

A Comprehensive Guide to Cross-Border M&A

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Introduction

Economists may look back on our current era as the age of mergers and acquisitions. According to Bloomberg, for example, M&A buyers spent \$3.8 trillion in 2015 alone, a number that surpassed the previous high set in 2007, before the financial crisis. Many factors have contributed to this trend — some call it a craze — including low interest rates, some sluggish domestic economies and the desire of multinationals everywhere to keep pace with competitors engaging in deals, particularly cross-border transactions.

Not surprisingly, as M&A deal activity and volume surge, the landscape of M&A is changing. Chinese companies, for example, are becoming major players. A Dealogic announcement from March 1, 2016 indicated that for the first time ever, China was the top acquiring nation globally for technology M&As, with \$34.7 billion through just two months of that calendar year. And as a Bloomberg article points out, some of those Chinese acquiring companies — like Anbang Insurance Group Co. — have an aggressive style that may involve shunning traditional notions of due diligence and “swooping in at the last minute or preempting any other bidders.”

There are also recent widespread efforts to curb so-called corporate inversions, a form of M&A which the US Department of the Treasury defines as a “transaction in which a US-based multinational restructures so that the US parent is replaced by a foreign parent, in order to avoid US taxes.” (An inversion need not involve a US-based company, of course, but the basic principle applies to any such deal.) Some of these efforts have been effective. In April 2016, for example, pharmaceutical giants Pfizer and Allergan terminated a \$152 billion merger due to anti-inversion tax rules put in place that month by the IRS and the Treasury Department.

A 2011 Harvard Business Review article notes that while companies spend over \$2 trillion on acquisitions each year, “study after study puts the failure rate of mergers and acquisitions somewhere between 70% and 90%.” So for most companies, due diligence remains essential.

Despite the M&A frenzy, then, it’s worth remembering that participating in a merger or acquisition is a little like opening a restaurant — the prospect is appealing but the risks are high, especially for novices. A 2011 Harvard Business Review article notes that while companies spend over \$2 trillion on acquisitions each year, “study after study puts the failure rate of mergers and acquisitions somewhere between 70% and 90%.” So for most companies, due diligence remains essential.

This playbook focuses on the practical aspects of international M&As that buyers face after a deal, but which must be considered carefully throughout the vetting process. Cross-border transactions are particularly complicated. They come with pitfalls in the form of unfamiliar legislation, unique cultural expectations, different languages and other barriers not present in home-country deals. Indeed, many of the elements discussed in this playbook are frequently overlooked by both buyers and sellers during the due-diligence phase of cross-border deals, which contributes to the traditionally high failure rates for M&As. Understanding these potential pitfalls can help you evaluate the real long-term value of a cross-border deal, set realistic timelines, and avoid costly penalties and reputational damage if and when the transaction occurs.

Given the complexities and high stakes involved, we strongly recommend that any business vetting a cross-border M&A deal develops a single coordinating project team. The team members should be drawn from finance, HR, legal counsel and (if the department exists) risk management to reasonably ensure that all aspects of the deal are thoroughly considered. The project team will almost certainly need to hire a third-party expert on the laws and customs of the target country to provide information and recommendations to lower risks and maximize advantages.



Asset Deals, Stock Deals,
Carveouts and Spinoffs

While M&A is a complicated area and each transaction is unique, it's worth stating at the outset the basics of stock (or "share") deals and asset deals. Generally speaking, in a stock deal the buyer obtains the seller's entire going concern, including the legal entity the seller has established and through which corporate taxes are paid and employees are registered with local authorities.

In an asset deal, by contrast, the buyer purchases certain portions of the seller's organization, and the deal does not include a transfer of the seller's legal entity to the buyer. It's important to note that asset deals often include not only physical assets (like equipment and buildings) along with trademarks and intellectual property, but also people — that is, the employees that work for the portion of the seller's organization that the buyer is purchasing. Certain asset deals are referred to as "carve outs" or "spinoffs," as a portion of the seller's organization is in effect being extracted and sold. In such cases, the buyer must ensure that, among other things, a legal entity is in place when the deal goes through so the newly acquired employees, and the acquired organization itself, can be registered with local tax authorities.

Asset deals tend to be more popular among buyers than stock deals. The buyer pays only for what it wants and avoids superfluous assets and the liabilities inherent in taking over a going concern. Because of the focused nature of asset deals, they may in some cases require less due diligence than stock deals. That said, a business considering a cross-border asset deal must be aware that those deals typically come with obligations in the host country that are costly and time-consuming. And as we've noted, those obligations may be unforeseen, especially if the buyer has obtained assets in an unfamiliar country. Fully understanding these obligations in advance is critical to the success of any deal, and it's especially important in carve-out deals where a specialist division of a large multinational is targeted by a much smaller organization.

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Legal Entity
Considerations

Determining Your Optimal Entity Type in an Asset Deal

Those considering a cross-border M&A deal must quickly determine if a legal entity needs to be established in the host country. In an asset deal it is not uncommon for the buyer to take on obligations (such as employees or contracts) in a country in which it had no prior business presence. In order to continue local business and employment activities after the transfer, it is essential that the buyer establish a local entity.

Legal entity options vary by country. But typically, when a business engages in taxable activities, it will need to establish a subsidiary or a branch. Absent taxable activities, it may in some cases establish a local representative office instead of a subsidiary or a branch. A representative office would satisfy the requirement to employ local workers, but it would not permit local trading.

To return to subsidiaries and branches: Very broadly, a subsidiary is a separate legal entity that provides a layer of legal protection between the parent company and the host-country entity. A branch, as the name implies, is an extension of the parent company, and as such a branch's liabilities are assumed by the parent company.

While the optimal entity type will vary by deal and country, the following factors tend to favor the establishment of a subsidiary over a branch:

- You will be providing services that require a license
- Your industry is on a restricted list in the host country (some countries have a list of industries restricted to local ownership)
- You will be engaged in government contract work
- You will be sponsoring local work permits
- You will be required under target-country law to open a local bank account

Since the above situations are relatively common, a subsidiary is often the optimal choice to reduce risks and allow for the widest range of target-country activities. There are, however, sometimes good reasons for eschewing a subsidiary in favor of a branch. For example, depending on the country a branch may offer relatively relaxed audit requirements, the ability to make payments in a foreign currency and the ability to wind down operations relatively quickly.

It's worth emphasizing that legal entity options, including the benefits and risks of each, will vary by jurisdiction. In order to make a well-informed decision, any business considering a cross-border M&A deal should consult with an expert familiar with the legal entity options of the target country.

Determining the Time It Takes to Establish a New Legal Entity: Branches and Subsidiaries

The comparative time it takes to establish a branch or subsidiary in any given country can be a contributing factor to an M&A buyer's decision. Indeed, in some situations the time required to set up a particular entity may be the single biggest determinant. During the due-diligence and budgeting processes, companies vetting a cross-border M&A deal almost invariably underestimate the time it will take to establish an entity. And it's almost impossible to overemphasize the importance of obtaining reasonably accurate timeline estimates. Failure to establish an entity by your target transition date, or "day zero," can lead to missed payrolls, noncompliance with local labor and tax laws, fines and reputational damage.

It is a common misconception that branches necessarily take less time to establish than subsidiaries. In many countries, the commercial registry scrutinizes branch applications much more closely than subsidiary applications, requiring official evidence of good standing of the parent company and the power of representation of its officers.

For a subsidiary also there are factors that can contribute to the application process taking longer than expected. In Germany, for example, if a subsidiary lists foreign rather than local shareholders and directors during the initial incorporation, then months may be added to the application process.

Similarly, most countries require subsidiary applicants to supply the criminal record reports of company directors. This standard requirement can create serious delays, especially if not accounted for early in the establishment process. A report from the FBI, for example, can take a number of weeks to secure. In some cases, then, it may be prudent to select a subsidiary's initial board of directors based on how quickly their countries of residence can provide a report.

Likewise many countries have robust controls to determine the ultimate beneficial owner (UBO) of a legal entity, in large part to ensure that the new companies are not used as fronts for money laundering and/or tax evasion. The controls also seek to prevent complex company structures designed to hide the reality that a single individual is really running the company. As a general trend, these kinds of controls are becoming more restrictive. For example, UK companies must now maintain registers of people of significant control (PSC) and file relevant details with local authorities. These and similar controls in other jurisdictions mean that businesses must choose their shareholders carefully — particularly if they have tight timelines — given that the controls may lead back to a UBO who does not want his or her details disclosed.

Creating a Contingency Plan: Representative Offices and TSAs

Even when a business undertakes careful M&A planning and due diligence, it may find that establishing an optimal legal entity prior to a deal's target date is impossible. For example, a buyer may need to strike quickly on a deal to preempt competition or to take advantage of a burgeoning market. If you're a buyer in this kind of situation, it's critical to understand your options. One common, useful contingency plan involves registering a representative office in the host country, which almost always takes considerably less time than registering a subsidiary or branch. Once established, the representative office will allow you to pay your new employees in the host country while you establish a branch or a subsidiary as your long-term solution.

Carve-out deals in particular are often characterized by looming deadlines and buyers scrambling to meet payroll and other obligations. Buyers in this situation may consider drafting a transition services agreement (TSA) with the seller. A TSA sets terms for the selling company to continue providing certain support services (such as payroll and IT) for a stated term after the deal is complete.

Buyers in particular should carefully review TSA terms and conditions as soon as possible in the due-diligence process. The TSA will give buyers an idea of the types and costs of services they'll need to provide when they assume control of the new organization. Of course,

the buyer may not include all the services the seller will need to assume and may charge inflated prices for continuing to provide certain services.

When You Have an Existing Entity in the Target Country

Buyers with an existing entity in the target country will face fewer challenges following a deal than those without a legal presence, but there may be related requirements nonetheless. If the acquired business' activities are different from the existing operations, the buyer may need to apply for additional licensing from local authorities and/or revise the company constitution's "objects" clause.

In addition, a buyer with an existing local presence in the target country may be registered in one region or province, but acquire a business in another. Depending on the country, this situation may necessitate additional registrations and reporting obligations. China, for example, has provincial-level tax, social security and corporate administration requirements. And Australia has state-level workers' compensation requirements. Depending on the target country, then, some M&A opportunities may be more or less attractive depending on regional benefits and requirements.

Legal Entity Considerations in a Stock Deal

So far in this section we've described entity considerations in relation to asset deals. In a stock deal, the buyer takes ownership of a fully formed entity, removing many of the legal-entity considerations we've addressed. Even buyers in cross-border stock deals, however, must consider legal entity implications. For example, certain countries such as Indonesia maintain evolving lists of "restricted" industries. If your newly acquired business is in an industry on that list, your company may be required to have a local resident as a majority shareholder. It's worth noting that in our example country of Indonesia, it is illegal to provide nominee shareholders. And in almost all cases, finding a last-minute local contact or contacts to serve in this capacity may prove difficult and expensive.



HR Considerations

Understanding Local Employment Protections

While the urgency to establish an entity in the target country is often driven by the need to pay employees, there are many additional HR considerations beyond meeting payroll. It is critical to determine early in the due-diligence process if your target country's laws protect employees when a business is transferred. All EU member states, for example, have legislation that accords with the European Commission's Acquired Rights Directive (ARD). The ARD ensures that when an "undertaking" (i.e., a business or part of a business) is transferred to a new owner as part of an asset deal, then the employees engaged in that undertaking also transfer to the new owner.

Probably the most widely known such legislation is the UK's Transfer of Undertakings (Protection of Employment) Regulations 2006, or "TUPE." Many countries outside the EU — such as Brazil, Colombia, India, Singapore, South Africa and South Korea — have similar legislation that ensures employees of an acquired business automatically transfer from the seller to the buyer. In these countries, both the employees' service histories and terms of employment are preserved so the employees don't suffer as a result of the transaction.

Other countries lack such legislation, and the distinction is an important one. When a transfer occurs in countries without ARD-type employee protections, the acquired employees will be terminated upon change of ownership. If they are required by the buyer, then they will be rehired on new terms of employment.

Other liabilities related to employee benefits may be difficult to uncover, such as the carryover of annual leave or Christmas bonuses. Neither of these benefits is necessarily stated in writing on employment contracts, but may be customary, implied terms of employment and as such will also be protected on transfer.

Collective Bargaining Agreements (CBAs)

When considering M&A transfers, buyers must understand if any transferred employees are covered by a collective bargaining agreement (CBA) and

understand employee rights under that agreement. CBAs in effect add an additional layer of employer obligations to a deal. Many countries in Europe have mandatory CBAs that apply to distinct sectors of industry. And if you're a buyer with existing operations in the target country, it's not unusual for a target business to be operating under a different CBA from the CBA of your existing workforce (should it have a CBA).

Generally speaking, it is virtually impossible when taking on transferred employees to avoid complying with an existing CBA, at least in the short term. In Europe, for example, collective bargaining terms can typically only be renegotiated if one year has elapsed since the transfer and the resulting terms are no less favorable than the original ones.

The Challenges of Drafting Employment Contracts for Transferred Employees

The potential for obscured employer obligations — such as those that are contained in a CBA or those, like Christmas bonuses, that are implied — complicates the process of drafting new employment contracts, particularly in jurisdictions with ARD-type protections. It is in fact extremely difficult to successfully duplicate the transferred employees' existing contract terms and conditions, including benefits, which are also protected under ARD guidance. In many cases, buyers are better off issuing a "transfer of employment" letter confirming that all existing employment terms and conditions will continue unchanged, whatever those terms and conditions may be. (See the "Protecting Intellectual Property" section below for additional information on this subject.)

At least a few words should be said about the drafting and circulation of transfer of employment letters. In most countries, these letters must be written in the local language. (Translations may be made, but the local language will prevail.) In addition, most countries empower only certain individuals to legally execute the document. For example, in Germany, a company's Geschäftsführer (managing director) must sign a transfer letter. A company engaging in a deal must know who is eligible to execute transfer documentation and ensure that the individual or individuals are available.

Benefits and Insurance Considerations for Transferred Employees

It's worth emphasizing the difficulties of attempting to provide identical benefits to transferred employees, and the difficulties of estimating employer costs for benefits once the transfer has been made. This process can be particularly fraught with challenges in carve-out deals, which often involve a handful of employees transferring from a large workforce to a relatively small one. For an acquiring company without an existing local workforce, securing insurance policies for a small group of transferred employees can be problematic.

Employee benefits schemes are of course sensitive to headcount, since insurers seek to spread risk across members. Because a small workforce doesn't provide a means to adequately spread risk, insurers will almost certainly offer a small pool of transferred employees inferior and/or more costly coverage than that provided by the previous, larger employer. Moreover, the coverage offered by insurers in such a situation is often conditional on individual underwriting. In addition, individual transferred employees with preexisting conditions may be provided coverage only on a moratorium basis or not at all.

To repeat: If a buyer vetting an M&A deal fails to account for the possibility that its insurance costs and risks may greatly exceed that of the seller's, cost and timeline projections may be meaningfully inaccurate.

Insurers, it should be noted, are not the only third parties that can seriously affect a buyer's ability to provide adequate coverage. Some benefits, such as company car leases, can only be provided if the employer has an existing bank account in the target country. It is a little-known fact that in many countries, establishing a corporate bank account can take months, due primarily to money-laundering controls. Failure to account for this can leave many buyers unable to provide benefits at the time of the transfer.

Employee Communication and Consultation

The success of an M&A deal depends on how well the workforce integrates after the transition. Employees transferring from larger organizations to smaller ones in particular may feel exposed or uneasy as they move to a relatively weak local infrastructure with un- or underdeveloped policies, processes and management. If a buyer fails to match benefits to the extent that it can, that buyer may be seen as cutting costs at the expense of the transferred workers, leading to disgruntled employees and perhaps litigation. Therefore to facilitate this transition and promote employee engagement, it is critical that transitioning employees are made aware of the employer's efforts to get the best possible deal for them. To that end, the employees should be informed of insurance-industry requirements and other constraints that are beyond the employer's control and may prevent the employer from offering identical benefits.

Consultation and open communication between employer and employees is, in short, critical to the success of an M&A deal. Countries with ARD-type legislation require formal consultation with transitioning employees. The timing of the consultations, and who must be involved, will also be dictated by local laws and by any applicable CBAs. In France, for example, both the buyer and the seller must consult with their work councils prior to the transition. If either company fails to follow the consultation requirements to the letter, they may face financial penalties, an injunction suspending the transaction until proper consultation has occurred and/or criminal sanctions for the legal representatives involved. To give another example: In Germany, affected employees must be notified of an impending transfer at least four weeks in advance. Failure to provide the requisite information in the notification may require the employees to remain with the seller.

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NEW PATENT APPL

Protecting
Intellectual Property

IP Agreements Between Buyers and Sellers

We explained earlier that drafting and executing a transfer of employment letter is generally preferable to drafting new employment contracts when taking on transferred employees in an M&A deal. It's important to note that these letters will not address the buyer's confidentiality or intellectual property requirements, and provisions contained in the employees' existing contracts won't provide the necessary protections. As a result, new confidentiality and IP agreements must be drafted and signed in support of the transfer letter.

The price paid for a business is often influenced by the value of its IP, so it's critical that IP ownership is fully reviewed and understood when vetting a deal. In a carve-out deal there may be shared IP following the transaction, which in turn will require licensing agreements. Where a license is provided for shared IP, the buyer must understand that the seller is in control of applying for registrations and maintaining them. And in some cases, a seller may actually have licensed the IP in question from a third party. During the vetting process, then, a buyer must identify who controls the seller's IP and carefully review all IP agreements in place between the seller and any third parties. The existing agreements may prohibit a change of control and may allow for termination at any time without cause.

In some cases, the seller may own the IP and grant licenses to other parties besides the buyer. In such situations, the buyer must review existing IP agreements carefully. Depending on the terms of those agreements, the buyer's ownership of the IP in question may be at risk.

Employee-Generated IP and Sleeping IP

In many countries, an employee that generates IP must be compensated. If that person is not compensated and there is a subsequent M&A deal, then any presumed assignment of inventions to the seller and eventual transfer to the buyer may be challenged. Buyers should therefore take care to ensure that any IP generated by the seller's employees has effectively been transferred to the seller.

IP that is not registered is often referred to as "sleeping IP." In a carve-out deal, buyers should identify any trade secrets, copyrightable work and unregistered trademarks by requesting a list from the seller.

In some cases, unregistered IP may be vulnerable to an assertion of abandonment for non-use.

Of course, requesting a list of IP assumes the seller has captured the relevant information and will be willing to share it. This is often not the case, in large part because few organizations capture tacit knowledge held by their employees. If a buyer is in doubt on this issue, it should reasonably ensure that employees who are likely to have such knowledge are identified and are transferred as part of the deal. In ARD-type countries, a buyer may safely assume that the automatic transfer rules will ensure that any such employees are transferred; however certain workers — such as contractors — may not be subject to the legislation.

Immigration Considerations

Even businesses that are relatively new to global expansion will understand that operating abroad involves immigration-related challenges, such as obtaining visas and work permits under host-country law. These are important considerations during the M&A vetting process as well.

Those new to conducting M&A due diligence should be aware that acquired employees may not necessarily be target-country nationals. And during the due-diligence process, you may find that some of the seller's employees have work permits. In such cases, the next step is generally to determine when each of those employees' work permits expires.

It's important to note, however, that work permits are usually attached to a sponsoring employer and are non-transferable. This can create problems in an asset deal, where the employing entity will change. In this situation the work permit will generally become void on the date the employee transfers to the buyer. As a result, the buyer must apply for a new work permit. The clearance process can take months, during which time the employee in question is not permitted to work for the new company, but nonetheless will have the expectation of salary payments. The delay in securing a new work permit will be aggravated by the fact that the individual will be considered a new hire rather than an intra-company transfer. And in many countries this means the buyer will have to provide evidence that there are no local candidates suitable for the role.

It should be noted that, depending on host-country regulations, expats may or may not accrue employment rights. As a result, in ARD-type countries, expats may or may not have a legal right to transfer in an asset deal.



Data Protection Considerations

Businesses are increasingly aware of data protection laws, in part due to high-profile multi-jurisdiction cases involving large corporations such as Google and Facebook. Most US-based businesses are also aware that data protection laws are generally speaking more restrictive outside the US than inside. Penalties for noncompliance can be severe, and the reputational damage brought on by noncompliance—to say nothing of an actual data breach—can be even more crippling.

M&A activity, including the due-diligence process, invariably requires the sharing of data. Where this sharing involves personal information such as employee data, the transfer and processing of the information must comply with all applicable laws. To take a typical example: If digital data from an EU member state is transferred to the US, it must be transferred in accordance with strict EU data protection legislation.

In an M&A deal, the seller owns the relevant data and therefore acts in the capacity of data controller. As data controller, the seller has the statutory responsibility to ensure that the transfer of this data to the potential buyer is lawfully managed. In practice, this typically means that all cross-border data transfers must be supported by an agreement between the parties stating that both will adhere to all statutory privacy standards applicable to the transferor (i.e., the seller).

It should be noted that data privacy legislation typically requires a data controller to obtain a subject's consent before using his or her data. And the data may only be used for the purpose or purposes stated when the consent is obtained. However, in many countries these data privacy laws will concede to the provisions of business-transfer laws, such as TUPE in the UK. These concessions allow certain data to be transferred between buyers and sellers in an M&A deal without the need to obtain the consent of the data subjects.

Under such laws a prospective seller may, for example, transfer employee data to a prospective buyer for the purposes of vetting a deal. The list of permitted information is, however, limited. And if the buyer requests any personal data outside the scope of the business-transfer laws, then the subjects' consent will need to be obtained.

Requesting data outside the scope of business-transfer laws may lead to significant delays in the vetting process, as the data could extend to thousands of individuals (e.g., employees, contractors or consumers). In such cases, the buyer may ask that the requested data be anonymized, especially in the early stages of the vetting process. As the deal progresses, however, there will come a time when anonymized data is inappropriate and data-subject consent will have to be obtained.

Finally, nearly all data protection laws ensure that data is retained only for as long as it is required. After a deal, then, the seller should destroy all personal data if it is no longer needed.

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Additional Considerations

Some Additional Considerations

We've tried to be comprehensive in this playbook, though there will be gaps in the considerations we've addressed due to space limitations and the fact that each M&A deal is unique. That said, those considerations we have addressed will likely alert you to others. For example, we noted in the HR section that the number of employees in a buyer's proposed operation will affect its insurance rates. Similar forces will be at work in the area of procurement. In a carve-out deal, for example, the buyer may not have the same purchasing power as the seller, which will lead to higher office supply expenses for the buyer. Profit and loss projections during the vetting process will need to be adjusted accordingly.

We've also addressed the importance of employee communication and consultation, which is a large subject. Early and effective communication will promote employee engagement, as we mentioned, but there are other pressing considerations that can easily be imagined. Employees that are transferring will assume, for instance, that they will be paid on the same day of the month on which they've always been paid. And many will have standing payments for mortgages and other personal expenses based on that payment history. It is therefore essential that any proposed change of pay date is communicated in good time to employees so they can make appropriate changes to their payment plans. It also makes sense to ensure that the date on which employment formally transfers is the first day of the month, so you don't have a split month for social security reporting.

And if you have no experience in the target country, it's hard to overemphasize the importance of understanding local labor laws and customs, which may be vastly different than those in your home country. In addition to considerations already mentioned, you'll need to understand how annual leave accrues and what rate of pay an individual receives. In some countries, pay calculations are made using average total earnings over a specific period. This means that immediately after the transfer, your calculations will have to include wages earned when the employees worked for the seller. You'll also need to ensure that you've established reporting lines in the host country, including those of remotely managed employees. And you'll need controls in place to ensure that your transferred employees don't breach maximum working time thresholds under target-country law.

Finally, it's important to obtain realistic estimates for the amount of time it takes to open a local bank account (often a prerequisite for running a local payroll) and for transferring funds to the target country. You'll also need to understand variable compensation structures and related obligations, such as overtime or on-call payments. In many countries, payroll vendors will need this information a few weeks in advance of the payment date.

These additional considerations are meant to provide useful information, but also to illuminate the many factors that can affect a cross-border deal



Conclusion

As we've seen, the M&A arena is a difficult one, with historically high failure rates. Anyone who has been involved in a cross-border merger or acquisition will tell you that some of the most testing moments arise when struggling to meet day-zero deadlines after the deal is struck. When the transfer is finally made, will you be able to pay your new employees, serve your clients, pay local tax authorities, sponsor expat workers and meet a host of other obligations in your new country of operation?

The best way to put yourself in a position to succeed is to conduct due diligence as far in advance as possible. Thoroughly vetting a cross-border deal will allow you to set realistic timelines and make reasonably accurate profit and loss projections. When done right, the process will invariably require the services of an outside expert. We say this not simply because we're in the business of providing such services, but because it's a fact. Few organizations are equipped to quickly gain an understanding of another country's statutory and customary employee benefits obligations, its legal entity options, its worker-protection laws, its data privacy requirements, and on and on.

So while we may live in a golden age of mergers and acquisitions, the risks remain. And you shouldn't let your competitors' frenzied deal-making lead you to a false sense of security about those risks. The fact is that cross-border M&A deals are more complicated than ever in today's increasingly restrictive global legislative environment. And as in so many areas of business, preparation is still the surest means of attaining long-term success.

The best way to put yourself in a position to succeed is to conduct due diligence as far in advance as possible. Thoroughly vetting a cross-border deal will allow you to set realistic timelines and make reasonably accurate profit and loss projections.

Cross-Border M&A Checklist for Buyers	✓
Understand that M&A deals are risky; some sources indicate that between 70% and 90% percent of deals fail.	
Understand that cross-border M&A deals typically come with obligations in the host country that are costly and time-consuming and may be unfamiliar to you.	
Understand that any agreements in the host country must comply with local laws (not the laws of the home country) and that they must be written in the local language.	
Develop a single coordinating project team. The team members should be drawn from finance, HR, legal counsel, risk management (if the department exists), and external experts to reasonably ensure that all aspects of the deal are thoroughly considered.	
Determine if a legal entity needs to be established in the host country, for example in an asset deal involving transitioning employees.	
Determine the optimal legal entity based on the planned activities, cost to maintain, time it takes to establish and other factors. It will likely be a subsidiary or branch (or their equivalents).	
If the time to establish the optimal legal entity is too long to meet agreed-upon deadlines, develop a contingency plan, which may involve establishing a representative office and/or entering into a transition services agreement (TSA).	
Understand the process for establishing a bank account in the target country, including how long it takes.	
Determine if your target country's laws protect employees when a business is transferred, for example if the country has legislation that accords with the European Commission's Acquired Rights Directive (ARD).	
Determine accrued employee rights such as severance and pensions, understanding that some liabilities may be difficult to uncover, such as the carryover of annual leave or Christmas bonuses that may not be stated in writing.	
Understand if any transferring employees are covered by a collective bargaining agreement (CBA) and understand employee rights under that agreement.	
Duplicate the transferred employees' existing contract terms and conditions. Understand that in many cases, buyers are better off issuing a "transfer of employment" letter.	
Understand that your insurance rates, procurement purchasing power, etc. may differ significantly from that of the seller due to the number of employees in the target country.	
Communicate and consult with transitioning employees well in advance of the transition. (This may be required under local law and/or by a CBA.)	
Draft and sign confidentiality agreements and intellectual property (IP) agreements.	
Identify who controls the seller's IP and carefully review all IP agreements.	
Ensure that any IP generated by the seller's employees has been effectively transferred to the seller.	
Determine if any of the seller's employees have work permits (i.e., are expats in the target country). If necessary, apply for immigration clearance for workers whose permits will become invalid after the transfer.	
Understand that the seller has the statutory responsibility to ensure the transfer of sensitive data to the potential purchaser is lawfully managed under all applicable legislation and that you may have to agree to adhere to all statutory privacy standards applicable to the seller.	

About Vistra Advisory Services Team

If you're concerned about protecting your company from the risks of a merger or acquisition, or if you're facing other international challenges, Vistra seasoned advisory team can help you understand your options and recommend practical, compliant solutions.

Our advisors are senior practitioners with real-world experience in international expansion and operations. They include former Big Four international consultants, CPAs, auditors, lawyers, international HR experts, business school graduates and tax specialists. Many have broad expertise in functional and geographic

areas, and many have niche specializations in subjects such as HR obligations, indirect tax, transfer pricing, data protection and anti-bribery legislation.

Let us help ensure that your international operations are in compliance with all applicable laws, that you've completed all necessary registrations, and that you've developed and implemented optimal policies and procedures to reduce risk and gain a competitive advantage.

For more information about how Vistra experts can help you, [contact us](#).

About Vistra

Ranked among the top three corporate service providers globally, Vistra is a versatile group of professionals, providing a uniquely broad range of services and solutions. Our capabilities span across international incorporations to trust, fiduciary, private client services, and fund administration. We employ over 4,000 professionals across 46 jurisdictions throughout the Americas, Europe, Middle East, and Asia Pacific.

As a leading global player with expert industry knowledge and location specialists, Vistra has a deep understanding of the professional worlds of our clients, and a proven track record of offering highly versatile solutions, providing the people, processes, and products that help our clients get the most from their international business.

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