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INTERNATIONAL MERGERS AND ACQUISITIONS: PRACTICAL TIPS

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Handling a cross-border merger or acquisition is usually a custom-designed process. The laws of at least two, and sometimes dozens of countries must be considered and balanced, as well as specific EU regulations. Not only the laws applicable to a transaction structure, but the availability of given structures themselves may differ. Multiple cultures must be allowed for and multiple law firms, accounting firms and other advisors made room for. This is a list of practical tips to keep in mind when facing a cross-border merger or acquisition.

General

BACKGROUND RESEARCH. It is recommended that you obtain as much information about the local legal and business environment as possible as early as possible.

DOCUMENT STYLE. Discuss the style of the transaction documentation early. Will it be US style (i.e., thick) or local style (i.e., minimal reliance on statutory warranties)?

CORPORATE GOVERNANCE DIFFERENCES. If a foreign business entity is involved, be aware that the corporate governance rules for such an entity may be significantly different from those in the US. For example, shareholder (or "member") consent may be needed when such a consent would not be needed in the US. Also, it may not be possible to take actions by written consent. There may be relevant notice periods for shareholder or board meetings that need to be considered and that, in some countries, cannot be waived. Finally, there may be specific dissenters' rights under local law that need to be addressed.

MECHANICAL ISSUES. Timing the closing (especially wire transfers) can get confusing. Be aware of where funds are going and where they are coming from. Consider having the parties wire funds into counsels' trust account(s) prior to closing to facilitate same day wire transfers within in a single jurisdiction at closing. Also consider having local counsel handle some or all of the closing logistics.

FOREIGN COMPETITION/ANTI-TRUST LAWS. You will need to confirm that foreign competition laws are not triggered or, if triggered, are complied with. Certain jurisdictions (e.g. Ireland and Germany) have broad anti-trust criteria that can be triggered by very small deals.

OTHER GOVERNMENT APPROVALS. Be aware that there may be government approval requirements for which there is no US counterpart. Check on this early as such requirements may be required pre-closing or even pre-signing. This may also require filing the transaction documents with the government. Examples include consent for a foreign investor to acquire shares, or pre-clearance of a change of control of the target company for labor law purposes.

MANAGEMENT OF EXPECTATIONS. In most countries things move much more slowly than in the US. Be sure that the all parties understand this and that all parties have a realistic expectation of the deal flow and likely closing timetable.

STRUCTURING ISSUES. The US and local (tax, successor liability and other) consequences of choosing a transaction structure (asset purchase, merger, share exchange, etc.) need to be considered and explained to all parties.

REPRESENTATIONS AND WARRANTIES. Consult local counsel regarding the appropriateness of proposed reps & warranties. In some countries there will be restrictions regarding who can give reps & warranties and what they can cover.

PARTIES TO THE TRANSACTION AGREEMENTS. When doing a share exchange or share purchase, it is not possible in some countries for the target company to be a party to some or all of the transaction agreements.

UNUSUAL DOCUMENTS. In some countries there may be additional transaction documents which are required or customary and may have complicated execution requirements (notarization, apostilles, etc.). For example, in the Netherlands, when consummating a share exchange, you will need a “Share Transfer” document. The execution logistics of this document are likely to require that one or more of the parties execute powers of attorney or involve a local Notary Public (note, a Notary Public outside of the US is substantially different than a Public Notary in the US).

ANCILLARY TRANSACTION DOCUMENTS. Some of the ancillary transaction documents may need to be governed by local law or may simply be inappropriate. Common examples include employment agreements with a founder of a non-US company (subject to local law) and local counsel opinions (often inappropriate).

CURRENCY EXPOSURE. Be aware of the underlying currency issues created by the transaction. Determine which currency will be used for payments and other terms of the transaction. The seller or purchaser may want to shift the currency risk to the other party or hedge any risk it may need to assume.

CHANGE OF CONTROL CLAUSES. The specific meaning of the language of a change of control clause (whether in the transaction documents or in due diligence materials) may be different under the law governing the relevant agreement. Don’t always take the language at face value. *This is a legal issue for local counsel.*

CERTIFICATES OF GOOD STANDING. This is a distinct US concept. A good standing certificate or equivalent is unlikely to be available outside of the US. Discuss this issue with local counsel early on. It is unlikely that the local government will provide same-day service if some type of certification must be obtained from it.

LEGAL OPINIONS. Legal opinions are very common in the U.S., but outside the U.S., law firms are generally not accustomed to giving legal opinions regarding due organization, capitalization, etc. Expect this to be an obstacle and consider whether it is essential to the transaction or whether concerns can be alleviated some other way, such as appropriate due diligence on the foreign target by local counsel.

PUBLIC INFORMATION. In many countries, you can obtain significant information on local privately held companies from the government. For example, in some countries you can request a “Trade Register Extract” which contains the names of the directors, officers, shareholders and persons authorized to bind the company as well as financial information.

Outbound Transactions (Acquisition of Non-US Company Stock or Assets)

TRANSFERABILITY OF STOCK. You will likely need to provide an explanation regarding the relevant US securities laws that the U.S. acquiring company must comply with, and related transferability restrictions on U.S. stock in a share for share deal. There is a general misconception, especially in Europe, that stock is freely transferable once issued.

AVOIDING A TAXABLE EVENT FOR TARGET’S SHAREHOLDERS. If your deal is structured as a share exchange, be aware that in many countries, the exchange will be a taxable event for the target’s shareholders. As a result, this structure can be extremely unpopular with the target’s local shareholders. You may need to be creative regarding deal structuring in order to get the deal closed.

LOCAL SECURITIES LAWS AND STOCK EXCHANGE RULES. You need to check on the local securities laws and stock exchange rules (if applicable). Many countries have strict rules regarding the issuance of securities to local residents. Remember that US registration exemptions are not the only consideration. Many countries have different interpretations of whether an offering is a “public offering” and may not recognize the concept of a “private placement” as used in the U.S.

SEC CROSS-BORDER RULES. These rules may be relevant when there are US shareholders in a target foreign company.

SHARE ESCROWS. Although a common practice in the US, it is often impossible for a company to take back its own shares, once issued, without costly court proceedings in many countries. Generally, a solution can be found but it will likely increase costs.

DUE DILIGENCE. The approach to due diligence may need to be altered due to different attitudes toward the process and/or the availability of information from other sources.

DISCLOSURE SCHEDULES. Depending on the size of the transaction and the experience of the parties, you may receive a “Disclosure Letter” instead of a “Disclosure Schedule.” Many times

this document looks quite different from the Disclosure Schedule of a domestic deal. It may be in narrative form and contain number attachments. It may not be in English. Ask for a draft of the document early so that everyone can feel comfortable with the final form.

GAAP. Always be aware that different countries have different accounting rules. Be careful of the assumptions you make based on the financials from a foreign company.

FOREIGN CORRUPT PRACTICES ACT (“FCPA”). It is important to determine whether past business practices of the target are likely to lead to FCPA liability. Also, the purchaser should make sure that the target is aware, post-closing, of FCPA rules and regulations in order to prevent a violation.

FOREIGN ENVIRONMENTAL AND INSURANCE RULES. Always check with local counsel regarding these rules. They are likely much different than those in the US and can create problems during the transaction as well as post-closing. For example, the successor liability rules attributable to the transaction structure may be different than you expect.

FOREIGN LITIGATION. If the target discloses foreign litigation (threatened or existing) or local counsel warns about possible litigation, ask questions regarding the level of possible exposure. What may seem like a small problem in the US may be a much bigger problem outside the US.

FOREIGN INVESTMENT RESTRICTIONS. There may be filings and/or consents needed pre- or post-closing.

NON-COMPETITION CLAUSES. The enforceability of non-competition clauses (in asset purchases, employment contracts or elsewhere) varies by country.

NOTARIES. Be aware that the role and qualifications of a notary vary by country. In many countries notaries are specially qualified attorneys whose job is not to represent one party but to ensure fairness to all parties. As a result, beware of “notaries” working at the office of local counsel. Do not assume you are talking to local counsel and that your conversations will be confidential. Be sure to ask how the notary is compensated. In some countries they receive a percentage of the value of the transaction. This can be a significant number. As a result, the structure or logistics of the transaction may be changed. If a notary needs to be involved, it may be worth finding a notary in a third country whose fee structure is more reasonable. Always consult local counsel on these decisions.

TRANSFERS OF REAL PROPERTY. If applicable, make sure you understand the local requirements regarding real property transfers. There may be recording requirements, court consents required or local ownership restrictions.

OBLIGATIONS TO TARGET EMPLOYEES. Regardless of transaction structure, the acquirer may have statutory duties (continuing pension funds, assuming employment contracts, payments due to technical change in employer, etc.) to the employees of a target company, which may be costly.

CONSULTATION WITH TARGET’S EMPLOYEES. Be aware that in some countries, an acquirer or a target company will need to obtain the consent of or consult with the target company’s em-

ployees or a representative board of employees before completing a transaction. In some countries, employees have a formal role in the management of local companies. Even if not strictly required, it may be local custom to consult with or meet with employees prior to consummating a transaction.

TRANSFERABILITY OF SHARES. The proper transfer of shares in a local company may be more complicated than canceling and issuing new stock certificates. Governmental filings may be required.

STAMP DUTIES AND OTHER TRANSFER TAXES. Consult with local counsel early on regarding the applicable stamp and other transfer taxes triggered by the structure of the transaction, in order to avoid the need to restructure the transaction should such taxes be significant.

TAX CLEARANCES. It may be necessary to obtain a tax clearance from a local tax authority. This may cause a significant delay if not addressed early; consult with local counsel early in the process to avoid delays and to structure the transaction in a tax efficient manner for the US acquiring company.

Inbound (Acquisition of US Company Stock or Assets)

BEA FORMS. With some exceptions, a US company with foreign ownership in excess of 10% is subject to the filing requirements of the Bureau of Economic Analysis.

EXON-FLORIO. If the transaction involves the acquisition of a company whose products or technology could implicate national security, an Exon-Florio filing may be appropriate. The filing is voluntary, but there is no statute of limitations on the government's ability to take a second look at the transaction if no filing is made. "National security" is a broader term than you might expect and is not limited to nuclear secrets and supercomputers.

EXPORT CONTROLS. The acquisition of a US company by a foreign person or entity and the subsequent disclosure of technology to non-US person may trigger US export controls.

EXPLANATION OF US LAWS (environmental, labor, employee benefits). Whether you represent the foreign purchaser or the US target, you may need to explain the basics of these laws to opposing counsel or the foreign purchaser. This may arise in the due diligence context (why the company's documents look a certain way) or as advice for post-closing (why things must be done a certain way).

TAXES. Common tax-free structures used by domestic companies to acquire domestic targets often become taxable transactions if deployed in a cross-border transaction. Tax structuring issues should be addressed by our tax lawyers early in the process to address these issues.

