ALL GLOBAL DEALS ARE LOCAL

(IF YOU WANT THEM TO CLOSE)

BY ROBERT A. PROFUSEK, H. JOHN KAO AND SOPHIE HAGÈGE

Sitting in a well appointed New York conference room, it's easy for an M&A lawyer to believe globalization has not changed his or her job that much. Wherever they flew in from, the principals all wear suits (unless they're from Silicon Valley), speak English and negotiate documents that pretty much have the same elements whether the target is headquartered in London, Hong Kong or New York.

But don't be fooled, this superficial commonality masks deep country-by-country divides. Foreign capitals are littered with the documentation—very often *not* in English—of busted deals. Wishful thinking aside, all countries are not alike and have many ways of making more difficult, slow and costly the global deals that they do not kill. M&A is global, but politics, legal systems, taxation and business cultures remain stubbornly local, and doing a global deal makes you vulnerable in many localities.

Successful global deals need to be pursued bottom-up as well as top-down. Potential regulatory, political, employee relations and other obstacles in each relevant country need to be addressed early and thoughtfully to avoid unpleasant surprises.

First, let us be clear that business and capital markets are not "globalizing," they are already truly global. For M&A, this means that even transactions between U.S.-based companies of any size are today more likely than not global in impact and thus vulnerable to non-U.S. issues and objections. The number of countries conducting formal deal reviews has multiplied, and size thresholds are low. Informal reactions by government, public and workers to perceived "foreign takeovers" can be just as devastating.

All this puts a premium on having local, highly capable boots-on-the-ground professionals in all jurisdictions relevant to a transaction. Global deals may be signed in New York or London, but need a big-footprint support team to assure they will close. Even if badly prepared deals do manage to close, they may generate major unanticipated costs and delay as unhappy local powers, who may feel blind-sided, demand attention and post-closing tribute.

Here are some of the kinds of local issues that can scupper, or at least damage, a global deal.

ANTITRUST

Ten years ago, premerger antitrust clearance on even the most geographically diverse deals entailed only a handful of national regimes. Today there are over 100. And remember that scrutiny is triggered not just by the parties' headquarters locations but also by virtually any significant node of revenues or assets, and thresholds are often quite low. Jones Day, for instance, recently handled a deal involving only a couple of billion dollars in turnover, yet we had to file with competition authorities in 45 countries.

Filings, of course, are just the surface reality. Clearance proceedings can be the trapdoor that opens into a world of political intrigue. The U.S. is hardly immune. Our antitrust winds change with administrations and broader policy initiatives. Imagine that multiplied by the number of jurisdictions involved.

China today is a perfect example. Despite finely crafted competition laws and regulations, when international tensions rise, enforcement may respond. Witness the recent spike in competition law actions in China, which some believe to be unfairly targeting foreign companies. Regardless of the motivation for such actions, their impact could range from disruptive to devastating.

DUE DILIGENCE

If anyone thought global transaction due diligence could be considered routine, deals like HP-Autonomy have surely given them pause. Clearly, M&A team leaders can no longer simply send a few associates into a virtual data room to read documents. Local business and legal expertise is required in each significant jurisdiction.

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Particular attention should be paid to anti-corruption laws, both our FCPA and non-U.S. measures. The UK, for instance, now has self-reporting requirements that may seem exotic to American eyes. More troublesome is the wide variation in what local business cultures consider customary and appropriate. Acquirers need to know what potential liabilities may be sitting in a target's closet, and that review needs to be done with legal talent who have expertise in the subject instead of any off-the-shelf M&A lawyer.

LABOR/EMPLOYMENT

Political opposition can have a very specific economic basis, such as with the proposed Pfizer-AstraZeneca deal, which was fiercely opposed in Britain and France over feared local job losses, among other objections.

Works councils and unions can, and very often do, quickly whip up public and even legislative opposition to transactions that are perceived to threaten current local employees. There may well be a local upside to a deal, involving increased investment and new hires down the road, but often there is no one making that case in a timely and effective way.

In China, labor strikes and worker protests are increasing rapidly, and many are deal related. By Jones Day's own count, there were at least 15 labor strikes in China since 2012 that were related to M&A transactions. This means that any M&A deal that has a Chinese component needs to be reviewed with this reality firmly in mind.

In France and other EU countries, employees are generally well organized in works councils and unions. As they must be formally consulted, even before a transaction is signed, they have real power to influence the choice of the acquirer and, in many instances, the terms of the transaction regarding employment conditions. This is why labor issues must be carefully addressed in transactions involving substantial EU components.

"NATIONAL INTEREST"

The rule of law starts to look cloudy when political hackles are raised. The French Government may simply say, and has more than once said, "You're not acquiring this company because it's too important to us." Witness Yahoo!'s recent attempt to acquire Dailymotion, a relatively small company which nevertheless was deemed too important a French technology success to leave the national fold. Think also about the newly issued French decree on foreign investments extending significantly the number of sectors which require prior approval. Recent experience of Jones Day's lawyers has proven that the French authorities have decided to apply this new legislation very aggressively and use it to impose cumbersome undertakings on foreign investors, in order to maintain the conduct of operational activities in France.

Larger European companies often get special government attention as "national champions" to be protected from foreign ties, as seen in Kraft's unsolicited offer for Cadbury. Such challenges are beyond the powers of lawyers and bankers to defend, though EC regulations may ultimately offer redress in cases where an EU member state's legitimate public interest in stopping a deal is not clear. But that is unlikely to help any time soon.

While "national interest" issues require public, investor and government relations expertise, local lawyers should be involved in anticipating problems and coordinating the communications effort.

NATIONAL SECURITY

Like our CFIUS regime, many countries have in place mechanisms to review takeovers that may give foreign companies control of, or even just access to, intellectual property and other assets that might be seen as compromising national security. As with antitrust clearance, there is great scope for discretion over when and how vigorously such reviews are conducted. Perceptions can become reality here. Appropriate communications spade work needs to begin well in advance of any deal press release.

In addition, as economic and trade sanctions proliferate around the world, other nations' equivalent of OFAC need to be closely monitored. The question is whether some far-flung operation of the post-transaction entity outside of the principals' headquarters countries could trigger scrutiny.

TAXATION

Recent debates about U.S. policy on "off-shore profits" and "inversions" may obscure the fact that our system was designed in pre-globalized times. Aside from tariffs, little thought was ever given to handling cross-border cash flows and corporate control complications.

Every country has its tax codes, not to mention its own political and social attitudes about corporations and their responsibilities. Dealmakers who focus on Uncle Sam and figure they will deal later with foreign tax regimes later do so at their peril.

The bottom line here is that dealmakers must recognize the profound differences between, say, China and France and the U.S., no matter how cozy everyone's M&A lawyers may feel sitting around a conference table.

Global deals require a global team that is well coordinated and acts in unison, a team that both thinks global and acts local.

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