Doing business in new markets

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Introduction

Businesses are becoming increasingly global, helped in part by the expansion of the Internet. However, while business itself may transcend jurisdictional borders, every country will maintain its own regulatory approach and will have its own customs and practices.

We have worked extensively with organisations in looking at their compliance and other risks when entering into a new jurisdiction. The note below looks at some of the considerations we have looked at. We update our work in this area frequently and help our clients with bespoke questionnaires and guidance notes – do contact us if you would like more details. Naturally these notes are not exhaustive and do not include everything you will need to consider.

There may be increased political or legislative risks that should be taken into consideration by businesses before they start operations. These risks will vary from country to country and their perceived importance will also vary depending on the specific operating sector and the concerns of each business.

This note sets out some of the key considerations for a business before it decides to start operations in a new country. There are many organisations that provide assessments of a jurisdiction's performance in important areas. The *Global Competitiveness Report* prepared by the World Economic Forum includes many of these areas as key indicators when assessing the attractiveness of each country as a place to conduct business (http://reports.weforum.org/global-competitiveness-report-2015-2016/).

Political stability

A country with a stable political system, in particular that manages peaceful transitions from one ruling power to another, will be more likely to benefit from economic stability. Politically-stable jurisdictions will find it easier to attract investment from outside, an example would be by the rapid growth of the Northern Ireland economy during the mid-1990s after the signing of the Good Friday Agreement. Key considerations include the following:

- How has the country managed transitions of power in the past? Have elections been free from violence?
- Is there any recent historical evidence that an incoming ruling power has failed to honour the commitments to investors of the outgoing ruling power? For example, have incoming rulers revoked licences or permits awarded to foreign investors by the outgoing rulers?
- Is there any obvious reason why a change to the political balance may occur? For example, where a jurisdiction has been ruled by a single individual for some time, is that individual in good health and what transitional procedures are in place?
- Are there any conflicts in neighbouring jurisdictions that could be likely to cause conflict in the jurisdiction in question?
- Are there any trade embargoes or sanctions that would prevent, or hinder, the operation of the business in the new jurisdiction?

The easiest way for an investor to monitor these issues is likely to be through political and business news reports, and through the investor's business contacts and associates within the relevant jurisdiction. Cordery's intelligence teams can help with this.

Infrastructure

A successful business operation will need to be serviced by the best possible infrastructure network. In many cases, the loss of basic infrastructure will have serious consequences for the ability of a business to perform. For example, an Internet-based business selling products to consumers will effectively be shut down by any loss of its Internet service. Key considerations include the following:

- How well served is the jurisdiction by airports and ports?
- What is the quality and cost to business of the jurisdiction's internal road and rail networks?
- What is the cost and availability of utilities (such as electricity and water) and how prone to interruption are these?
- How well developed is the telephone communications network (for example, is 3G technology widely in use)?
- How widespread is Internet use, how secure is the service, how prone is it to interruption, and how modern is the network (for example, is high-speed broadband widely in use)?
- How clear is the commitment of the government of the relevant jurisdiction in its commitment to the future maintenance of the jurisdiction's infrastructure?

The CIA World Factbook (www.cia.gov) can be a useful source of information on key infrastructure elements like airports (including runway length), ground transportation and telecoms infrastructure (mobile and fixed line).

It's also wise to check the events calendar for your new location. Major events like the Olympics or World Cup can bring infrastructure investment but create challenges in the short term with construction, disruption and extra visitors. London Transport for example estimated an extra 800,000 bus passengers during the Olympics. If your investment depends on new infrastructure plans make sure those plans are built on solid foundations – as an example a number of corporations experienced issues with investments in Greece after hoped-for infrastructure improvements failed to materialise.

Crime and healthcare

Two important practical concerns before operating in any new jurisdiction will be the level of crime in that jurisdiction and the healthcare services available. Riskier jurisdictions with a high level of crime and an ineffective police force will require additional consideration to be given to the personal safety of employees and the protection of business assets. The cost of normal business insurance in these jurisdictions may well be increased as a result. In addition, a business should consider the healthcare options available to its employees and the quality of those services:

- What is the level of risk to both the business and its employees from crime in the new jurisdiction?
- Is there a specific threat from terrorism in the new jurisdiction?
- Does this level of risk differ significantly from the home jurisdiction, and, if so, what additional actions should be taken to mitigate this?
- Where the business has moved employees (and their dependants) into the new jurisdiction, are the available healthcare services equivalent to those in the home jurisdiction.

Freedom of courts from political interference

Judicial independence is important in ensuring that businesses have confidence that any recourse they may have to the court system will be fairly dealt with. It also enables a business to plan for the future more efficiently, as greater reliance can be placed on past court decisions as an indicator of how similar circumstances would be dealt with in the future. Key considerations include the following:

- Is the process for the appointment of judges transparent, fair and impartial?
- Are judges free to make decisions that may be unfavourable to the relevant government without fear of this affecting their own careers?
- Is there a formal judicial review process that applies to decisions made by the government and is there evidence that this process is effective?
- Is there evidence of past political interference in the outcome of court cases?

It may be difficult for a business to be in a position to assess the strength of a jurisdiction's judicial independence. However, there are organisations that monitor and assess judicial independence (this is a factor considered in the *Global Competitiveness Report* prepared by the World Economic Form) and it may be possible to gain a feel for the risks from news reports and commentary relating to the relevant jurisdiction.

Approach to bribery and corruption

The anti-bribery laws of many jurisdictions (notably the Foreign and Corrupt Practices Act in the US http://www.justice.gov/criminal/fraud/fcpa/ and the Bribery Act 2010 in the UK https://www.gov.uk/anti-bribery-policy) will require a business to ensure that no part of its operation, in any jurisdiction in which it operates, commits bribery offences. The UK legislation imposes liability for any bribery offences committed anywhere in the world by any business that has a connection to the UK, irrespective of whether or not that business is primarily based in the UK. Proper controls must be put in place to guard against any potential liability. Key considerations include the following:

- To what bribery legislation is the business already subject in its existing jurisdictions?
- What policies or other controls need to be put in place to ensure compliance with this legislation by the business' new operation?
- What new legislation will be imposed on the business in the new jurisdiction?
- Will this new legislation also require the existing business to alter or tighten its practices in the jurisdictions in which it already operates?

Transparency International (TI) provides data on a country-by-country basis aimed at assessing the prevalence of corruption within a jurisdiction and any recent steps taken to improve the situation (http://www.transparency.org/research/cpi/overview). TI's Corruption Perceptions Index 2013 is available online (at www.cpi.transparency.org) and measures the perceived levels of corruption in 177 countries and territories around the world. The Index ranks and heat maps those countries in order of perceived corruption from those regarded as the least corrupt (Denmark and New Zealand) to those perceived to be the worst (Afghanistan, North Korea and Somalia). Clearly doing business in countries toward the bottom of the list will require greater due diligence and enhanced compliance measures, including training. A business should not wait for these issues to be raised by a local lawyer; local lawyers may not be aware of the far-reaching scope of the US and UK legislation and therefore may not prioritise these risks as highly as lawyers from the US and UK.

Regulatory environment

The level of regulation to which a business is subject will significantly impact the cost and efficiency of running that business. Some regulation will be directly imposed on a business and affect all of its day-to-day activities, eg environmental or consumer protection regulations. There may be additional legislation that will arise only when specific actions are being contemplated by a business, eg when acquiring another business. Key considerations include the following.

- What are the basic regulations that will apply to all businesses irrespective of the sector in which they operate? These will often include environmental protection legislation, public information filings (eg accounting information), and tax filings.
- What industry-specific regulations will apply to the business in the new jurisdiction having regard to the sectors in which the business will be operating? For example, there may be consumer protection regulations that will be relevant to business selling goods to the public
- Is the sector in which the business will operate one that is considered to be in the national interest (eg defence) or a matter of particular public interest (eg media ownership)? If it is, further industry-specific regulations are likely to apply.
- What market threshold will the business initially have, and how is this expected to grow in the future? Most jurisdictions have competition laws aimed at protecting against abuses of a dominant market position and these may affect a large business' ability to grow freely.
- Does the provision of goods, services or works to the public sector need to be obtained under a procurement process? In order to prevent fraud, waste, corruption or local protectionism most jurisdictions use some form of public procurement procedure, often requiring a procuring authority to issue a public tender if the value of the procurement exceeds a certain threshold, that businesses have to follow, competing against other businesses, in order to win contracts. What governmental or third-party consents are required to effect any business acquisitions that may be contemplated by the business? These may include shareholder consents or consents from any relevant governmental bodies. In addition, in certain

jurisdictions, particularly those in Eastern Europe, it is often necessary for a buyer to obtain the consent of a seller's spouse prior to any sale of shares or other assets.

Currency controls

Jurisdictions with weaker economies may seek to achieve greater stability by restricting the amount of foreign currency or local currency that is allowed to be traded or purchased. Although currency controls are increasingly uncommon, Article 14 of the agreement establishing the International Monetary Fund contains a provision that permits countries with transitional economies to utilise currency controls. Key considerations include the following.

- Does the new jurisdiction implement currency controls? The affected jurisdictions tend to be those with smaller economies, although Brazil, China, India and Russia all have some form of currency controls in place.
- What form does the currency control take? Some jurisdictions may ban the use of foreign currency or fix exchange rates, while others may require that payments involving non-nationals only be made through accounts with authorised local banks.
- Where restrictions on the movement of money out of the jurisdiction are imposed, how will this affect the new business' ability to repatriate its profits?

Investment controls and local partners and foreign direct investment

The laws of some jurisdictions may seek to protect certain key industries or assets from foreign ownership. In this scenario, it may be necessary to seek the participation of a local partner in order to conduct the desired business. It will be important to understand the restrictions that may apply in advance. Where a local partner is required, appropriate controls on that partner must be agreed. Key considerations include the following.

- Are there any laws which require businesses operating in certain industries to be conducted through joint-ventures with a local business? For example, China has historically limited the percentage of motor vehicle manufacturing and research businesses that may be owned by non-Chinese parties.
- Are there any 'indiginisation' or 'economic empowerment' laws that require a certain percentage of a business to be held by or on behalf of a historically under-privileged local population? These can commonly be found in African countries (such as South Africa and Zimbabwe).
- Are there any restrictions on the ability of foreign parties to own real estate in the new jurisdiction? In many smaller jurisdictions (particularly island nations) significant restrictions are placed on the ability of non-residents to buy real estate. This can also be the case in Switzerland.
- Where a subsidiary company is being formed in the new jurisdiction, are there any requirements that the directors be nationals of that jurisdiction?

Many jurisdictions seek to attract foreign direct investment in their country through bilateral investment treaties. Typically these grant investments made by a business in the territory of another country a number of guarantees, which usually include fair and equitable treatment, protection from expropriation, free transfer of means and full protection and security. Whilst these treaties are by their nature business-friendly the terms need to be carefully checked to ensure that they can deliver what they promise.

Working hours and culture

It is crucial to understand the working practices and culture of the new jurisdiction. This is key to ensuring good morale within the workforce in that jurisdiction and a close integration of that workforce with the business' existing workforce. Key considerations include the following:

- What is the minimum wage due to employees? What wage is expected within the relevant industry sector and what other basic employee rights apply?
- What are the expected working hours and days within the relevant jurisdiction? For example, the weekend in certain jurisdictions (predominately North African and Middle Eastern jurisdictions) runs from Friday to Saturday.

- What is the statutory holiday entitlement of employees and is there any custom of supplementing this with additional holiday dates?
- Does the predominant belief system in the relevant jurisdiction differ to the home jurisdiction and if so does this require any changes to be made to the business' usual working practices? For example, in Muslim countries, working hours are often reduced during the month of Ramadan.
- Is there a language barrier and, if so, how can this be overcome?
- Will any employees seconded into the country from HQ be able to work freely? For example in some countries it can be difficult for women to lead in business negotiations.

The working practices of a global business are likely to be judged in accordance with the expectations of the most developed jurisdiction in which it operates. A business may comply with all of the minimum requirements that are imposed on it in a new jurisdiction, but may still suffer adverse publicity if these minimum requirements are seen to be insufficient in another jurisdiction in which it operates. A good example is the adverse publicity suffered by many global clothing manufacturers accused of unfairly treating workers in developing countries, even though those manufacturers may be meeting or exceeding all of the minimum requirements imposed by the employment laws of the relevant developing country.

Ability to hire and dismiss employees

The ease with which a business can make changes to its workforce in the new jurisdiction will be an important factor, especially where the business is entering the new jurisdiction for the first time and may face uncertain initial demand. This will include the business' ability to move existing employees into the new jurisdiction to assist with any set up and to make employees employed in the new jurisdiction redundant if the business is required to downsize its new operation in the future. Key considerations include the following:

- What restrictions are there on the business' ability to relocate employees from its existing operations to the new jurisdiction (eg is a work visa required and if so what are the criteria for obtaining one)?
- Is there a requirement to constitute a council of employees (like a European Works Council) in the relevant jurisdiction and what consultancy and information rights will that body have?
- On what grounds can employees be made redundant in the relevant jurisdiction?
- What is the length of the redundancy procedure, and to what level of compensation are affected employees entitled?

Protection of assets

When acquiring assets in a new jurisdiction, it is important to ensure that there are no local laws which may impact the ownership of those assets in the future. The ability to protect the business' intellectual property may also vary in different jurisdictions. Key considerations include the following:

- Are there local laws which grant a third party rights over any key assets acquired in the new jurisdiction? For example, in Italy it is common for tenants or neighbours of property in agricultural areas to have a pre-emptive right to acquire that property if sold, and title to the property may be at risk if this right is not respected.
- What intellectual property rights are available in the new jurisdiction to protect any newly-created intellectual property in that jurisdiction? Do these rights arise automatically or do they require registration?
- Can the protections already covering the business' existing intellectual property in its home jurisdiction be extended to cover, or be replicated in, the new jurisdiction?
- What restrictions should be built into any employment contracts in the new jurisdiction to ensure the protection of the business' intellectual property and other confidential information?
- To what extent can the poaching of key employees in the new jurisdiction by competitors be protected against?

Repatriation of profits

Once a business has been successfully established in a new jurisdiction, the business will often wish to repatriate all or a part of its profits to its home jurisdiction. Early consideration should be given to the tax structuring of any such proposals to ensure that any transfer of funds is as tax efficient as possible. Key considerations include the following:

- What withholding taxes are applied (whether to dividends, interest, royalties or otherwise) under the tax laws of the relevant jurisdiction?
- Are any tax exemptions available that would reduce the amount required to be deducted by any applicable withholding taxes?
- Are any double taxation treaties in place between the business' new jurisdiction and home jurisdiction that may reduce the rate of withholding?
- Will currency fluctuations have a significant impact on the attractiveness of any profit repatriation scheme? For example, if the currency in the new jurisdiction is weak against that in the home jurisdiction, a business may wish to wait to repatriate any profits until the currencies are more balanced.
- If, once repatriated, the intention is to distribute any profits to the business' ultimate owners, what steps can be taken to mitigate the effects of further taxes being deducted by the home jurisdiction from the repatriated profits?
- What insurance policies need to be put in place to cover the operations of the business in the new jurisdiction?

These notes are for general guidance only and are not legal advice. You should not do, or refrain from doing, anything on the basis of these notes. Cordery thanks LexisPSL and our inhouse counsel friends for their help in putting these notes together.

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