

Considerations for US Companies Contracting Abroad

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There are many reasons why your company might consider entering into contracts with counterparties in a country where you do not currently have a presence. Perhaps you are expanding into a new geographical market, have identified a lucrative joint venture opportunity or have a project that needs to be outsourced to organizations overseas.

Whatever the rationale, there are several critical contract-related issues to consider when you contract in a new jurisdiction. We've outlined some of these below.

Contracting conventions

Foreign countries often have different laws and conventions surrounding contracts. For example, some countries have laws prohibiting restrictions on resellers accepting passive sales from clients in territories beyond those defined for them by contract. Other countries have governing contractual defaults or provisions that may be read into contracts in the absence of express statements to the contrary, so you will need to ensure that contracts with counterparties in foreign countries abide by the relevant contracting requirements.

Cultural conventions and processes

Cultural conventions also may affect your ability to negotiate or form a contract with counterparties abroad. For example, in some countries (as with some companies), "No" or "There's no way we can do that" may be a standard negotiation strategy more than a statement of fact. In other countries, companies actually may be constrained by governmental requirements. Being aware of cultural conventions can help significantly as you work to form contracts globally.

IP protection

It can be far more challenging to protect intellectual property once you begin to expand outside the United States. Government-supported IP protection is territorial – and US IP laws and registrations only protect your IP rights in the US. Once you begin selling products in a foreign country, your IP will only be protected if you have obtained protection in those foreign jurisdictions. For example, a US patent generally will not provide patent protection in other countries. Given this territoriality, consider taking steps to secure the available IP protection, particularly before engaging in extensive expansion or if your product would be easy to reverse-engineer. Some countries have regimes that are less protective of the IP rights of foreign companies, or limit or restrict transfers of IP out of the country, so you will want to take those risks into account as well.

Confidentiality, security and data transfer concerns

As soon as data begins to flow across borders to unaffiliated third parties, there is some loss of control regarding who can access the data and what sorts of security measures are available. For that reason, you should take steps to ensure that data transferred across borders is limited to only the information necessary to facilitate the transaction – and you should impose other protective security measures as needed.

Foreign consumer protection laws

Foreign consumer protection laws may apply to products and services offered to consumers in foreign countries, even if the contracts are governed by US law. As these consumer protection laws can have substantial effects on

your activity abroad, as well as your legal commitments, you will want to check with counsel to ensure compliance with these laws in the country where your counterparty resides.

Tax concerns

While tax obligations for sales of goods and services often are straightforward for businesses that operate solely in the US, tax issues become more complicated once a business expands abroad – and associated taxes imposed can comprise a far greater percentage of the overall transaction value, unless tax treaties between the US and the applicable foreign government provide relief. It is important to speak with a tax expert to ensure tax allocations are properly addressed.

Export control issues

Federal laws restricting the export of goods, technology and related technical data may present a challenge to those planning to contract abroad. Sanctions for violations of these laws can be substantial, so you should speak with counsel to ensure that the export or re-export of the applicable products or services doesn't violate any export control laws.

FCPA issues

The Foreign Corrupt Practices Act prohibits US citizens and entities from bribing foreign government officials to benefit their business interests. While this may appear straightforward, companies often run into trouble with the FCPA in three ways:

- They're not aware that they are dealing with a foreign government official.

- They're not aware that their actions may be interpreted as bribery.

- They're not exercising adequate controls or oversight over foreign sales representations and resellers.

You should take steps to train employees and other representatives on these risks, and counsel can advise you on your approach.

Other regulatory issues

Once you begin contracting across borders, you may be subject to new and different regulatory requirements, in addition to those already discussed, such as rules applying to medical devices and sensitive information. Even if you are in compliance with US law, you will want to seek advice of counsel with respect to any differing foreign regulatory rules.

Determining governing law and venue

When contracting abroad, it is particularly important that your contract defines the governing law and venue for any disputes, in order to provide a clearer path to interpretation and resolution. However, parties often prefer their "home court," which can turn these provisions into points of major contention. Counsel can advise you on venues that provide an appropriate balance and increase chances of enforcement against a foreign counterparty.

Contracting with foreign consultants

The following additional issues are key considerations when contracting with foreign consultants.

Differing IP ownership rules

In addition to the concerns surrounding IP protection discussed above, differing IP ownership rules should be top of mind when contracting abroad. For example, in some countries, assigned copyrights may revert to the original owner after a period of time, while others require that IP be assigned retroactively on a periodic basis, and not prospectively. If the contract being entered into involves assigned IP, you should work with counsel to verify the relevant IP ownership rules in that country.

Quality control

When working with foreign consultants, overseeing activities on the ground can be a substantial challenge, so you will want to take steps to ensure effective monitoring practices are in place to mitigate quality control risks.

Commitments to third parties prohibiting contractors outside the US

You may be subject to regulations or restrictions that limit your ability to contract with foreign entities, pursuant to contracts other than the direct contracts with the foreign contractors. For example, US governmental contracts, and contracts with commercial third parties in highly regulated industries, often impose such restrictions. With respect to any particular work that you intended to outsource overseas, you should ensure that you are not prohibited (or likely to be prohibited) from utilizing foreign contractors for that work.

Diligence burden created by using foreign contractors

Agreements with foreign contractors typically receive a particularly close review in investments and M&A deals. Obtaining advice of counsel before entering into these agreements can help limit diligence issues and transactional blockers that might otherwise inhibit material opportunities.

For all these reasons, it is vital that US companies contracting in a new jurisdiction seek advice of counsel to ensure that their expansion is established and structured in a compliant and effective manner – and with a thoughtful assumption of the potential risks.

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