

Beyond Illusions 4: Cross-Border Transactions

Hosted by Dentons, in conjunction with ACC SoCal
August 30, 2017
The Magic Castle, Los Angeles

Cross-Border Business Transactions

Types of Cross-Border Transactions

- Merger and acquisitions
- Joint ventures
- Bank financing
- Securities financing
- Sales and distribution arrangements
- Manufacturing arrangements
- Franchising
- Outsourcing
- Licensing

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General Issues Facing Cross-Border Transactions

Cultural and Communication Complications

- Parties to such deals often come from diverse cultural backgrounds and sensitivities, language experience, and business practices.
- English is predominant global business language, BUT
 - Don't assume all English words have the same meaning to all cultures
 - Avoid colloquialism in communication
 - Spoken and written words are only PART of communications between parties
- Local counsel will help avoid offending cultural sensitivities and miscommunications
- Over-communicating and early and persistent collaboration are essential to success in overcoming such hurdles

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Common vs. Civil Law: What are some key differences?

	Common Law	Civil Law
Functions of lawyers	Debate and oppose	Advise and inform
Judge's role during trial	Referee/umpire	Director/examiner
Selection of judges	Political appointment from practicing lawyers or elections	Merit advancement from judicial specialists (with the exception of some specialized courts)
Status of Judges	Political VIPs	Mid-level civil servants (with the same exceptions as previously)
Language	English	Local languages
Appellate review focus	Procedural	Procedural & substantive

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Common vs. Civil Law: Practical Applications: *How do these differences manifest themselves in day-to-day legal practice?*

- In general, common-law practitioners are accustomed to more flexibility and more initiative by lawyers. Civil-law practitioners will be limited by statutes and codes.
- Contracts drafted in the common law environment are not primarily based on Code and Statute; each one can be crafted more easily to fit the transaction instead of the Code. Contracts in civil law environment need to qualify for the one of the many standards set by statutes or codes, and will be drafted to supplement or reverse the standard rules.
- In litigation, attorneys more active, can often find an argument or case to support a position, less dependent on judges whom, in civil law contracts are bound to apply the statutory rules (the attorneys role is to demonstrate that the statutory rules should or should not apply).

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Due Diligence

- Due diligence - in all dimensions is increasingly essential as pressure mounts - from international sanctions and extraterritorial legislation on conduct of business abroad
 - Partners - at first phase
 - "Know Your Customer" Considerations
 - Target Investment - throughout and as a condition precedent to closing
 - Technical - e.g., environmental liability exposure in manufacturing site
 - Integrity
 - Legal
 - Currency Restrictions and Considerations
 - Financial (different accounting standards)

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Term Sheets

- Consider legal and cultural approach to non-binding term sheets in different jurisdictions (enforceability, expectations as to changes, disclosure obligations)
- Ensure that expectations for negotiation and operations align with the local business culture
- Avoid over-applications of domestic due diligence standards, which can cause delay, waste time and resources, or result in missing key issues. Credibility can be lost if a party makes diligence requests that appear to be particularly unusual or unreasonable to the other party
- Due diligence methods must take into account the target jurisdiction's legal rules, local customs and traditions
- Employing local counsel is key to any successful and efficient diligence

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Nuts and Bolts

Issues to Consider in M&A and JV Agreements

- Entity formation and Governance
 - Not always an analogue
 - Speed
 - Expense
 - Different governance structures (dual board structure)
- Tax
 - VAT
 - Transfer pricing
 - Double taxation treaties
 - Information treaties
 - Form BE-10 US Department of Commerce
 - FBAR
 - FATCA

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Issues to Consider in M&A and JV Agreements (cont'd)

- Contract provisions may not be enforceable
 - Non-competition provisions
 - Termination provisions (distribution agreements)
- Labor and employment
 - Substantially different roles and influence; interplay with government agencies
 - Roles of unions and works councils
 - Different social objectives
 - Different levels and nature of protections
 - Termination often an issue
- Employee benefits
 - Often different concepts and schemes (health insurance, pensions)
 - Equivalent treatment may not always be possible
 - Pension Plan liabilities can be substantial
- Expropriation Risk

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Issues to Consider in M&A and JV Agreements (cont'd)

- Different requirement for Asset and Stock Transfers
 - Civil law notaries
 - Commercial register/Company House
- Bankruptcy/Insolvency Rules (especially in distressed M&A)
 - Different standards of insolvency and resulting legal requirements
 - Personal and criminal liability risk for directors and officers
- Currency
 - Exchange Rate Risk
 - Inability to transfer foreign exchange/Currency Controls (transaction closing/timing considerations; documentation issues)
- Data Privacy Rules
- Merger control/antitrust standards / considerations
- IP Protection

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Dispute Resolution

- New York Convention on International Arbitral Awards
- Bilateral treaties, if any
- Considering independence and reliability of the local courts as compared with international arbitration
- Record of enforcement of arbitral awards in the target country and extent of use of the 'public policy' exception to enforcement
- US Law and US Courts vs. Local Law and Local Courts
 - Never, if a party has no US assets
 - US Law may be okay if arbitration is chosen
 - Use Local Law: when and how>
 - Third Country "Neutral" Law
 - Common in Europe
 - May Create an Issue in the US (Lack of Nexus under US Law)
 - Enforcing a Judgment
 - Enforcing an Arbitration Award

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Post-Closing Considerations

Large-scale Cross-Border M&A transactions do not end with the closing date but result in post-closing matters where the client continues to need assistance in a variety of jurisdictions

- Post-closing consents
- Replacement of officers and directors of acquired subsidiaries can take time
- Change of control notifications in different jurisdictions
- Implementing planned workforce reductions
- Consolidating group structure

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Best Practices

- Determine who is the Client
- Determine nature of the project
- Understand client business objectives and style
- Understand client's reference point for legal framework
- Anticipate unfamiliar concepts/processes
- Clarify project scope, fee expectations and billing practices
- Clarify deadlines and timing expectations
- Confirm preferred methods of communication
- Evaluate need for in person meetings
- Form Legal Team (*jurisdictions relevant for local counsel; specialists*)

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U.S. Attorney-Client Privilege

- An essential element in the U.S. legal system to protect confidential attorney-client communications from disclosure, including to government authorities.
- In many countries, privilege rules are very different, and failure to recognize any differences can result in inadvertent waiver of the privilege (particularly for in-house counsel working on a deal, who is not be licensed in various foreign jurisdictions).
- With proper planning, waiver can often be avoided:
 - Engage licensed local counsel early to help establish proper communication protocols
 - Avoid protected communications with non-legal consultants
 - Segregate sensitive information on IT systems
 - Keep sensitive legal advice oral (rather than via email) in jurisdictions where in-house counsel privilege may not apply

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The Foreign Corrupt Practices Act

18 U.S.C. §§ 78dd-1, *et seq.*

Governs:

- Any Publicly Traded Company Registered in the United States or its agents
- Any US Person, including citizens, residents, or “domestic concerns”
- Any “foreign national or business” acting or causing actions within the United States



The Department of Justice prosecutes criminal violations of the FCPA through its Fraud Section and 94 US Attorney's Offices



The SEC investigates compliance with the FCPA, provides civil enforcement led by a FCPA unit headquartered in Washington and expanding across the nation

Prohibits Bribery of Foreign Officials:

- Payment of “anything of value” (directly or through a third party)
- To a “foreign official,” foreign political party, or candidate for office, including officials of state-owned businesses
- With a “corrupt intent” to influence a government decision, obtain business, or obtain an improper advantage

Books and Records:

- Publicly Traded Companies must maintain **accurate books** that reflect all transactions
- Publicly Traded Companies must have **internal accounting controls** to ensure all transactions and dispositions are recorded
- It is a crime to circumvent such controls

Penalty: Individual up to 5 years in Prison and fines; Entities \$2M to \$25M fine per violation, disgorgement, debarment

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FCPA: Anti-Bribery Provisions

- Prosecutions can be brought against:
 - U.S. companies, both public and private
 - Most non-U.S. subsidiaries of U.S. companies
 - U.S. citizens and resident aliens
 - Third parties or employees of any nationality acting for a U.S. company
 - Third parties or employees of any nationality who cause an act in the U.S. in furtherance of a bribe to a non-U.S. official
 - Foreign issuers listed on a U.S. stock exchange

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FCPA: Anti-Bribery Provisions

The Anti-Bribery Provision: What Does it Prohibit?

- Prohibits, directly or indirectly, giving or offering **anything of value** to a foreign official for the purpose of influencing a decision
- Must have intent to “**corruptly**” influence a decision or obtain an improper business advantage
 - Ignorance is not bliss
 - Beware of liability for third-party conduct
 - Offer need not be accepted
 - Government need not be your customer

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FCPA: Anti-Bribery Provisions

The Anti-Bribery Provision: What is Allowed

1. *Bona Fide* Promotional Expenditures
 - Reasonable meals, travel, and entertainment
 - Small, token gifts and promotional items of nominal value
 - Must directly relate to a legitimate business purpose, such as:
 - The promotion or demonstration of products or services
 - The negotiation, execution, or performance of a contract with a foreign government or agency
2. Payments that are lawful under the written laws and regulations of the official's home country
 - Rarely applies because few nations have written laws expressly permitting such payments

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Sanctions

- The US has an extensive and often complicated sanctions regime that targets specific individuals and entities, but also countries and economic sectors of those countries.
- Sanctions can change with little or no notice: may rapidly expand/contract depending on geopolitical events, domestic political dynamics
- "US persons" are required to abide by all sanctions programs, and this includes all US corporations and other entities organized under US jurisdiction, and their foreign branches
 - *Some programs extend the prohibition to foreign subsidiaries of US entities*

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Sanctions (cont.)

Blocked persons (the SDN list)

- Specially Designated Nationals and Blocked Persons (SDN List) maintained by the US Treasury's Office of Foreign Assets Control (OFAC)
 - Assets under US jurisdiction are frozen
 - Visa bans (for individuals)
 - Transactions generally prohibited absent OFAC licensure
- Be aware: the SDN List serves as a de facto screening list for virtually all financial institutions with global presence
 - This means that US Dollar-denominated transactions with SDNs, even if the transaction is not prohibited under a sanctions regime, may be at risk of being frozen by the US corresponding bank.



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Sanctions (cont.)

- Sanctions programs govern imports, exports, and in a number of cases, re-exports
 - For SDNs: all transactions and therefore imports/exports are generally blocked without a license
 - For some country-specific programs (Iran, Cuba), transactions are generally blocked without a license
 - For others: depends on the sanctions program. For example, Ukraine-related sanctions' Sectoral Sanctions Identification list (SSI list) permits transactions with SSI listed entities except for certain debt/equity transactions.
- When dealing with import restrictions, customs rules on country of origin may be superseded by sanctions regulations/definitions
- Diligence with respect to supply chain and distributors is critical, particularly to guard against SDNs or diversion

Speakers

David Blood is a partner in Dentons' global Corporate practice, with significant experience negotiating corporate and complex commercial transactions around the world.

David has deep experience representing US, international and multinational clients with respect to matters such as mergers and acquisitions, joint ventures, private equity investments, financing, licensing, distribution and other commercial transactions. He has counseled companies operating from and in Latin America, Europe, the Middle East and Asia.

In particular, David leads a variety of international and US business matters focused on structuring and closing complex corporate and business transactions in the media, entertainment, sports, hotels and leisure, telecommunications, health care and emerging technology sectors. He has advised a variety of global companies with respect to cross-border investments, joint ventures, operations, acquisitions and other commercial arrangements. He has represented buyers, sellers, licensing entities, distributors, investors and founders in such arrangements.

In addition, David has advised a variety of clients with respect to media production and distribution opportunities. He has been on the ground floor of major developments in content distribution throughout the past two decades, including video on demand, online distribution, electronic sell-through, over-the-top, mobile and other forms of distribution. He has counseled various new and independent networks and content producers on all aspects of their businesses, and he has represented US and international distribution platforms in connection with securing and producing content and securing technology required for their distribution systems.



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Speakers

Andrea Chang is a partner of the Real Estate practice group in Dentons Los Angeles office. Her practice includes all aspects of a broad range of real estate and finance transactions, with a focus on real estate loan documentation, workouts, restructuring, development, real estate finance, commercial acquisitions and leasing.

Andrea regularly represents lenders in documenting loans related to land acquisitions, refinancing and construction financing, loan modifications, loan workouts, conduit mortgage loans as well as multi-family loan transactions. She also regularly represents public companies, private companies, property management companies and individuals in acquisitions of all types of real estate transactions, including, but not limited to, retail shopping centers, mixed-used properties, land acquisitions and hotels and investments and assumption of loans. Andrea has also served as lead counsel on more than 150 site acquisitions throughout California and Nevada in a narrow four year span.

Andrea publicly speaks about matters related to real estate and has published a cover article on real estate receiverships in *Los Angeles Lawyer* magazine.



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Speakers

Michael Duvall is a member of Dentons' Litigation and Dispute Resolution practice, focusing on class actions, business and commercial litigation, appeals and administrative enforcement actions.

Michael has defended dozens of class actions including successfully trying a consumer class action, has successfully argued several appeals in federal and state courts throughout the country and has briefed multiple cases to the United States Supreme Court.

Michael regularly represents both public and private companies in the insurance, real estate, food, pharmaceutical and telecommunications industries. He defends those companies in class actions alleging consumer fraud and unfair competition; in product liability class actions; in employment, trade secret and employee classification disputes; and in shareholder and corporate governance disputes. Michael's cases regularly involve alleged violations of federal and state consumer protection laws, including the Real Estate Settlement Procedures Act (RESPA), the Racketeer Influenced and Corrupt Organizations Act (RICO), the Fair Credit Reporting Act (FCRA), the Fair Debt Collection Practices Act (FDCPA), the Fair Housing Act (FHA), the Electronic Funds Transfer Act (EFTA), California's Unfair Competition Law (UCL) and California's Consumers Legal Remedies Act (CLRA).

Michael also regularly represents victims of domestic violence in *pro bono* matters and was named a Volunteer of the Year for the Legal Assistance Foundation of Chicago for 2016.



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Speakers

John Zhang is a partner in the Firm's Los Angeles office and a member of the Corporate practice. John has extensive experience working on mergers, acquisitions, private placements and public offerings of securities, and other sophisticated business transactions in the United States and elsewhere. He has served as lead corporate counsel to clients in a wide spectrum of industries, including investment banking, private equity, renewable energy, electronics, video games, furniture, automotive parts, information technology and entertainment.

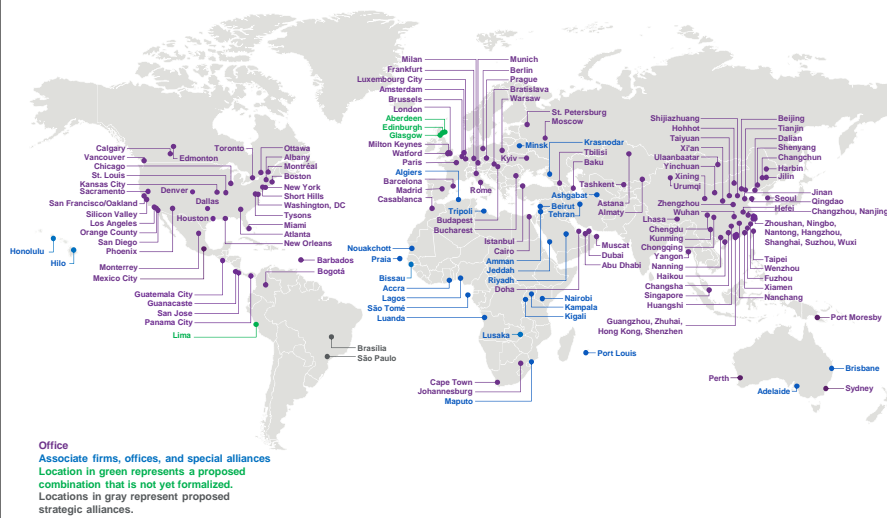
In addition to his regular corporate practice, John is skilled in cross-cultural negotiations and has successfully served as the lead counsel in a number of high-profile, high-stakes international litigation matters.

A graduate of China's most prestigious school, he is among the best known Chinese-speaking lawyers in the United States.



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