout, be it an independent counsel or a business partner, must be able to translate investor's demands into practical solutions in the local arena. This "East meets West" approach would be vital to evade barriers to commercial success in deployment of business in any new market, let alone Vietnam.

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Dr Robert Lewandowski studied mathematics and German philology at the University of Warsaw (Master of Art) and law at the University of Mainz, Germany. He later joined the list of German lawyers at the Frankfurt am Main Bar Association in Germany and the list of Polish legal advisers at the District Chamber of Legal Advisers in Warsaw. He holds a PhD degree in law from the University in Mainz. For over 20 years, Robert has specialised in corporate law, with a focus on private mergers and acquisitions, cross-border work, general corporate advice and litigation, collecting experience firstly in legal firms in Germany and the United Kingdom.

His expertise covers personal data protection and cyber security law and he also works for companies as their data protection officer. He has authored over 100 articles and 15 books and commentaries on Polish and International law published internationally. He wrote the first ever book on the subject of "Polish Commercial Law: An Introduction" in 2007 in English, with the second edition of this book published in 2019. Robert is currently working on his postdoctoral thesis on the subject of partnership law concerning the acquisition of own ownership interests.

QUESTION ONE

What are the most important steps to identifying commercial opportunities before entering a new market in the UAE – and what are the most common commercial mistakes you have seen businesses make?

The most important first step is to undertake comprehensive market research in the new country, including identifying potential future customers, industry trends, insight, quotas, customs duties, export controls/import regulations, laws governing product liability and to examine whether or not there are any similar products and/or services already offered compared with the products/services of the client.

It is also vital to learn more about any competitors currently operating in the new market and market saturation and to carry out a deep analysis under which financial conditions the client's products/services may be sold in the new market. To identify these opportunities, the client should engage external advisers from the new market who will help him/her to elaborate a study about the commercial conditions in the new market and also establish any risks which might be involved with this investment showing expected growth levels.

Having undertaken this evaluation, the client should then write a detailed business plan in which the purpose of the investment is clearly defined outlining the financing of the business in the new market within the start-up phase. Business mistakes result mostly from the failure to undertake an in-depth risk analysis of the new market before starting up and underestimating local and regional aspects of doing business in a new country. Entrepreneurs often forget to test their products and services in the new environment before they decide to enter a new market. Ignoring the competition is another potentially fatal business mistake.

DLP Dr. Lewandowski & Partners (DLP) is an established legal firm in the heart of Warsaw offering a comprehensive range of services and legal advice fully tailored to our Polish and international clients. We specialise in helping foreign clients enter the Polish business sector and offer our expertise regarding the setting up of entities, acquisition of enterprises and providing their market evaluation, representing clients in commercial litigation cases before Polish state and arbitration courts, and enforcing (cross-border) judgments. Our multilingual staff provides services in Polish, English, German and Russian.

We provided advice for the City of Warsaw for the UEFA EURO 2012 competition, as well as the construction of the National Stadion PGE in Warsaw and Deepwater Container Terminal (DCT) in Gdańsk.

DLP is a member of IsFiN with its seat in Brussels (Belgium). This is a platform of emerging markets advisors, which allow DLP to provide its services on a worldwide level. DLP is also a member of DIRO network with its office in Hamburg (Germany).

QUESTION TWO

Local market intelligence is vital to exploring commercial viability in a new market. How has Covid impacted access to this information, and how can businesses make fully informed market entry decisions as Covid disruptions continue?

Any client seeking to open a business in a new country should beyond doubt inform himself/herself about existing commercial possibilities in advance and this exploration must be carried out thoroughly in light of the Covid pandemic, in order to obtain updated and genuine news, data and analysis.

The outbreak of Covid has certainly caused huge uncertainty in the business world and this was compounded by fake news characterised by misinformation about lockdowns, the number of deaths, prevention measures, supply shortages and/or shopping mall closures. This all blurred the picture of the true identification of commercial viability. To address this situation, it's advisable that every client should create an advisory board consisting of external counsels from different fields of expertise (e.g. economists, lawyers, accountants and industry experts) who will provide a full set of information about commercial opportunities under the turbulent conditions of the pandemic. This may help the client to understand the new market and the regional variation in business conditions during the crisis and create a business model tailored to this situation.

QUESTION THREE

How can businesses identify and evade barriers to commercial success in a new market – from cultural and language differences to competitors and other new market entrants?

Without fully understanding different market entry barriers, clients may choose an ineffective market entry strategy. Research and risk analysis completed as part of a feasibility study may reveal potential barriers and this study should be provided by experts, so that clients can develop strategies to address and evade barriers successfully. If a new market is subject to trade and economic sanctions, the client shall select a different market not affected by these kinds of restrictions.

If the target market is imposing significant tariffs on imports, then the client can consider producing these products or part of them directly in the new market to avoid importing from abroad. To find a location with lower taxation and financial governmental support, they should identify a place in the target market with lower or zero taxes (in Poland there are special economic business zones with exemption from taxes and public subsidies).

If the chosen new market should be affected by political instability, then market entry shall be made for the short term, not investing in facilities and employees and providing business rather through a liaison office, distributorship, sales representatives and agents. Barriers subject to customer preferences, such as religious and cultural aspects and language, may be met by appealing to the target market and developing value-added activities in the target market to increase the attractiveness to foreign purchasers. Economic barriers such as high costs for raw materials, tax rates or costs for acquiring development land can finally be lifted through a thoughtful model of cutting/reducing such costs (e.g. avoidance of double taxation, leasing instead of buying land and export raw material).

TOP TIPS

Scoping a new market for commercial threats

- Inform yourself about the new market by engaging external, local advisors such as lawyers, accountants, economists and industry experts on social media.
- Provide a thorough analysis of the competitors in a new market, focusing on their position in the market, their annual turnover, number of employees, price structure, local presence, manner of operations and any gaps you can fill with your products/services.
- Elaborate a comprehensive business plan defining the purpose of entering the new market, short and long-term milestones, and project financing including an emergency plan in the event of a possible exit from the market, and also implementation tools and technologies for remote selling/services at the early stage of the investment endeavour.
- Consider and use an appropriate method of conducting business in a new market, taking into consideration various aspects of indirect and direct investment.
- Evade any barriers in the new market in compliance with the laws, regulations and local jurisdiction by developing new and original strategies and tools.

"The outbreak of Covid has certainly caused huge uncertainty in the business world and this was compounded by fake news"

Thomas Paoletti

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Thomas Paoletti is the founder and general manager of Paoletti Legal Consultants. He has more than 20 years of experience in sophisticated corporate, real estate, finance and technology-related matters, on all sides of a transaction, be it the buyer, seller, lender, borrower, investor, or the director.

He has an active role in several organisations in the UAE, including the President of the Italian Business Council and Vice President of the Italian Social Club of Dubai. He is also listed as a lawyer at the Italian Embassy in Abu Dhabi, the Italian Consulate in Dubai and the Italian Trade Commission in Dubai. Before moving to Dubai, Thomas was a partner at Studio Legale Paoletti in Rome for more than 10 years. Thomas received his Law degree from the University of Rome, after completing his graduation thesis as a visiting scholar at Yale.

Paoletti Law Group is a global legal and business services firm advising clients across the Middle East, EU countries and the rest of the world.

It provides value-adding and cost-effective solutions for national and multinational businesses in a wide range of sectors including corporate domestic and cross border transactions, finance, new technologies, construction, and oil and gas.

Headquartered in UAE, the firm maintains offices in Rome and Shanghai, and grants its clients access to a worldwide network with operational desks in key jurisdictions around the world.

QUESTION ONE

What are the most important steps to identifying commercial opportunities before entering a new market in the UAE – and what are the most common commercial mistakes you have seen businesses make?

The UAE has a long and proud history of trade and finances, which makes it simultaneously an open space for entrepreneurship and a difficult and competitive market; for this reason, any company that seeks to engage in the UAE's market first has to secure a sizable initial capital to spend in the first stages of its business, independently of the specific trade or business that it wishes to conduct, to deal with the country's high competition.

The UAE is also a very diverse country (more than 89% of its population being expats) with a very diverse economy, so the key to successful market entry has less to do with investment and marketing, and more to do with adaptation to the local cultural landscape.

Some mistakes that should be avoided by investors and businesses when introducing their brands, products and services in the UAE are related to:

- investing in a product that sells poorly in a particular UAE social and cultural context.
- compliance with local laws, rules and regulations such as registration of businesses and economic substance which can result in fines and closure of companies.
- Underestimation of the influence of culture and tradition of the market and its rules.

QUESTION TWO

Local market intelligence is vital to exploring commercial viability in a new market. How has Covid impacted access to this information, and how can businesses make fully informed market entry decisions as Covid disruptions continue?

Local market intelligence is necessary to gather authentic information for market research and strategy formulation. Market intelligence analysts used this information to help businesses avoid investment risks by identifying potential threats and opportunities. With the advent of Covid-19, the physical ability of people to reach markets was affected, which made the traditional method of data collection impossible.

Generally speaking, all global open markets have been hit hard by the Covid-19 pandemic, especially financial markets, since these are supported by complex networks of information and delicate infrastructures that have been effectively shut down by the various governments and institutions of the world as a safety measure to avoid economic collapse and recession.

This unexpected turn of events has led to a drop in investment from foreign capital and entrepreneurs, leading thus to a reduction of the market itself in the UAE; nevertheless, the UAE's government has successfully implemented measures to sustain the economy, such as:

- A series of record-breaking stimulus packages for existing businesses in the UAE and the foreign direct investments in the country.
- A gradual re-opening of the financial infrastructures and centres.

Added to this, there is much that companies and businesses can do to support the economic recovery and even end up with benefits from the restructuring of the market; to this end, it is recommended that businesses invest in digital technology and Fourth Generation industries such as space technology, Artificial Intelligence, cyber security, and Biometric databases. This last point is crucial to regain the capacity to gather and process data related to the various segments of the market, since Biodata is the cutting-edge technology that is being used to create large databases of information about the consumers and their habits, ideas, expectations, etc.

QUESTION THREE

How can businesses identify and evade barriers to commercial success in a new market – from cultural and language differences to competitors and other new market entrants?

It is paramount for commercial success that companies integrate themselves into the local customs, mores, traditions and idiosyncrasy of the consumers, so as to "become" part of the community.

To counter this, it is important to show cooperation and respect to the local consumers by engaging in social welfare activities and campaigns that help establish a connection between the business and the people.

Finally, in this cultural setting, it is of the utmost importance and relevance that companies and investors take a risk on segments of the market that are underdeveloped in some of the emirates, and avoid the common mistake of clustering in the financial centres, where the competition is most rife and accelerated; this will help open up new venues of the economy, contributing to the economic growth of the rest of the federation, and establishing a firm position in the market.

Challenges posed by competitors and new market entrants could be dealt with by professional consultants that can help identify structural problems and provide personalised and objective steps to tackle competitors and new market entrants. With more than 15 years of experience in the UAE and 25 years in the international market, our team provides companies and investors with the market analysis and strategy along with incorporating business strategy appropriate to navigate in the constantly evolving UAE business world.

TOP TIPS

Scoping a new market for commercial threats

- Assess the strengths and weaknesses of your business in relation to the market and competitors; this will help us adapt to the economic climate and thrive in its conditions.
- Market research will help us understand the limitations of our products and services in a particular market and make products and services that are more in line with what the consumers actually want.
- Measuring the reach of our productive infrastructure, which will help us rationalise our resources more effectively, instead of wasting investment in markets and targets that are unlikely to succeed.
- Evaluating our personnel to align them with the standards of quality and performance that are required, so as to not let our internal functioning be an obstacle to business growth.
- Analyzing the socio-political climate of the market to avoid unwanted interference from government, institutions and/or political organisations that work against the freedom of exchange.

"The UAE is a diverse country (more than 89% of its population being expats) with a diverse economy"

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Nathan A. McDonald assists clients in all areas of banking, including regulatory, consumer compliance, BSA/AML, and safety and soundness. He advises FinTech startups as external General Counsel and Chief Compliance Officer, including fintechs looking to partner with traditional banks. Mr. McDonald also advises clients on developing effective cannabis banking programs.

Clients hire Johnston Clem Gifford because we live our values: applying a sense of urgency in managing crisis or capturing opportunity and an obsessive curiosity over the details that affect our clients and give them commanding influences and positions; employing a collaborative philosophy that uses the knowledge of our whole firm to improve client outcomes; and utilising clear communication that presents information in a straightforward, relatable way, without legal jargon, and advanced technology that prioritises our client's agenda, uncovers important information, and protects our clients' information. With offices in Texas, JCG represents clients across the United States.

QUESTION ONE

What are the most important steps to identifying commercial opportunities before entering a new market – and what are the most common commercial mistakes you have seen businesses make?

Identify the need. This step identifies whether demand exists for the offering and, more important, tests the willingness of potential customers to purchase it. Failed offerings, commonly, may have identified an interest in the solution but have not confirmed that potential customers are motivated to pay for the solution.

Research competitive solutions. Understanding the competitive landscape is essential to successful entry. Success, however, requires looking beyond direct competition and considering innovators who may develop the next, better offering. A myopic approach focusing solely on existing competition can lull ventures into a false sense of pre-launch security as the industry's cutting-edge leapfrogs both the venture and its competition.

Analyse regulatory implications. Regulations not only present costly barriers to entry (for example, securities regulations affecting capital raises) but also can affect form, fit and function (consider the effects of privacy protections on system architecture and security redundancy or Covid regulations on employee and customer access). Failure to obtain a required permit or approval or comply with a notice requirement has grounded ventures on the rocky crags of regulatory compliance.

Ensure sufficient funding. Capital is fuel for business: research, development, marketing, human resources – every component relies on capital. Far too often, venturers underestimate how much capital they will need to move from launch to positive cash flow (i.e. when the venture's income sustains its operations). The result: critical resources are allocated to fundraising rather than development or sales, or critical opportunities are missed because funds do not exist to capitalise on them.

QUESTION TWO

Local market intelligence is vital to exploring commercial viability in a new market. How has Covid impacted access to this information, and how can businesses make fully informed market entry decisions as Covid disruptions continue?

Covid affected market intel such as foot traffic and point-of-sale behaviour. However, market behaviour continues to be tracked and analysed in other ways – such as payment processor Square, AI developer Neurons, Inc., Forbes, and scholarly journals (see "Impact of the Covid-19 Pandemic on Online Consumer Purchasing Behavior" by Shengyu Gu, et al, in the Journal of Theoretical and Applied Commerce Research, and "Beyond Pajamas: Sizing Up the Pandemic Shopper" by Harvard professor Ayelet Israeli, et al.) In the U.S., the Census Bureau provides periodic updates on national economic indicators.

The U.S. Census Bureau also collects and processes data at the regional level, such as monthly retail sales by state. Data can be sorted according to year, state, and industry to help businesses analyse trends from pre-pandemic days to the present. And the U.S. Federal Reserve provides data segregated by individual counties or metropolitan areas (for example, an analysis of household debt by county and major metropolitan areas). Tools such as these provide a view of macroeconomic trends, in the context of continued Covid disruptions, which businesses can use to form contours of a market strategy.

However, a local market strategy requires "boots on the ground" – access to consumers within the target market. Even now, Covid disrupts this effort (for example, continued travel restrictions). Survey software – such as Survey Monkey, Qualtrics and CheckMarket – allows for targeted, individual surveys via email, text and social media. An advisory team of trusted professionals residing in the target market provides the business with a ready-made survey segment for market research (their families, communities, and connections) practically free of Covid disruption.

QUESTION THREE

How can businesses identify and evade barriers to commercial success in a new market – from cultural and language differences to competitors and other new market entrants?

The new venture must develop a target market and diligently assess the reasonable likelihood of this potential customer base to purchase the new offering. Does the customers' need that is potentially met by the offering outweigh their aversion to spending money on it? Engaging market consultants can help them understand these dynamics; using external counsel to hire these professionals can provide an additional layer of confidentiality and protection to their analyses and reports during this critical, early phase of development.

Besides understanding the opportunities available, the business must understand the landscape presented by existing competitors and emerging threats. It must also understand its own strengths and weaknesses to position itself well. External counsel can help businesses navigate regulatory requirements and other potential hurdles by, for example, providing expert insight regarding the contours of registered patents owned by competitors (or which threaten the new venture's competitive posture) and craft patentable new claims to differentiate the venture.

Perhaps as important, local external counsel can help the business understand cultural and language novelties particular to the market. Local counsel reside, work, shop, play, and raise families in the market – they speak the language and understand the local culture, including tastes, preferences, customs, and other important considerations. Their knowledge not only helps the business acclimate with the new market (indeed, local counsel may be a member of the business' target market) but also keeps the business from running afoul of local laws and customs.

TOP TIPS

Scoping a new market for commercial threats

- First, form a local advisory team to help you proactively navigate obstacles and position yourself well for successful market entry.
- Second, identify barriers to entry, such as local laws and regulations, competition, and availability of resources, including human resources.
- Third, assess the competition to identify ways to differentiate your business from the pack and capitalise on your strategic advantages.
- Fourth, identify and evaluate your strengths and weaknesses so you can identify potential challenges before they arise. Your local advisory team is best positioned to assist with their objective, outside viewpoint.
- Fifth, develop a plan of action with the help of your local advisory team, but be flexible so you can adapt to ever-changing legal and regulatory requirements, consumer tastes and preferences, and market conditions.

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John R. Colter-Carswell, the Director and managing partner of the Firm, has been practicing law in Mexico for more than 20 years and coordinating legal activities with outside law firms.

He has been the Legal Department Manager for certain Mexican conglomerates, as well as Grupo Pulsar, S.A. de C.V. and Fabricas Orion, S.A. de C.V., where he became involved in a variety of domestic and international legal aspects with respect to business transactions.

John has become a well-known, respected and well-connected leader among legal, corporate and government institutions and associations throughout the region, such as the Maquiladora Industry Association, local industrial chambers of industry and commerce, Federal and State Commerce Department, foreign investment governmental agencies, international promotion bank, American and Canadian Consulates, British and Holland commercial offices, and industrial parks among others.

QUESTION ONE

What are the most important steps to identifying commercial opportunities before entering a new market – and what are the most common commercial mistakes you have seen businesses make?

To identify commercial opportunities before entering a new market in Mexico, it is first important to touch base with certain associations and public agencies that will assist the new venture in determining the kind of market that will be targeted, and that will help to review and analyse the type of industries that will be selected. This will allow us to review all related information of such an industry, such as specified market studies, specialty labour opportunities and site selection, that would allow them to have the necessary data comparable across economies, and make several assumptions about the type of business and the procedures used.

Afterwards it will be necessary to incorporate your company on the selected site, notwithstanding that the new Mexican company will be incorporated in a determinate state or city within Mexico, and this will be its corporate domicile for fiscal purposes. It's important to select a legal firm who normally deal with foreign investment companies to go over all legal/fiscal procedures and incorporate the new Mexican company, to be ready to operate, import or export their goods, among others.

One of the most common mistakes is not hiring a specialised international law firm or accounting firm that will help the new venture eliminate problems during the incorporation process. Businesses should hire an accounting firm that is used to dealing with international companies investing within Mexico, so that the new venture complies with all accounting, fiscal, payroll, tax paying, as well as other related outsourcing services.

Colter Carswell y Asociados, S.C. is a full service international law firm located in the Metro area of Monterrey, Mexico, supported by associated offices in Mexico City, United States of America and the European Union, having extensive experience in counseling clients in all aspects of domestic and international business, providing our clients with professional legal representation on a responsive and efficient basis at competitive rates.

The sophistication of our practice and the expertise of our lawyers are the equal of any other firm, but our international support strategy allows us to provide immediate and greater personal attention, staffing continuity and cost efficiency than larger legal organisations. We work closely with our clients to eliminate inefficiencies and use legal assistants to perform specific functions.

Our law firm acts as global general counsel to certain national and multinational clients for all aspects of their business, including assistance in their operational matters. Also, Colter Carswell y Asociados, S.C. offers a variety of non-legal services intended to provide client support in the establishment or expansion of their endeavors by doing business in Mexico.

QUESTION TWO

Local market intelligence is vital to exploring commercial viability in a new market. How has Covid impacted access to this information, and how can businesses make fully informed market entry decisions as Covid disruptions continue?

Local market intelligence is very important to select the viability in a new market and of course during the Covid pandemic, but also our current government has been a great problem when it comes to collecting such information. Some new ventures have put projects on standby until they may have better information that allows them to be in a better commercial position.

Our current government has reduced its employees and the response of any inquiry has been very slow. They have also close all world-wide offices of PROMEXICO, which has to be the best agency for information for commercial market purposes.

Notwithstanding the above mentioned, there are still specialised associations that may assist the new venture with information that will allow them to have a better knowledge of their business and for better industrial decision-making.

Now local governments are moving on and setting up market intelligence agencies that may assist the new ventures doing business within Mexico.

> **"Businesses should hire an accounting firm that is used to dealing with international companies investing within Mexico"**

QUESTION THREE

How can businesses identify and evade barriers to commercial success in a new market – from cultural and language differences to competitors and other new market entrants?

The normal barriers to commercial success dealing in Mexico is related to market entries and local requirements. The Covid pandemic has generated uncertainty for the Mexican economy, but the government and the private sectors have made efforts to support the Mexican reactivation of the companies, as we said, once the new venture has all the information it needs. But prior to entering Mexico, it's very important to be assisted by specialised accounting and law firms that will help the new venture on their endeavours by doing business within Mexico.

Mexican customs regulations, product standards, and labour laws may present challenges for foreign investment companies, but of course with a correct counsel this can be less problematic. Also embassies or consulates of different foreign countries may assist on this kind of case.

Violence involving criminal groups has created heightened insecurity in some parts of Mexico, including in some border areas, in certain port zones, and along truck and rail corridors. This is an important matter to take into account when doing business within Mexico. To select the proper private or Governmental protection, it will be important to have certain personal security measures or have specialised training that will provide better knowledge of the situations.

With respect to cultural and language differences, in Mexico there will be too much of a problem. Most people speak English as a second language, but for other languages there are certain institutions that may assist us to have a better knowledge of the business operations and compliance situations.

TOP TIPS

Scoping a new market for commercial threats

- Perform market research to analyse potential customers and competitors as well as identify consumer segments with similar characteristics, as well as new business growth opportunities.
- Get a high-level view of the market and define the market for the operation of your new venture in Mexico, which is in need of a good understanding of the potential type of the business and their industry sector.
- Understand the barriers, business threats and commercial risk that will have on the operation of the new Mexican venture.
- Define the business model that will be used for entering the new market within Mexico.
- Select a skilled law firm to incorporate your new venture in Mexico and an accounting firm that will follow up on all outsourcing services needed to operate normally. Both firms need to have experience with foreign companies doing business within Mexico.

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Chris Johnson has practiced law in New York, Saudi Arabia and Washington since 1978, including 20 years in Riyadh. He currently manages a team of 20 attorneys in Riyadh, active in a wide range of corporate, commercial, finance and other regulatory specialties. Clients include multiple embassies in Riyadh, multiple international banks, Tech company, international online sales companies, U.S Government, oil and petrol companies, financial companies, global investment company, Healthcare companies, multinational computer technology companies, industrial gases companies, pharmaceutical companies, multinational electric utility companies, infrastructure and transport systems companies, Global Architecture companies , Global construction companies, Global electric companies, Global trading companies and international social media companies. Chris has served on numerous boards, including serving as Chairman of the American Business Group of Riyadh (3 years), Chairman and CEO of the humanitarian air service provider AirServ (3 years), and Chairman of the Vint Hill Economic Development Authority (10 years). He currently serves as Chairman of the Middle East Council of Chambers of Commerce (MECACC) and KKR Saudi Ltd.He has participated in U.S. Trade and Investment Framework Agreement (TIFA) negotiations with Saudi Arabia and the Gulf Cooperation Council, and has served as an expert witness on Saudi law before various courts and arbitral tribunals and as an advocate and arbitrator in ICC Arbitration.

The Law Firm of Mohamed Al-Sharif, in association with Johnson & Pump, has represented a broad range of local and international entities in the Kingdom since 1979 in a broad range of commercial activities, including leading industrial, defense, finance, engineering, pharmaceutical, consumer, information technology and construction contractors and suppliers.

We have represented multinationals from all major markets and handled a wide range of litigation matters related to construction, antitrust, intellectual property, tax, environmental law and other fields. We had also handled commercial, corporate and regulatory matters, construction and privatisation projects, asset securitisations, disputes, liquidations and financings. Our Law Firm team includes both Western and Arab legal professionals, combining Western-style service with local legal, claims, regulatory and practical expertise.

QUESTION ONE

What are the most important steps to identifying commercial opportunities before entering a new market – and what are the most common commercial mistakes you have seen businesses make?

Date before you marry: Saudi business culture diverges radically from what global investors have learned to expect from their experience in other countries. Before moving beyond offshore sales and services, it is best to consult experts and experience the market first-hand.

Legal idiosyncracies: Unique in the world, the supreme law of the Kingdom is the Islamic shari'a. Saudi judges are trained in Islamic seminary, generally inexperienced in the world of commerce, and trained to prioritise shari'a principles where these conflict with administrative and commercial norms from other jurisdictions.

Feeling and flexing new regulatory muscle: Saudi regulators exercise broad investigative and prosecutorial powers with few clear limits or protections for perceived offenders. This makes for a plethora of surprises, and a much lower level of predictability than elsewhere.

Doors opening slowly. The Saudi private sector's entry into the modern industrial economy continues to rely heavily on trading, a still heavily protected sector. Though compelled to join the WTO to partially open its markets, trading and other sensitive areas remain substantially reserved for wholly Saudi-owned entities. Trading was partially opened, albeit subject to onerous conditions – including forced joint ventures and heavy capital requirements – though it is now possible for the biggest suppliers to register wholly foreign-owned trading companies.

Foreign investment vs. aggressive protectionism. While the government has announced ambitious plans to privatise publicly-owned healthcare, education, utility and industrial assets, implementation has been delayed by forced technology transfer and local equity requirements, in some ways similar to controversial Chinese import substitution and protectionism.

"Catholic Marriage" syndrome. Foreign investors are often pressured to deepen relationships with local agents into "Catholic marriage" partnerships, prematurely or unnecessarily, in an economic environment where doors are opening meaningfully for foreign investors to participate more independently than before, and often suffering dire consequences when seeking to disengage on reasonable terms.

Saudization. To satisfy extremely aggressive localisation quotas applied by the ministry of human resources, not always in harmony with the realities of available talent, investors should verify at the outset what quotas will apply in their field of activity and determine whether and how it may be possible to satisfy these requirements.

The taxman cometh. The Tax Authority has been aggressive in assessing sometimes unreasonable taxes on foreign investors who, unlike their Saudi competitors (who pay a much lower zakat or religious tax), are subject to a 20% corporate income tax. In this context, it's best to work closely with experienced local tax advisors to anticipate and pre-empt potential areas of liability, and prepare to defend against unreasonable assessments.

Intellectual property. In a shari'a law environment, Western-style patent and copyright protections have been slow to evolve and worrisome infringements have occurred involving piracy of software, broadcast content, and pharmaceuticals patent infringement, giving rise to placement on the U.S. priority watchlist for intellectual property violations, though a new Intellectual Property Authority promises improvements.

Heads I win, tails you lose. The Tenders Regulations remain in many ways one-sided in favour of government agencies, including in treating a suspension of work as a breach, even in the face of non-payment and barring claims until completion. This puts contractors in the position of financing their own work as a condition for ever being paid. Relief may, however, be on the way in the context of privatisation of government-owned entities and treatment of new giga-projects as commercial rather than public entities, with the prospect of impartial arbitration and better quality of contractual fairness and accountability.

QUESTION TWO

Local market intelligence is vital to exploring commercial viability in a new market. How has Covid impacted access to this information, and how can businesses make fully informed market entry decisions as Covid disruptions continue?

Flying Blind. Saudi Arabia remains a laggard in commercial transparency, with no private business information services of the quality of Dunn & Bradstreet or, other than basic commercial registration data, access to information filed with government agencies. While the ratings agencies do issue reports on major banks and listed entities, only S&P has a presence here.

High walls. In a culture where privacy is highly valued and protected, trading families and other privately-held entities are often reluctant to share financial information, leaving prospective investors largely in the dark regarding prospective counterparties' financial profiles.

Know Your market. Feasibility studies are possible through global consultants with a presence either in Saudi Arabia or nearby offshore services centres, most importantly Dubai, though again available data is more limited than elsewhere.

QUESTION THREE

How can businesses identify and evade barriers to commercial success in a new market – from cultural and language differences to competitors and other new market entrants?

It takes a chain. While Saudi Arabia has advanced significantly over recent decades both culturally and commercially, it continues to rely heavily on Lebanese, Syrian, Jordanian, Egyptian and other third-country Arab nationals to bridge the very substantial cultural and regulatory barriers and differences; such third country Arab expatriates are often well-qualified to do so based on common language, religion and culture, coupled with an understanding of Western business culture based on long histories in their birth countries of European colonisation and economic integration.

TOP TIPS

Scoping a new market for commercial threats

Given the radically divergent business culture, an unusually high level of joint ventures fail. Our general advice is to establish an independent local presence, if at all possible: at least until getting to fully understand the local commercial culture and know potential partners.

If going solo is not feasible, investigate the commercial reputation of any prospective partner through direct inquiry and follow-up with references, ideally Western professionals with long-term direct experience working with the candidate. Where a joint venture proves the best option, best to start slow and formalise a relationship only after working together less formally long enough to understand a prospective partner's strengths and weaknesses.

However insistently partnership candidates may claim to be masters of all trades, this is typically unrealistic; foreign investors are better served to screen local partners for capabilities relevant to each separate activity and product line.

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Mr. Silverman and his firm act as Customs and trade counsel to some of the largest and most prestigious multinational companies. The firm's clients include importers, exporters, retailers, foreign manufacturers, buying agents, trading companies, trade associations, customshouse brokers, and foreign governments.

Mr. Silverman assists clients in structuring their import transactions to minimise customs duties, ensure regulatory compliance, and eliminate customs penalty exposure. He represents companies during Customs audits, investigations, seizures, exclusions and penalty cases.

He has written and lectured widely on customs and trade issues. He graduated cum laude from law school and he was on the law review. He has an undergraduate degree in accounting. He has many articles on customs issues and he is a customs counsel to the NY/NJ Foreign Freight Forwarders and Brokers Association. He has been recognised in "The International Who's Who of Business Lawyers."

"Shipping costs have gone over the top since Covid: a trader should know what its cost will be to know how to price products for sale and manage customer expectations"

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP is one of the nation's largest law firms devoted exclusively to international trade and customs matters.

The firm represents a variety of clients, ranging from privately held companies to Fortune 100 corporations engaged in the manufacture and distribution of textiles, consumer electronics, foodstuffs, computer and telecommunications equipment, pharmaceuticals, chemicals, automotive products, steel, wearing apparel, agricultural products and other consumer and industrial products.

The firm's lawyers have substantial experience practising before government agencies responsible for the administration and enforcement of international trade and customs laws, including US Customs & Border Protection, Department of Commerce, International Trade Commission, Court of International Trade and Department of Justice. Several of our attorneys are also licensed customs brokers.

Customs and international trade regulations are constantly changing. Our years of experience and broad-based clientele allows us to anticipate problems before they arise and resolve issues once they are identified. We encourage companies to review their transactions to minimise duties and avoid compliance problems with agencies that regulate international trade.

Office locations: New York, Washington, D.C., Milwaukee, Los Angeles and Hong Kong.

QUESTION ONE

What are the most important steps to identifying commercial opportunities before entering a new market – and what are the most common commercial mistakes you have seen businesses make?

An international trader can enter a new market by acquiring a company, adding to their product lines, or by simply deciding to sell goods into a new market. The trader should immediately gather information that is available through different sources. US Customs and Border Protection (CBP) has printouts that can be accessed with an importer's permission that will tell you whether their entries are being regularly processed for that company which would tend to indicate that no investigation is pending. The reports can also tell you whether the company has unpaid duty bills.

You can also obtain CBP reports to indicate all of the import activity within the past number of years. This report can provide a line by line analysis of each entry filed by this importer. This report can act as confirmation of the financial data that has been provided to a potential buyer, and permits the buyer to compare import values with tax and financial reporting data for consistency.

Import data about the target and competitors may be found on various databases that report information from vessel manifests.

The US Department of Commerce (DOC) has data available as to import volumes and quantities of products (by country) for each Harmonised Tariff Schedule provision. This data can provide information as to where products are coming from in your new market.

Different DOC websites permit a researcher to determine whether the product to be imported is the subject of an antidumping duty/countervailing duty order. ADD/CVD duties are often exorbitant and can make products too expensive to market in the US. If certain products are the subject of ADD/CVD cases from country A but not from country B, then an analysis can help to determine whether an ADD/CVD can be expected for the same products made in country B. It is also important to know whether an ADD/CVD circumvention case has been filed against the same products made in country B.

Finally, a new trader entering the market will want to know whether special requirements or licenses must be obtained before goods can be imported. Many Federal and State agencies regulate the importation of goods into the US. A surprise in this department can result in your products never being released into the US.

QUESTION TWO

Local market intelligence is vital to exploring commercial viability in a new market. How has Covid impacted access to this information, and how can businesses make fully informed market entry decisions as Covid disruptions continue?

As a new person entering the market, you have to look at all costs and timing in light of the current Covid environment. There have been extensive delays when it comes to effectively acquiring materials and goods. Past performance is no guarantee of current or future performance. You should explore relationships and reliability with vendors to try to make educated predictions for the future. Similarly, shipping costs have gone over the top since Covid has required pent-up demand to be filled now that goods are available, and a trader should know what its cost will be to know how to price products for sale and manage customer expectations.

TOP TIPS

Scoping a new market for commercial threats

- Take advantage of information databases that are available about importations of your products.
- Understand the requirements that must be met before products can be imported to avoid business disruption by Government agencies that control your importations.
- Conduct a survey or an audit of all importation activities to minimise the payment of duties and potential penalties.

QUESTION THREE

How can businesses identify and evade barriers to commercial success in a new market – from cultural and language differences to competitors and other new market entrants?

Here is where our firm or other firms like ours can be most helpful. Often, an international trader focuses only on the product, pricing, turnaround, and sales, which are all critical to a successful business venture. But that company may be missing opportunities to minimise duties by restructuring products or restructuring transactions, which are all permitted exercises for products to be imported into the US. If you can lower your duty then that may result in additional profit that will go straight to the bottom line and may distinguish your company from others in the same market.

We can even get you a binding custom ruling on questions that are critical to the success of your business. On the other hand, a review of this type could reveal that the company may not be in compliance with certain customs laws, and if these issues come to light, they could subject the trader to seizures, shipment exclusions, additional duties and possibly penalties. Better to identify and rectify problems than defend them in a criminal or civil penalty case or forfeiture action.

This process will also identify the type of records that your company should maintain to support your import program and any special reduced duty programs in which your company is enrolled.

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Ivan Dilly has more than 20 years of experience working on issues covering all industry segments, in a highly complex and global business environment, and with dedication to the aeronautical, aerospace and defense markets.

For more than a decade, he took over the legal/compliance management in South America for a leading European Group with businesses in the civil aerospace, defense and power systems areas. He holds a master's degree (LL.M., Business Law) from the University of California, Berkeley – School of Law/USA, an MBA from FIA – Business School SP, and specialisations from Stanford University/USA, Harvard Law School/USA, Hague Academy of International Law/Netherlands, PUC-SP/Brazil and Mackenzie University/Brazil.

He was recognised by Legal 500's GC Powerlist for Brazil as one of the most influential and innovative lawyers (2016), and by Legal 500's GC Powerlist Brazil: Teams as one of the best legal teams in Brazil (2017 and 2019).

He is appointed exclusive member of IR Global for Aeronautical Law in Brazil, member of the International Bar Association – IBA, of the International Relations Committee of the OAB/SP, of the IAPP (International Association of Privacy Professionals). He is a pilot (ANAC – DAC).

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We have more than 20 years of experience working in the global aerospace, aviation and defense industries.

QUESTION ONE

What are the most important steps to identifying commercial opportunities before entering a new market – and what are the most common commercial mistakes you have seen businesses make?

In his welcome address to new students in 2021, Harvard Law School Dean John Manning argued that lawyers and the legal profession will be central to resolving challenges facing the nation and the world today. He adds that being a lawyer is a superpower. But how can lawyers play this role? In today's business environment, technological and scientific advances shorten life cycles of products and services, business models change, and new competitors appear from outside the industry. The impacts are everywhere, including the legal market: the days when a firm's name alone could attract new clients are long gone. Emphasis has moved now to the expertise of the individuals: every industry has a need and its own special nuances that make it different. Those nuances are where a niche attorney becomes so valuable.

Identifying commercial opportunities is the key ingredient for the success of a new market entrant. It is important to not only conduct a thorough study of the market and identify potential barriers to entry, but to have a good picture of who your ideal clients are: what is important to them, where to find them, how to attract them, how best to serve them, and more.

It's also vital to learn about the competition: market sizes, market shares, growth rates, unit prices, per capita sales and brand positioning. A proper and in-depth inquiry into local laws and policies, to be conducted by local counsel, is also crucial at this stage, as it impacts both strategy and allocation of investment.

The most common mistake businesses make in this regard is to act in haste and not put enough time into studying the market. Another common error is to focus completely on the local market, and not the global scenario. Having information on the size of the market and competitors in other countries will help to estimate business potential: in today's connected world, it becomes imperative to have an all-round view of the market with respect to its standing in the global economy and identifying potential threats, not only within the market but also from outside the local region.

QUESTION TWO

Local market intelligence is vital to exploring commercial viability in a new market. How has Covid impacted access to this information, and how can businesses make fully informed market entry decisions as Covid disruptions continue?

There cannot be enough emphasis on the importance of local market intelligence. However, the vantage point from which a traditional study would occur needs to evolve. Covid has led to unprecedented disruptions to daily life and the impact has trickled down to each and every sector. Taking the aviation sector as an example, the crisis has been the most challenging in any airline's history: a major Brazilian airline reduced its flights from 1000 a day to just 70.

There has been a substantial impact on access to local market information and its reliability, but these obstacles can be strategically overcome. Electronic media and e-commerce have received a boost, which has increased the availability of information online like never before. If trustworthy sources can be identified, it can result in obtaining high quality information in an efficient and timely manner. Another possible solution is the collaborative effort combined with a local analyst/economist/lawyer. The dynamics of every local market can be best understood in the context of local cultures and value systems with the help of a local counsel, which would be able to provide vital insider information, potentially leading the business to success.

QUESTION THREE

How can businesses identify and evade barriers to commercial success in a new market – from cultural and language differences to competitors and other new market entrants?

There also arises the need for businesses to identify and try to evade barriers to commercial success. A way of identifying such barriers is a study of the market dynamics with the help of a local counsel/law firm, providing a treasure of valuable information. Another means is to professionally analyze, with the help of an expert, the news and recent events for the past few years to understand how the Government and the dispute resolution mechanisms work in that particular market and how effectively businesses can resolve problems and hurdles. A law firm experienced in the field of competition/antitrust law can be of vital help in this regard and can help the business navigate barriers smoothly.

There are important aspects that help businesses navigate their way into a new market and continue to grow, like consumer segmentation/classification, situation of purchase, analysis of the competition, analysis of complementary products and services, other industries, foreign market and environment analysis. A systematic approach with due attention to these factors is important.

TOP TIPS

Scoping a new market for commercial threats

- Understand use of technology and e-commerce in the relevant market. Brazil is the country with the fifth largest online population in the world and its Chamber of Deputies has recently approved a Bill to regulate Artificial Intelligence: viewed globally as the technology of the future. The Bill is still awaiting Senate approval.
- Understand compliance with local and international norms, with potential to upgrade as and when policy changes are introduced. Local lawyers/law firms are key to this process and their involvement is vital for the business to proceed with confidence.
- Engage an entrepreneurial lawyer who can understand and manage legal requirements with a commercial focus. It is essential to include lawyers capable of presenting potential projects to agencies, authorities, relevant Governments and commercial ventures, who can effectively communicate targets and potential contributions by the business to the local market/economy.
- Adopt and suggest potential and effective dispute resolution mechanisms, such as mediation and arbitration, to avoid jurisdictional disputes and delays by local Courts or adjudicatory authorities. Local lawyers/law firms in Brazil can assist in this as many specialise in this area of practice. They can also help the business to find other industries in the local market that align with their areas of interest.
- Plan in a futuristic manner, especially keeping in mind environmental needs and adoption of human friendly techniques. The Brazilian government encourages adopting green and clean technology like renewable sources of energy.
- Provide a breath of fresh air in the potential market by innovation and modernisation. Consumers in Brazil are well connected onlin. Research and development-based teams, along with lawyers conversant in technological aspects in the local market, could propel the business to unforeseen levels of success.

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Kate is an experienced financial services, banking and finance professional. As the Partner in charge of the Banking and Funds practices of Voisin, she advises on the establishment of investment vehicles ranging from single investor/corporate group structures to retail collective investment funds.

Kate's regulatory and funds practice specialises in the legal, regulatory and corporate governance aspects of investment vehicles, collective investment funds, holding companies and managers. Kate and her team aim to provide practical, honest solutions to what are often complex legal and regulatory issues. They aim to take the worry out of setting up these structures.

Once established, Kate and her team aim to provide a seamless transition to the maintenance of the structure providing ongoing regulatory advice if required, together with advice on the financing of the structure practical, pragmatic advice on any required restructuring as and when required.

Kate's banking and finance practice focusses on advising on large corporate borrowing transactions, predominantly relating to commercial real estate groups borrowing from conventional lenders and debt funds. The debt is regularly £100m+, often involves 30+ corporate entities and multiple lenders providing senior and mezzanine debt at various points across the group.

Voisin is one of Jersey's leading law firms, with particular expertise in litigation and commercial matters, including the use of Jersey trusts, companies and partnerships, banking, structured finance and funds.

We are large enough to handle the most complex commercial transactions yet small enough that you will know our staff, and they will know you, by name. We pride ourselves on translating our passion and our knowledge into a responsive, dynamic and pragmatic service for our clients.

QUESTION ONE

What are the most important steps to identifying commercial opportunities before entering a new market – and what are the most common commercial mistakes you have seen businesses make?

Clients shouldn't assume that the local legal and regulatory environment and the related market is the same as the UK and plough ahead with plans before seeking guidance and advice. Whilst Jersey is an incredibly easy place to do business, you still need to research before you make a commitment. That includes researching both Jersey and any foreign jurisdiction the entity will operate in prior to finalising plans.

Be aware of local requirements for housing and employment within the Island. Whilst these do not prohibit those who were not born in Jersey from living and working here, there are certain criteria that must be met in order to take up residence and employment. We often see clients wishing to establish a financial services businesses here which will be administered by a local service provider, only to mention later that they will wish to move here in future years once the business is established. Establishing a physical office here is different to establishing a business which sits within a local administration firm. Setting out your goals to your advisors at the outset can save valuable time in structuring the transaction.

For clients looking to establish a business here administered by a local service provider with external investors/clients, the process is far easier. However we often see clients who have researched Jersey well but not considered that there may be external requirements marketing into other jurisdictions for example funds into the EU. All of the issues are surmountable however an early awareness is key, as is explaining your vision to your advisors.

QUESTION TWO

Local market intelligence is vital to exploring commercial viability in a new market. How has Covid impacted access to this information, and how can businesses make fully informed market entry decisions as Covid disruptions continue?

Jersey is in a rather strong position with regard to gaining local market intelligence and thankfully Covid has had little impact upon this. Because the majority of our business comes from overseas there are a number of agencies within Jersey who have been established to assist.

Jersey Finance is often the starting point for many new entrants into Jersey, especially those in the financial services or digital areas. Whilst there has been some impact to the ability to meet up with people from Jersey finance, their international offices in Dubai, Hong Kong and New York as well as international visits (albeit less frequent than pre Covid) have maintained a presence and with the use of video conferencing this resource is still accessible to all even if you can't travel to Jersey.

For those looking to establish a real presence in Jersey (so not a business situated within an administrator) Locate Jersey provides information for businesses moving to Jersey and assists with the required applications to commence a business here. They also put the business in contact with local experts and trusted service providers, arranging meetings with governmental bodies if required and agencies to assist the move to Jersey (e.g. relocation experts) or any other assistance that is required to ease the process.

Furthermore the Jersey Financial Services Commission are happy to answer queries and take calls so that potential businesses can gain insight into whether an application to establish a regulated business would be considered favourably. Add to that the many trade associations and groups, and there is a wealth of information in Jersey available to any party looking to establish themselves here.

"Jersey Finance is often the starting point for many new entrants into Jersey, especially those in the financial services"

TOP TIPS

Scoping a new market for commercial threats

- Find a trusted advisor either in the jurisdiction you are looking to establish yourself in or with contacts in that jurisdiction. Be brave enough to be choosy in your selection of trusted advisor.
- Ask for introductions to local trade bodies, associations, regulators and even potential competitors so that you can gauge the market.
- Even friendly deals require due diligence and documentation. If you are being advised to either carry out a piece of due diligence which you feel is unnecessary, or enter into a document which you believe is too complex ask questions, find out why and understand the pitfalls of not following the advice.
- Never underestimate the power of employing someone locally with knowledge of the jurisdiction you are setting up in appropriate to the business.

QUESTION THREE

How can businesses identify and evade barriers to commercial success in a new market – from cultural and language differences to competitors and other new market entrants?

Find local trusted advisors and research before making firm plans or offers on a business. If there are language barriers or cultural issues, think about approaching a trusted professional in your own jurisdiction who has contacts or offices in the jurisdiction where you are looking to establish the business.

By appointing a trusted advisor in those jurisdictions you can then gain access to information you require, be that via introductions to trade bodies and associations, others in the same market, or governmental and regulatory bodies. Your local advisor will know the people to talk to and the pitfalls of doing business in that jurisdiction. You can also ascertain the current market size and how many competitors have looked to establish themselves, and of those how many have gone on to do so and how many have remained. Once the business has been established, insight can be gained by employing local people from that jurisdiction. We often see businesses fail because they people try to run them from outside Jersey and fail to adhere to local laws and regulation.

When purchasing a foreign business, take the time to understand the processes involved in purchasing that business which protect you, as purchaser. This applies equally to any jurisdiction (we have encountered issues arising from this when acting for purchasers purchasing businesses overseas using a Jersey vehicle, for example, not realising that shares cannot be transferred in the UK without dealing with stamp duty). The friendly deals are the riskiest. Listening to your advisors could save you a considerable amount of aggravation in the future.

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Aaron P. Allan, a Senior Partner in Glaser Weil's Environmental & Energy Department, has litigated cutting edge and "bet the company" cases for over 20 years, for a diverse range of business entities, including significant environmental and insurance coverage cases, toxic tort cases and real property litigation matters.

Aaron has long represented water utilities accused of delivering contaminated drinking water and many other companies subjected to claims brought under CERCLA and other environmental laws. He has also represented manufacturing companies, government entities, shopping centres, hoteliers, oil companies, solar energy companies, financial institutions, trustees and real estate developers.

Aaron also helps clients manage environmental due diligence, environmental site remediation activities, and liability risks associated with the sale, purchase or foreclosure of environmentally contaminated properties.

Matt Jann, an Associate in Glaser Weil's Corporate Department, maintains a broad corporate transactional practice with a focus on the purchase and sale of businesses and securities.

Matt is experienced in all aspects of the purchase and sale process beginning with due diligence and the preparation of letters of intent, to the negotiation and documentation of purchase agreements and ancillary transaction documents, to the review and preparation of fairness opinions, and finally to post-closing dispute resolution.

Matt has represented clients in the successful purchase and sale of businesses in a wide range of industries, including medical practices, construction, traditional and green energy, manufacturing, environmental systems, IT services, real estate holdings, food and liquor manufacturing and wholesaling, e-commerce, and ad-tech and marketing services.

Myriam Biz, an Associate in the firm's litigation and real estate departments. Myriam advises client in litigation matters pertaining to contract disputes and employment law, including wrongful termination and sexual harassment.

In real estate, she focuses her practice on leasing transactions for both individuals and businesses.

Myriam earned her LLM at Florida Coastal School of Law. She received her Master's in business/taxation at INSEEC Business School and a Master's in business law at the University of Paris Nanterre. She also graduated from the University of Montesquieu with a B.A. in law.

Glaser Weil, based in Los Angeles, is one of the country's premier full-service law firms. Advising a roster of diverse, selective clients — from startups and large global corporations, to local and national landlords and developers, to high-profile entertainers and other well-known individuals — Glaser Weil represents clients' interests with an unprecedented level of dedication and commitment.

"Financial, cultural and legal issues may all serve as barriers to successfully entering a new market"

QUESTION ONE

What are the most important steps to identifying commercial opportunities before entering a new market – and what are the most common commercial mistakes you have seen businesses make?

Entering a new market requires both agility and preparation to effectively deal with unforeseen challenges. While having a strong business concept is a necessary foundation, research and preparation are both essential to success: having a "great idea" alone will not suffice.

When evaluating a commercial opportunity, the focus will differ among companies depending upon their size, industry, growth potential and goals. But success will invariably depend on a company's ability to accurately assess a commercial opportunity before entering a new market. One of the most important initial steps is to conduct a thorough market analysis. This involves collecting data to learn about market dynamics in the targeted industry and analysing the company's long-term prospects. By conducting comprehensive market analysis, a company will significantly increase its ability to determine whether a project merits going forward, under what parameters, within what timeframe and with what legal constraints. Anticipating and identifying the issues and challenges that a company is likely to face will allow management to set its goals and priorities based on research and preparation, rather than simply enthusiasm and a great work ethic.

Companies often make a mistake in performing this analysis prior to "getting the lawyers involved", in order to avoid the expense of engaging legal counsel until the commercial opportunity is fully vetted. But more often than not, this approach results in an incomplete and inaccurate analysis of the risks and opportunities, costing the company far more than if it had engaged its legal team at the outset. Even in the early vetting process, the legal team can and should be engaged to provide insight on potential legal issues.

QUESTION TWO

Local market intelligence is vital to exploring commercial viability in a new market. How has Covid impacted access to this information, and how can businesses make fully informed market entry decisions as Covid disruptions continue?

Around the world, Covid-19 has impacted every aspect of our lives, including our access to information related to local market intelligence. In the pre-Covid era, market data research was analysed based on a relatively stable set of historical circumstances, taking into account potential recessions, and other political and socio-economic factors. Covid-19 has upended that stability, reduced the value of that history, and turned upside down many of our understandings that were formerly drivers for business and market analyses. Much of the data collected by businesses during the pre-Covid era is no longer reliable and this may seriously impact the decision-making processes of businesses. In fact, almost two years into this pandemic, market analysts are still struggling to predict the path of the virus on business markets.

With information being imperfect and sometimes unavailable, many businesses that depended on market research were unable to thwart the effect of the virus, successive lockdowns and job losses, that slowed sales and the economy. As Covid disruptions continue, it appears that one way for businesses to make informed market entry decisions is to invest in more sophisticated, up-to-date market analysis and legal strategies. The volatility of the market due to the pandemic has created greater uncertainties for businesses and requires all economic players, including market analysts and legal experts, to identify their respective strengths and weaknesses, to adapt to new market conditions, and to identify new markets. Businesses are now required to become new market shapers and to be more innovative and creative in developing new business models. As the pandemic has stalled many business opportunities, it is crucial for businesses to keep developing new strategies to expand their current market or to enter new markets in the hope of reaching a broader customer base. In addition to developing these new business strategies, it is more important than ever for companies to be aware of any new legal requirements and issues they will face in any new market, and to develop necessary response strategies.

QUESTION THREE

How can businesses identify and evade barriers to commercial success in a new market – from cultural and language differences to competitors and other new market entrants?

Financial, cultural and legal issues may all serve as barriers to successfully entering a new market. Efficiencies present in an established market will almost certainly be lacking as a company transitions into a new location, and businesses should adopt a clear strategy to avoid unnecessary costs. Failing to consider cultural differences can also be devastating. For example, when Starbucks decided to expand its business by entering the Australian market, it ignored the Australian culture and Australians' relationship to coffee. This led Starbucks to close 90 stores after entering the Australian marketplace. A business can enter a new market with a brand-new or existing product, but in either case, the business will have to show the audience that it is offering something different to existing competitors in the market.

Integrating a legal strategy is crucial to ensure the best business structure to account for tax and potential liability issues, as the majority of legal and tax issues arise while entering a new market. For example, Google entered the European market over 10 years ago while ignoring European antitrust rules. While Google seems to have down played the legal constraints of the European market, the European Commission found that Google abused its market dominance by imposing restrictive clauses in contracts with third-party websites, preventing competitors from placing their search adverts on these websites. In 2018, Google was ultimately fined $1.7 billion for breaching EU antitrust rules. This example shows the importance of taking potential legal and structural issues into account at the inception of pursuing a new market business opportunity.

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Adriana Posada – Velásquez is Partner, Founder and Director of A&C LEGAL. Her main areas of practice are corporate law, commercial law, mergers, acquisitions and transnational reorganisations, litigations and compliance investigations.

Lawyer from Universidad Externado de Colombia (1991), with a Specialisation in Contractual Law and Business Juridical Relations (1999) from Universidad Externado de Colombia, a Diploma in International and American Law from the Centre of American and International Law, Academy of American and International Law, Dallas Texas, (2003), a Master's in Business Administration, from University of Phoenix (2010), and a Course of Renewable Energy Law, Universidad de los Andes (2018).

A&C LEGAL is a law firm incorporated in Bogotá, Colombia in 2009, as a solution for organisations that require high-quality legal services, and also paralegal support at a reasonable cost, with qualified staff always available.

A&C LEGAL's commitment is to minimise the risk inherent in the operations of its clients and assist with the implementation of safe practices for the benefit of shareholders, employees and the community in general. The firm is also committed to the integral development of its employees; whose purpose and focus is customer service.

Under the Business Process Outsourcing (BPO) model, A&C LEGAL functions as a law firm in the client's offices, for which a team of lawyers and paralegals is assigned to attend the day-to-day legal requirements of clients, in areas such as corporate, contractual, commercial, labour, administrative, litigation, and policy and procedure support. The firm also takes care of legal filing, answering of communications and procedures before different entities and, in general, of the administration of the legal area of the companies.

QUESTION ONE

What are the most important steps to identifying commercial opportunities before entering a new market – and what are the most common commercial mistakes you have seen businesses make?

To identify if a potential business opportunity can be materialised in a market, we suggest analysing the following aspects:

- Analysis of the sector in the market: if it is incipient, growing, at its peak or in decline.
- Verifying how regulated the sector is in the market: if permits, registrations, authorisations or special qualifications are required to carry out the activity.
- Know the regulations on foreign investment and the impacts that it may have on the business model to be developed.
- Analyse the distribution chain to reach the final consumer and the regulations for all activities within the links of the chain.
- Analyse competitors and consumers and local regulations on competition, consumer law, marketing, advertising and other related matters.
- Protect intellectual property in the new market (registration of brands and names).
- Consider national and municipal taxes, fees, contributions, labour costs, among others.
- Know the regulations on transparency, antibribery and anticorruption, money laundering and terrorist financing prevention, and implement practices from the beginning of the operation that allow the identification and management of the risks associated with these matters.
- Know the local regulations on data privacy and implement practices that allow managing risks in this area.
- Know the regulations on waste treatment and other environmental regulations.

The most common error we have seen businesses make is the lack of willingness to understand the risks that the new market represents and insist on observing the new market based on what they know about the countries they already operate in. This prevents an effective risk planning and minimisation strategy from being carried out, which will result in the company having to deal in the future with administrative investigations, lawsuits from competitors, consumers, employees and other similar matters.

QUESTION TWO

Local market intelligence is vital to exploring commercial viability in a new market. How has Covid impacted access to this information, and how can businesses make fully informed market entry decisions as Covid disruptions continue?

Covid has allowed the market to adapt to other ways of collecting data in real time. The information technologies and the observance of data privacy regulations are fundamental for these purposes.

Regulated markets in Colombia – for instance, hydrocarbons and pharmaceutical sectors, among others – have established ways of reporting sales, prices and other data that are a source of valuable information to explore business viability. Likewise, there are associations in certain sectors of the economy in which the associates report reliable information that results in another important source of information. On the other hand, the economic and financial data of the government, issued by the National Department of Statistics (DANE) are available to citizens for consultation and analysis. Thus, all this data should be consulted for business opportunity initiatives that allow a better overview of the Colombian market.

For non-regulated sectors, or those in which there is no official or private data, market research experts are essential. They have been adapting to the changes brought by the non-physical presence of their researchers for the compilation of data. This, however, does not significantly impact data analysis, which is ultimately what is important for market decision making.

All in all, I believe that every day market intelligence is becoming more prepared to operate, with or without disruption by Covid. It is all about having the technological tools through which the information can be collected in real time and data analysis can be performed. Here, Big Data – which allows analysis and interpretation of large volumes of data – is essential for decision-making.

QUESTION THREE

How can businesses identify and evade barriers to commercial success in a new market – from cultural and language differences to competitors and other new market entrants?

Companies that want to enter a new market can rely on the expertise of expert competition lawyers, who, by definition, study the entry barriers that a business has in a market and must have a panoramic vision of all the aspects that must be considered to identify and manage such entry barriers, which includes all regulation not only in competition law, but in the other branches that we mentioned in the preceding answer.

Business associations are also a valuable source of information that assist their associates in gaining awareness of the problems of each sector and how to deal with them.

The most important thing, in my opinion, is the profile of the people or the team that companies entrust to opening new markets, who must have very specific skills that encompass much more than commercial ability, financial and deep knowledge of the goods or services that the business will offer to the new market. They should also have the disposition to understand the risks that the new operation represents, have the creativity to establish strategies of risk mitigation, be able to recognise cultural differences and understand how the business can adapt to them including, as much as possible, the effective management of the new country's language and, hopefully, the knowledge of its culture, and of the "subcultures" that each region in the interior of the country possess.

TOP TIPS

Scoping a new market for commercial threats

- Identify the sources of information for all the relevant aspects that will be mentioned below, and define an effective data administration and management strategy, which allows having sufficient, reliable and timely information for decision-making.
- Identify competitors or potential competitors, and other stakeholders – including authorities – and have a clear policy of interaction with them, in compliance with competition law, prevention of anti-bribery and anti-corruption rules, data privacy regimen, and any other regulation applicable to each category.
- Have an allied law firm that has the ability to provide updated information on new regulations that may in any way impact or affect the operation of the business, including: new taxes, fees, contributions, new regulations or modifications to existing ones, either specific to the particular business, or applicable to the new country's market, including without limitation, labour, corporate, commercial, environmental, exchange and customs aspects.
- Identify all aspects of the chain of distribution of products or placing services on the market and be attentive to changes, regulations, and situations that may affect them.
- Plan the operation with a perspective that anticipates change.

"The most common error we have seen businesses make is the lack of willingness to understand the risks that the new market represents"

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Stéphane Bertouille has a law degree from the University of Louvain, a licence in Economics from the same institution, and an LLM in Corporate Law from New York University.

He started his own law firm, Bertouille & Partners, in 1991 and in 2005 the firm merged with Lawfort and joined Everest in 2007. He is now the managing partner of Everest. Stéphane Bertouille practises international tax law, tax litigation, corporate due diligence and transactions and corporate finance.

Stéphane Bertouille is fluent in French, Dutch and English.

Everest is a law firm specialising in legal services for businesses and corporations. Everest comprises a lot of a team of lawyers, each highly specialised in those fields of law with which companies are faced daily.

Its legal services focus on the things that truly matter to clients: quality, economy, expertise - and a regional and an international focus in which client's business takes centre stage. Its lawyers have practised for years in renowned international law firms, where they have built up their reputations, counselling large corporations as well as small and medium-sized enterprises. In addition, several lawyers lecture at university.

Everest has offices in Brussels, Ghent and Antwerp.

QUESTION ONE

What are the most important steps to identifying commercial opportunities before entering a new market – and what are the most common commercial mistakes you have seen businesses make?

From a legal standpoint, Belgium is a very stable country. The rule is contractual freedom, which allows for provisions in contracts that suit the foreign investor, subject to abiding by EU provisions that could restrict this contractual freedom.

In other words, Belgium is pretty much a no-surprise country when choosing to enter its market, except for the law of 1961 on exclusive distribution of unlimited duration and the B2B legislation on unfair trade practices in effect since 1st September 2019. The most common mistakes we have detected are related to:

- The setting up of an inadequate distribution system, whereby the foreign producer uses a distributor to spread his goods throughout the Belgian territory and – at some point – decides to enter the market with his own sales force.

This could cost him a fortune if he has developed a long-term relationship with his distributor, who over the years became quasi-exclusive, with or without a written agreement (even providing for a foreign law to apply to the agreement and even if the contract is subject to arbitration). Indeed if the termination prior notice-termination indemnity in lieu of prior notice is insufficient, it could cost him up to three years semi-gross profit of the distributor, plus up to two years of the same to compensate his specific investments and redundancy cost of the workforce. This has been especially true in the automobile sector where huge sums have been allocated to distributors by the courts. To be noted that distribution agreements of limited duration are deemed to be unlimited after two renewals.

Under the pressure of the EU Court of Justice, the Belgian courts tend to be less generous, but the law is still there.

The solution – if realistic in practice – is to always work with contracts of limited duration and terminate them after the second renewal and work with agents/your own salesforce thereafter.

- Franchise agreements: when the legislation relating to pre-contractual information (provide business plans to the franchisee, etc) has not been properly disclosed, it can lead during the first two years to the cancellation of the agreement and reimbursement of the franchise fees to the franchisee.

- The new B2B legislation allows any contracting party to go to court and claim the cancellation of contractual provisions that are too unbalanced. We do not have case law available yet, but foreign suppliers should be careful when imposing extremely strict conditions in their favour, and always provide for an arbitration clause in case of a dispute to avoid the spreading of negative precedents.

QUESTION TWO

Local market intelligence is vital to exploring commercial viability in a new market. How has Covid impacted access to this information, and how can businesses make fully informed market entry decisions as Covid disruptions continue?

Access to market intelligence has become much more difficult during the Covid-19 pandemic. The main reason for this difficulty is the rapid change and adaptation of the market. While retail businesses were suffering from the pandemic, e-commerce was booming.

In order to make fully informed market entry decisions while Covid disruptions continue, one must keep an eye on political developments. There are federal measures but also regional aids to help the businesses that had to shut down because of Covid. It is important to check the level of solvency of local clients and their potential future.

> **"There are several layers of regulations in Belgium but not many differences, and regional legislations are (most of the time) exactly the same"**

QUESTION THREE

How can businesses identify and evade barriers to commercial success in a new market – from cultural and language differences to competitors and other new market entrants?

Identifying barriers is not very complicated in Belgium. But, as always, the devil resides in the details and several local regulations should be considered: administrative requirements, advertising, labour law, and terms and conditions of sale are among the number of issues that need to be reviewed carefully before entering the market.

There are several layers of regulations in Belgium as it is a federal system but not many differences, and regional legislations are (most of the time) exactly the same. An example of this is the work permit process: it is an integrated process with similar requirements wherever the application is filed.

Languages should not be seen as a barrier but more as an opportunity: many people speak several languages and the public does not necessarily care in which language a product or service is promoted.

Although language differences are a fact, the cultural differences are very limited among communities in Belgium. The consumer's taste is generally the same and businesses that are successful in one part of the country are also successful elsewhere in the country.

TOP TIPS

Scoping a new market for commercial threats

- Entering the Belgian market requires a thorough and preliminary examination. Although it is a country offering many opportunities, one must also keep an eye on the following issues.

- The Belgian market comprises various linguistic communities (Flemish, French and German) and regions (Flemish, Walloon and Brussels-Capital) with different language legislations. These are really important in B2C relations but are also relevant in B2B (for example: all labour documents and labour-related communications with the employees must be conducted in either Dutch, French or German depending on the location of the employer's operating unit). Another example is the environmental permits that differ from region to region.

- Belgium has a protective labour law with stringent language regulations. There is low professional mobility because of high minimum wages and high levels of protection offered by labour law provisions and the social security system.

- When building his distribution system/network and drafting his B2B contracts the new foreign entrant should be careful when drafting the agreements to be put in place and consider arbitration for dispute resolution.

Real Estate

IR Global's Real Estate members are not just content to be part of the industry but lead it through innovation. Their cross-border offering covers Real Estate from conveyancing and notary services through to large deals across a range of sectors. They identify projects for investments in their own jurisdictions and have invaluable contacts with investors and funds, making them indispensable to clients.

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Manishi has recently founded Anhad Law and has over 29 years of experience, advising foreign multinationals and major Indian corporates on company law, labour and employment law, M&A and general regulatory matters.

He is a labour and employment law specialist, advising on a range of matters, including employment audits, whistle-blower investigations, company policies and/or handbooks, employee termination and transfer, the closure of establishments, the transfer of business and undertakings, sexual harassment complaints, employer and employee rights and matters involving unions. He is also known for his involvement in investigations and/or enquiries concerning employees including in matters of misconduct by employees and/or associated parties. M&A is also an area of specialisation, and Manishi has advised several clients on complex joint ventures, acquisitions including business/assets transfer, corporate restructuring and shareholders agreements in particular.

Manishi has considerable experience across sectors, including manufacturing, services, automobiles, aviation, banking, chemicals, commerce, electronics, FMCG, information technology, paper, packaging, pharmaceuticals, ports, real estate, retail and telecommunications.

Anhad Law is a modern law firm. The word Anhad means "limitless" and the name has been adopted intently, as it is best suited to describe the enormous potential of the Firm and the professional competence of its members.

Some of the key practice areas in the firm are Dispute Resolution, Labour and Employment, M&A (Private)/ Corporate-Commercial, Real Estate and White-Collar Crime /Anti-Bribery and Foreign Direct Investment, etc.

Each practice area at Anhad Law is represented by the Partners who have vast experience and expertise to deal with the matters falling within their practice area domain. Some of the key members of Anhad Law are widely recognised for their experience and expertise in their chosen practice area, and have been recognised by Chambers and Partners, Who is Who Legal, Legal 500 and Asialaw, etc.

Being driven by innovation, we adopt an unconventional approach to legal practice. We understand evolving legal needs of conventional and new-age businesses. We strive to offer tailor-made legal solutions to our clients, giving due consideration to a client's business and markets. We proactively deliver innovative and practical legal solutions, that are backed by extensive legal research, for ensuring strict legal and regulatory compliance.

QUESTION ONE

With international travel still facing disruption due to Covid, what's your advice to businesses attempting to manage overseas real estate processes as they enter a new market?

In the case of foreign entities looking at setting up operations in India, at first the foreign entity is required to establish its presence as: a liaison office; branch office; a subsidiary under the Companies Act, 2013; or as a limited liability partnership, and is allowed to acquire real estate only for its business purposes (save and except acquisition of agricultural land).

Real estate is a tangible asset and when acquiring rights over an immovable property, or while planning to invest in real estate, a physical on-site inspection is a must. This exercise proves beneficial to verify the extant, location, surrounding, vicinity, actual condition as compared to the description on-paper, accessibility and travel time etc.

In it not uncommon for foreign entities to engage services of a reputed real estate broker while it is in the process of establishing legal presence in India, to help identify a property suitable for its requirements. Typically, a broker becomes entitled to commission on successful closure of the transaction.

It is rather customary for foreign entities to engage the services of a reputed law firm to help with drafting and negotiating a letter of intent, which typically captures the broad understanding regarding commercial terms and other basic framework regarding the transaction being contemplated between the parties. The letter of intent is usually a non-binding instrument, and further action on execution of a binding agreement is usually subject to: no adverse findings as an outcome of due diligence; parties agreeing to the form and content of the definitive deed; and the foreign entity being granted approval for incorporation of business presence in India.

Cautious and judicious negotiations at the stage of letter of intent go on to ensure that the transaction heads smoothly in the right direction and no party is compelled to remain in the transaction without free will and want. In case the incorporation of Indian entity is underway, the foreign entity generally reserves the right to assign rights and obligations under the letter of intent in favour of the Indian entity, once it is lawfully incorporated.

"When acquiring rights over an immovable property or planning to invest in real estate, a physical on-site inspection is a must"

QUESTION TWO

Are there any barriers to cross-border real estate transactions in your jurisdiction, and how can businesses overcome them? Do you have any examples of how you have helped clients to do this?

As per the FDI policy, FEMA and regulations framed thereunder, 100% FDI is permitted in construction-development projects (which would include development of townships, construction of residential/commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure, townships), with certain conditions like lock-in period for investment, restriction on transfer for such period, etc. 100% FDI is also permitted in completed projects for operation and management of townships, malls/ shopping complexes and business centres.

However, FDI is not permitted in an entity which is engaged or proposes to engage in "real estate business", construction of farmhouses and trading in transferable development rights (TDRs). "Real estate business" means dealing in land and immovable property with a view to earn profit.

The definition of "real estate business" excludes earning of rent/income on the lease of immovable property, not amounting to transfer. Further, real estate broking services do not amount to real estate business and 100% foreign investment is allowed in said activity, under automatic route.

As per the FEMA and regulations framed thereunder, sale and purchase of "agricultural land" by a resident outside India is strictly prohibited. As such, foreign citizens are not permitted to directly acquire real estate agricultural land, or farmhouse or plantation property in India, without prior permission of the RBI. However, non-resident Indians and foreign citizens of Indian origin can acquire agricultural land, or farmhouse or plantation property, by way of inheritance of those agricultural lands, from persons resident in India.

This restriction is not applicable in case of acquisition of agricultural land by an Indian company that has foreign investments, provided that the acquisition of agricultural land by the Indian company is for undertaking bona fide business activity consistent with India's FDI policy. Since agricultural land is a State subject, State Governments are free to make laws in this regard. While the States of Maharashtra only lets agriculturists acquire agricultural land, other states like Delhi, Goa, Bihar, Tamil Nadu and Karnataka, both individuals and companies are permitted to acquire agricultural land for carrying on agricultural activities.

QUESTION THREE

What are the tax implications for businesses purchasing real estate as part of their market entry? How can they make sure they are structuring their real estate deals effectively to mitigate any risks or financial repercussions?

Immovable property owned by an Indian company can be acquired either by way of acquisition of the business (by purchase of shares of the Indian company) or directly by purchasing the asset in the form of an immovable property.

The transfer of assets by way of a slump sale attracts stamp duty (when the entire business is transferred as a going concern for a lump-sum consideration). Stamp duty implications differ from state to state. Rates generally range from 5 to 10 percent for immovable property, usually based on the amount of consideration received for the transfer or the market value of the property transferred (whichever is higher). Depending on the nature of the assets transferred, appropriate structuring of the transfer mechanism can possibly reduce the overall stamp duty cost.

In India, a foreign purchaser can choose from different acquisition options generally available. Direct investment by the foreign parent company, acquisition though a local holding company in India and investment through an intermediate holding company (resident outside India), are some of the options/vehicles often availed by investors acquiring real estate in India, and often the decision is influenced based on tax and regulatory factors.

We recently advised one of our clients (who is a US-based real estate investment fund) to establish an intermediate holding company in Cyprus, and the Cyprus entity was used by the client (as foreign portfolio investor) to route investments from the US, into India. This was suggested to minimise tax exposure for the client in India. In a normal situation, an investor would be subjected to withholding tax and capital gains tax, at time of sale of the real estate, before being permitted to repatriate proceeds from sale of asset/immovable property, out of India. This was done to allow the client to take advantage of favourable tax treaty (DTAA) between Cyprus and India, prevalent at that point in time, whereby the client enjoyed full exemption from imposition of any capital gains tax that accrued in India.

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"Tax deductions available to business and real estate owners have been the principal way to lower taxable income related to the asset"

Messner Reeves provides a full range of legal services to a diverse group of clients from Fortune 500 companies to individual entrepreneurs. We are as excited about working with small business owners as the largest corporations because, for us, it's all about maximising potential. We develop the legal strategies that can help propel the minor operation to the next level or the next 10 levels – whether that means doubling in size or becoming a worldwide, publicly traded enterprise.

Messner Reeves has offices in Colorado, New York, Nevada, California, Arizona and Utah.

QUESTION ONE

With international travel still facing disruption due to Covid, what's your advice to businesses attempting to manage overseas real estate processes as they enter a new market?

Prior to the impacts associated with the Covid-19 pandemic, businesses had already sought ways to streamline, automate and create efficiencies in their processes – both for existing markets and potential expansion areas. This includes reliance on market-driven analytics and "instant" communication (i.e. telephone calls, electronic messaging, etc.), though hands-on work remained a primary function behind the data and relationships. Through Covid, additional avenues emerged such as video-conferencing and virtual/AI experiences – that even two years ago were disfavoured over traditional in-person practices. These are now considered routine and standard.

Businesses should think about ways that these now crucial pieces of technology can alleviate concerns that may have existed during pre-Covid times where decisions were not made and steps not taken without key personnel being on the ground to vet out locations, markets, support staff, agents, etc. Like any disruption in the industry, a re-focus on roles and responsibilities is an easy method to incorporate such change. Where a CEO, CDO or COO previously was required to walk every potential site and have lengthy sit-downs with regional development coordinators on market feasibility, a better solution at this stage is the conduct much of this virtually, and then establish a check-and-balance process where the trusted people on the ground who can perform and report on those duties previously under the purview of the officers. While personal visits and in-person discussions may still ultimately be required, developing a system where much of the initial work has been delegated to others closer to the new market will ensure that the better markets are vetted and entry is more efficient without wasting further key resources.

QUESTION TWO

Are there any barriers to cross-border real estate transactions in your jurisdiction, and how can businesses overcome them? Do you have any examples of how you have helped clients to do this?

There are always jurisdiction-specific legal requirements, standards and practices that may appear to be barriers to cross-border real estate transactions. In reality, these so-called "barriers" are merely the same steps that any business would face related to a real estate transaction just like in their home jurisdiction. Likely, the very requirements that the business is used to at home are the same in a cross-border transaction, just with different names. The key then is to engage with and utilise real estate and legal professionals who handle these transactions routinely and make the process simple.

Professionals should create a master timeline document at the outset that governs the important dates and deadlines – from locating a suitable project to initial contract negotiation to due diligence and closing and post-closing matters. The professionals must be involved at every step of the transaction. Often, we find that legal professionals are only brought in once a letter of intent or memorandum of understanding is executed which may contain some binding obligations. If those obligations deal with dates and deadlines but fail to account for local practices (i.e. a non-local buyer may be unaware that in this jurisdiction a Phase I environmental study takes 60 days from scheduling to complete, making a 45-day closing impossible), the transaction becomes increasingly likely to fail.

Finally, there are a variety of requirements that may need to occur beyond the four corners of the real estate agreements or lease. Financing requirements have their own local flavor – they may involve having a local signatory or domesticated entity (an LLC for example) as the borrower. This means that a new entity needs to be structured, federal tax identification numbers obtained, bank accounts and opinion letters generated, etc. From an operational standpoint, tax revenue may need to be reviewed, credits applied for, employment practices structured, etc. With the right professionals in place (ideally an "outside general counsel" who understands the corporate vision), the success of the transaction will be easily obtainable.

QUESTION THREE

What are the tax implications for businesses purchasing real estate as part of their market entry? How can they make sure they are structuring their real estate deals effectively to mitigate any risks or financial repercussions?

TOP TIPS

Avoiding common legal and financial real estate pitfalls in your jurisdiction

- Find a trusted partner early in the process. Absent specific and local knowledge, a simple process becomes unduly complicated.
- Utilise technology where possible. From data analytics and market-based development to continual video conferencing with local professionals, such technology will mitigate much of the risk involved well before funds on spent on a project that is unlikely to succeed.
- Lean into your professionals. You have hired your trusted professionals to guide you through nuances related to the deal in the specific jurisdiction. Rely on their advice and have them help you understand how it correlates to steps you take in your home jurisdictions. Common practices with different names become less daunting when explained.
- Plan early and adjust often. Create a detailed estimated plan on timing and financial implications at the outset – and prepare to change those often as issues arise. Nothing should come as a surprise.

Tax planning is important – especially when viewed from both the local, state and federal level and as it relates to potential tax incentives and credits that may be available to entering businesses. Without planning, there may be money needlessly left on the table. Most tax planning begins with how to hold the property. There are a variety of entities in which to hold real estate, some of which are designed to limit liability (limited liability companies, series limited liability companies) and others which are designed to maximise tax benefits for investors by controlling how income from the properties are treated (i.e. earned, investment or passive income – each of which is taxed differently). Generally speaking, most real estate assets will be held in a separate special purpose entity formed as either a limited liability company or an s-corp (which is a corporation whose income is passed through to the individual shareholders for tax purposes).

Regardless of the type of entity structure, tax deductions available to business and real estate owners have been the principal way to lower taxable income related to the asset. These deductions include property taxes, property management fees, capital improvements, etc. Furthermore, certain economic conditions can likewise create passive losses which are deductible.

Operationally, many jurisdictions offer programs for tax incentives or tax credits for development, primarily based upon the number of local employees and jobs created by the entry into the market. These funds are not unlimited and have specific application requirements – identifying such opportunities early on and relying upon local experts will serve to mitigate some additional tax risks that may appear.

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Schwarz Law Partners LLP is a full-service boutique law firm, offering sound and practical professional advice in the areas of Real Estate, Business Law, Corporate, Securities and Commercial matters. Our firm tagline "Guiding Your Growth" has been followed with vigour for over 40 years. Located in Toronto, Ontario – the economic centre of Canada – the firm provides worldwide service through its associated IR Global firms in over 150 jurisdictions. Schwarz Law Partners LLP services clients of all sizes, from small family businesses to Banks, Trusts, Credit Unions and international corporations.

QUESTION ONE

With international travel still facing disruption due to Covid, what's your advice to businesses attempting to manage overseas real estate processes as they enter a new market?

Canada is one of the most vaccinated countries in the world with over 71% of the population double vaccinated. Business travellers are welcome and those with double vaccination have no quarantine period provided they follow the published requirements. This allows the opportunity for prospective purchasers or corporate representatives looking to find locations and property for their companies to come into Canada and "kick the tyres" of prospective purchases.

Notwithstanding the above, it is our advice that a local solicitor or accountant should be retained to act as a guide and advisor, in order to mitigate any unforeseen circumstances that may arise due to Covid-19. This trusted individual, supervised by his or her respective Law Society and/or Institute, would have the expertise to assist in managing assets and transactions during any disruption occasioned by Covid-19.

There are other alternatives available in every major municipal centre. Professional property managers, commercial brokers, fund managers and more abound in the Canadian landscape and the sophisticated foreign corporation looking to establish itself in Canada will have no difficulty in finding the kind of advice it needs to launch a venture and/or purchase real estate in Canada

QUESTION TWO

Are there any barriers to cross-border real estate transactions in your jurisdiction, and how can businesses overcome them? Do you have any examples of how you have helped clients to do this?

One barrier to cross-border real estate transactions that could directly impact an executive moving to Canada – who wished, either through his or her corporation or personally, to purchase their home in Canada – could arise in 'hot' real estate markets across Canada, due to governmental interference in trying to cool those markets down. Local governments have put in place transactional taxes on non-resident purchasers. This can make purchases in certain markets inefficient and costly. If the executive has obtained landed status and become a resident of Canada, these taxes would not apply.

However, this scenario can be avoided by identifying alternative markets and/or alternative asset classes which are not in the residential segment.

The Federal Government and various Provincial Governments have enacted legislation that may have direct impact on potential foreign investment in Canada. Apart from additional land transfer taxes payable by foreign corporations or beneficial owners of corporations, provinces like Prince Edward Island have absolutely refused to allow foreign ownership of land in the province. There are restrictions in other provinces on the acquisition of agricultural lands. The overriding provisions of the Investment Canada Act – for large transactions, cultural implications, international trade agreement status of the purchaser's country of residence, and how the lands and business are being acquired – need to be considered. Further, the movement of funds into Canada is subject to the Proceeds of Crime and Terrorist Financing Act. Fintrac (the Financial Transactions and Reports Analysis Centre of Canada) was established to watch all funds entering the country to ensure their legality. Therefore, source of funds and transparency are critical to any investment.

One of the most difficult transitional matters is lack of knowledge of the local landscape, which can best be overcome by having a team of Canadian professionals knowledgeable in the areas you require, who could source properties, structure the purchase, arrange introductions to finance sources and provide the legal framework necessary to paper a deal.

QUESTION THREE

What are the tax implications for businesses purchasing real estate as part of their market entry? How can they make sure they are structuring their real estate deals effectively to mitigate any risks or financial repercussions?

The most common structure for non-resident corporations acquiring Canadian real property is typically done through a Canadian corporation. Ownership of the Canadian corporation is generally held by the foreign corporation making the investment. Foreign corporations will organise their affairs according to the Tax Treaty that is applicable (if one exists) between their home jurisdiction and Canada.

Taxation of real property (rental and disposals) is always sourced in Canada, given that real property is situated within its jurisdiction. Canadian real property is considered Taxable Canadian Property (TCP) under the Income Tax Act (Canada) (the "Act"). The rate at which the TCP is taxed will depend on the structure of the purchaser (corporation, trust, etc.) and where the TCP is located within Canada. The withholding tax, if any, will be linked to the purchaser's country of residence. Repatriation of earnings to the foreign parent will attract Canadian withholding tax that is typically in the range of 5% - 25%. US corporations eligible for Treaty benefits will typically be subject to 5% withholding tax on distributions out of the Canadian subsidiary. Foreign corporations in other jurisdictions will need to consult their professionals to make the determination.

Capitalising the Canadian purchaser corporation by the foreign corporation will require an adequate ratio of debt and equity, to ensure the Canadian thin capitalisation (thincap) rules are onside. Most often, foreign investors inadequately capitalise the Canadian entity with debt, resulting in significant tax consequences. Section 18 of the Act requires the Canadian purchaser corporation to maintain a 1.50:1.00 debt-to-equity ratio. Failure to maintain adequate debt to equity ratio could result in denial of inter-company interest deductions and recharacterisation of the denied interest as deemed dividends, which carry a withholding tax liability to the foreign parent corporation.

Often, foreign investors have concerns related to the protection of their investment from unsecured creditors. One method to provide security is to have monies advanced to comply with the minimum thincap rules and allow for the foreign corporation to loan in funds to the purchasing entity, thereafter securing those loans through mortgage registration on title, general security agreements and registration under the Personal Property Security Acts of the various provinces. This will rank the foreign parent corporation in a secured position ahead of unsecured creditors.

TOP TIPS

Avoiding common legal and financial real estate pitfalls in your jurisdiction

- Retain the correct advisory team to provide the benefit of local knowledge.
- Research the target, the market and know the desired result before embarking on any action.
- Ensure all necessary financing is in place before taking any steps.
- Effect the best tax planning and minimisation strategy before entering into an agreement.
- Take all steps through an incorporated entity relating to any transaction.
- Be transparent at all steps in the process to avoid issues later.
- Be bold in a cautious fashion.

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Savvas gained extensive experience in providing tax advisory services, including advice about the formation of international tax structures, financial advisory services and general business advisory services.

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SMPadvisory | Global is an experienced accountancy practice based in Limassol, Cyprus. We're a firm of chartered accountants and registered auditors supporting entrepreneurs and businesses to achieve their financial goals.

Our partners collectively have more than 40 years of accounting experience and are some of the most advanced in their field; many of our peers and other professional firms come to our partners for advice on their most critical and complex issues. Indeed, with such vast experience behind us, you can rest assured that SMPadvisory | Global will deliver a professional and reliable service: providing peace of mind and greater profitability for our business clients, and helping our individual clients to enjoy greater financial security and success. We look to offer something beyond pure financial expertise.

We're strategists, not box-tickers.

QUESTION ONE

With international travel still facing disruption due to Covid, what's your advice to businesses attempting to manage overseas real estate processes as they enter a new market?

Many luxury villas and apartments will require a property management agreement to be executed: a service that is commonly offered by developers. This is a material agreement and attention should be given to understanding all terms and conditions to ensure that the purchaser's property is maintained and secure during any absences from Cyprus.

Managing overseas real estate in new markets is not simple. It is advisable to use the services of a real estate management company. There are three main types available:

- A specialised agency dealing with property management and rental.
- A company-developer. If you buy a new home (for example, an apartment in a complex) then it most likely already has a management company.
- Real estate agencies, many of which take over the management of the real estate purchased from them.

A wide variety of specialists are often involved in the process of managing residential property: managers, accountants, lawyers, insurance specialists, marketers and others. Therefore, by signing a contract for the management of real estate with a management company, a homeowner can guarantee that his property is in good condition. It is worth considering:

- The company's reputation in the Cyprus property market.
- Their experience in the Cyprus real estate market.
- Their specialisation in a certain segment (for example, the rental of business-class housing).
- The professionalism of the staff and their knowledge of market trends.
- Their honesty and integrity. No one can give a 100% guarantee of success: if the company's specialists reveal all of the opportunities and risks, then they are taking a responsible approach.
- Their attentiveness and attitude. A good manager tries to understand the client's requests as accurately as possible.

Despite this, no one is immune from error. You should carefully read the agreement with the management company, and engage an experienced lawyer.

QUESTION TWO

Are there any barriers to cross-border real estate transactions in your jurisdiction, and how can businesses overcome them? Do you have any examples of how you have helped clients to do this?

Any person who is not a Cypriot citizen or a citizen of an EU Member State has to obtain permission from the Council of Ministers before registering property. If no separate title deeds have been issued, it is essential to include the building license and approved architects' plans along with the application. Establish necessary permits and licenses at the outset, prior to commencing construction.

Offshore entities may buy premises for their businesses, or residence for their foreign employees. Permission to buy property must be sought from the Council of Ministers by written application and submitted by non-EU citizen purchasers after the contract of sale is signed. However, purchasers may take possession of their property without restriction. It should be noted that permission is granted more or less as a matter of course to all bona fide purchasers.

However, for peace of mind, provisions should be made in the purchase agreements to cover what will happen if a third-country national is denied permission. It could be stipulated that the purchaser can assign their property rights to another party, provided the full purchase price is paid. Otherwise, the agreement will be frustrated, and any money paid under the agreement should be refunded to the purchaser, unless the vendor may prove that damages have been sustained.

Hidden commissions negotiated between an agent or intermediary and the vendor (in most cases a developer) are arguably the most costly pitfall when purchasing property. Such commissions can range from 5% to 50%, or more. Such costs can be avoided by engaging a reputable professional who can provide clients with the required references.

QUESTION THREE

What are the tax implications for businesses purchasing real estate as part of their market entry? How can they make sure they are structuring their real estate deals effectively to mitigate any risks or financial repercussions?

Indirect taxes: It is important to calculate any VAT (ie, nil, 5% or 19%), transfer fees, stamp duty, professional fees, disbursements and immovable property taxes that will be applicable as early as possible, in order to budget accordingly.

Property purchasers who have made uninformed VAT calculations often find themselves either unable to manage their properties as they wish, or facing significant VAT liabilities.

Direct taxes: When the disposal is not subject to income tax, Capital Gains Tax (CGT) is imposed at a rate of 20% on gains from the disposal of immovable property situated in Cyprus, including gains from the disposal of shares in companies which own such property directly, and excluding shares listed on any recognised stock exchange. As of 17.12.2015, shares of companies which indirectly own immovable property situated in Cyprus – and at least 50% of the market value of said shares derive from immovable property – are subject to CGT. In the case of share disposals, only that part of the gain relating to the property situated in Cyprus is subject to CGT. For the purposes of CGT, disposal includes: exchange, option to purchase, gifting, leasing and any monies received for cancellation of property disposals.

However, there are many exemptions to the above:

- Land with buildings acquired between 16th July 2015 and 31st December 2016 is exempt from CGT (subject to conditions).
- Transfers arising on death.
- Gifts made from parent to child, between husband and wife, or between second or third-degree relatives.
- Gifts to a company where shareholders are members of the donor's family, and the shareholders continue to be members of the family for five years after the day of the transfer.
- Gifts by a family company to its shareholders, provided such property was originally acquired by the company by way of gift, and provided it is kept by the recipient for a period of at least three years.
- Transfers as a result of reorganisations.
- Donations to charities, the Government, and political parties.
- Compulsory Acquisitions.
- Exchange or disposal of property under the Agricultural Land (Consolidation) Laws.
- Exchange of properties whereby the gain made on the exchange has been used to acquire the new property. The gain that is not taxable is deducted from the cost of the new property: i.e. the payment of tax is deferred until the disposal of the new property.

While lawyers are not required to conduct tax due diligence automatically, it is highly advisable.

TOP TIPS

Avoiding common legal and financial real estate pitfalls in your jurisdiction

- Appoint an expert who specialises in property. The biggest mistake is signing a purchase contract presented by a developer, as they are unlikely to protect the buyer and are generally heavily biased in the developer's favour. Buyers must also be wary of experts acting on behalf of vendors or builders. A reliable lawyer who is proficient in the purchaser's language and independent of the other parties involved is the most important consideration when buying property in Cyprus. A good property expert makes these potential pitfalls easier to navigate.
- Put everything in writing. Ensure that all points negotiated are set out in the contract of sale, particularly any agreed extras, necessary repairs or damages.
- Make a will as soon as property is purchased. Cyprus Law includes an element of forced heirship. However, certain categories of foreign purchasers are entitled to bypass these rules and make a will to pass down the property as they wish.

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Jaap has been practicing law since 2000. After studying at the University of Utrecht and an LLM program at the University of Nijmegen, Jaap acquired extensive experience with international transactions at Clifford Chance (Amsterdam, Warsaw and London) and EY Law, focusing primarily on corporate, real estate and finance transactions and regulatory advice.

In addition, Jaap has worked for five years as head legal of a Dutch bank going through a major restructuring. The in-house experience, combined with doing corporate and real estate transactions in various parts of the world, provides an extra edge that enables Jaap to close transactions successfully.

"There are relatively few barriers to investing in the Netherlands for foreign investors"

Synergy Business Lawyers is a corporate law firm based in Amsterdam, the Netherlands. We provide legal services for international businesses in the broadest sense, from real estate and commercial contracts to mergers and acquisitions, regulatory law to litigation and arbitration. With a long record in international business law – mainly in the Netherlands, the EU, the US and Israel – Synergy Business Lawyers can assist you in all legal aspects related to international commerce, whether it is hi-tech, green energy, real estate, regulated markets or manufacturing.

QUESTION ONE

With international travel still facing disruption due to Covid, what's your advice to businesses attempting to manage overseas real estate processes as they enter a new market?

Directly after the outbreak of Covid-19, buyers became more hesitant to invest in real estate overseas. The possibilities to travel were limited. Transactions were put on hold because of uncertainty among investors about the consequences of the Covid crisis and the measures to contain the spread of the virus. Not being able to travel had a significant impact in the first few months of the pandemic.

In the second half of 2020 we also saw a significant increase in transaction volume from investors from outside of the Netherlands. Most of the investors that were willing and able to continue their business abroad had long-standing local advisors that enabled them to continue their business and seize new opportunities. Even with the travel restrictions in place, investors were able to close new deals. It's important to note that these investors already knew the Dutch market and were not new to entering the market.

For investors that are considering real estate investment in the Netherlands, it is important to gather a team of advisors that enable them to get a very quick and in-depth knowledge of the local customs, practices, laws and regulations surrounding the real estate market. When businesses invest in a team that become trusted advisors over time, it enables them to continue to manage their overseas business even in a time of travel restrictions.

QUESTION TWO

Are there any barriers to cross-border real estate transactions in your jurisdiction, and how can businesses overcome them? Do you have any examples of how you have helped clients to do this?

The Netherlands has a very open economy and many investors from all over the world are investing in the Netherlands; not only in real estate. There are relatively few barriers to investing in the Netherlands for foreign investors, however, if we had to name one barrier that becomes a problem for some foreign investors it is opening a bank account. This is becoming more difficult due to anti money laundering regulations (AML-regulations), especially when the company has several ultimate beneficial owners and does not have any directors residing in the Netherlands.

The AML-regulations contain rules for the banks and professionals involved in real estate transactions for customer screening and identification. Banks have to be strict to make sure that they comply to the AML-regulations at the risk of significant fines or even criminal prosecution for the banks that cannot show that they have their AML-policy in order. In our experience it helps to engage a local advisor when opening a bank account in the Netherlands to manage this AML-procedure. In itself, the procedure is not difficult, but the AML-officers have a tendency to reject or delay more time-consuming AML-procedures. It helps if an advisor explains the structure and assists with answering follow up questions.

Another barrier that foreign investors experience is collaboration with a local municipality, if this is required for the project. Permits and zoning can be experienced as a barrier for someone that is not accustomed to detailed spatial planning as is done in the Netherlands. The same applies for procedures regarding environmental issues and remediation measures. These can be time consuming procedures and are therefore experienced as a barrier for doing business in the Netherlands. We have advised numerous clients in this type of transactions. Before investing in the Netherlands it is important to perform a thorough title search and be advised on all zoning and environmental related matters of the property.

Another recent barrier is the mandatory disclosure rules. As of 1st January 2021 companies and their advisors need to report cross-border arrangements to local tax authorities if these arrangements meet certain criteria. The mandatory disclosure rules apply to anyone (legal entity and advisors) that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement. These rules on mandatory disclosure apply to all advisors (tax advisors, lawyers, civil-law notaries, consultants, bankers, accountants and other service providers) that are involved in the implementation of cross-border structures and/or transactions.

TOP TIPS

Avoiding common legal and financial real estate pitfalls in your jurisdiction

- For investors that are considering real estate investment in the Netherlands, it is important to gather a team of advisors that enable them to get a very quick and in-depth knowledge of the local customs, practices, laws and regulations surrounding the real estate market.
- Before investing in the Netherlands it is important to perform a thorough title search and be advised on all zoning and environmental related matters of the property.
- Tax structuring has always been important, but due to various and rapid changes in legislation, our advice is to start with good tax advice and have a clear tax structure in mind before entering the Dutch real estate market.

QUESTION THREE

What are the tax implications for businesses purchasing real estate as part of their market entry? How can they make sure they are structuring their real estate deals effectively to mitigate any risks or financial repercussions?

Legal and financial pitfalls are, for example, regulatory reform of the housing market, energy measures and policies to fight climate change and tax structuring.

Regulatory reform. The housing market has been going through a very explosive price increase over the last three years. There is increased pressure on the Dutch government to take action and safeguard affordable housing and restrict rent increase for small apartments (social housing). One of the concerns is that increased regulations by the government will have an effect on the entire real estate market in the Netherlands.

Energy measures. Real estate is increasingly becoming aware of the impact of climate change regulations and how it will affect the use of energy. This applies to new developments, but also to transformation projects and existing offices. For example, offices need to have a minimum energy label as of 1st January 2023. If such a label is not obtained, the offices cannot be leased. There is also a tendency to replace existing use of gas to local heat projects or electrical alternatives. It is important to take this into consideration when investing in various types of real estate.

Tax structuring. Tax structuring has always been important, but due to various and rapid changes in legislation, our advice is to start with good tax advice and have a clear tax structure in mind before entering the Dutch real estate market.

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