Top Ten Dos and Don’ts for US Companies Doing Business Internationally

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By Stephen Clayton, ACCMember InTransition

Many US companies, small and large, want to distribute their products effectively and efficiently in international markets - and to make a profit doing so. In 2010, the US government established the National Export Incentive (More details on the NEI) and set the ambitious goal of doubling US exports by the end of 2014. The NEI provides for some government assistance, but the decisions on how to export and do business outside the US must be made by each company. Even large companies often don't know how to address very different ways of doing business - this article identifies ten issues that always need to be considered.

1. Understand that Doing Business Overseas is Different than Doing Business in the USA.

The vast majority of American business people and lawyers have no experience with business or law outside the US. This is not surprising. Only 1% of American college students spend even a single semester studying outside the US, and a miniscule number of US high school students study abroad. The US education system is notoriously poor at creating fluent speakers of other languages. On top of that, even the largest US companies rarely send US employees overseas for extended periods of work.

In many US companies the employees with significant international experience are foreign citizens working in the USA or their home countries.In 2008-09 the number of US students who studied abroad was 260,327, and 40% of those were in England, France, Spain, and Italy. The number of foreign students studying in the US was 723,277 during 2010-11. US students studying abroad tend to focus on literature, art and social sciences while foreign students in the US study science, engineering and business. Most foreign students leave the US immediately after graduation, though some stay in the US a few years to get job experience that will be helpful to them back home –where they may end up working for a US company.

Senior management, including the general counsel, should realistically assess their personal limitations and the limitations of their company and its management team when they plan and conduct international business. The foreign companies they will do business with have probably been dealing with American companies and companies from France, Germany, Japan and other major players for many years. They will often have local employees throughout their organizations who have gone to college in the US, worked in the US, worked for US companies and who are fully fluent in spoken and written English for business purposes. They know how business is done in their country - and they know you do not.

2. Do Appropriate Due Diligence on the people you hire to run your overseas operations and the people/companies you engage to sell distribute and service your product.

When you hire a Country Manager, head of Sales, head of Service or Finance or other senior manager for your operation in another country, what are the most important qualifications? For most US companies they are:

1) that he made his numbers in his last job, and

2) that he speaks fluent, only lightly accented English. Those are certainly important, but they do not mean this will be the right person for your company.

For example, in a business setting, the person who speaks the best English may have no credentials, authority or power in his native culture. And the person who made his numbers may have done so through conduct that violates your company's Rules of Business Conduct - or US and local law.

Your company probably does standard background investigations on your employees in the US.It is reasonable to assume that you will need to know just as much information about your employees in other countries as you do about your employees in the US. Unfortunately, it is likely that you have no Americans in your organization with the cultural, language and business skills to ask the right questions or understand the answers to adequately assess candidates in other countries. You need to build or hire that expertise.

Reasonable background investigations on third parties who aid your business overseas are required. More than three quarters of cases under the Foreign Corrupt Practices Act involve US companies being held responsible for the conduct of third parties. The Department of Justice and SEC have been very clear that if a company has not done reasonable due diligence background investigations on third parties it will receive no credit for having a compliance program when a third party working for it violates the FCPA.

3. Train your employees - and your management - and your Board.

It is fair to assume that US business people will have, at best, a tourist's knowledge of the foreign countries and cultures where your company does business - and no knowledge at all of foreign laws. American business managers are notoriously ethnocentric and chauvinistic. Many will not recognize that they need training and be unwilling to devote time to it.No matter how hard your company tries, it is unlikely many junior employees, let alone senior managers, will learn a foreign language on the job. But companies can provide incentives to learn more about the places where the company is doing business and how to do business effectively in the company's foreign locations.

In the past larger companies sent US managers overseas as expatriates to make sure the interests of the US company were being properly managed and to gain an increased understanding of how the company's business was being done. Expatriates were also able to learn how business was being conducted and assess the strengths and weaknesses of overseas employees by working with them for several years. This practice was never widespread and has diminished in the 21st century. Part of the decline was due to cost. US management saw overseas assignments as "hardship posts" and gave large cost of living allowances and other expensive perks to employees who would endure working overseas. The peculiar US tax system taxes the expatriates on their worldwide income and helped to make long-term foreign postings dreadfully expensive for US companies. Finally ambitious managers recognize that leavingUS headquarters for a lengthy overseas assignment takes them out of the corporate career mainstream and will put them behind their peers who remain in the US.

If one year or longer foreign assignments are not possible for your company, consider short-term rotations. Assigning US staff to long term multi-national business projects and virtual teams will also give your US employees experience dealing with international operations and working with people from other countries so they can build international perspective.

4. Consider Exclusive Distribution Arrangements –but agree to them only if absolutely necessary.

Many companies starting business in a new country are pressured by the prospective local distributor to grant exclusive rights to the territory. Granting a single company the right to market, sell and service your products in a country or territory may be the fastest, easiest and least expensive way to gain entre into a new market, but an exclusive distribution agreement is a marriage. You are new in town and do not know what is available in the field, so probably should only be dating rather than marrying the first eligible person you meet.

Exclusive distribution arrangements have been very good for some companies in certain industries and markets. But they have also limited growth and caused companies to stagnate and fail to address the opportunities in the market. Most companies find they can sell more products at a higher profit when they engage multiple distribution channels.

In a number of countries exclusive distributors acquire a right to have the relationship continue, and under local law the courts will grant them large indemnities if your company terminates the agreement or takes away their exclusivity. Also there can be a danger that the exclusive distributor will essentially own the market for your products in a specific country and therefore holds power over your company.

If you are going to enter into an exclusive distribution arrangement:
- Clearly limit the term of the initial contract to not more than 2 years;
- Clearly state that the purpose of exclusivity is to develop the entire market and the exclusive privilege is intended to be for a limited time and a limited territory;
- Provide tough business development goals for the exclusive partner and make it clear that the exclusivity terminates if the goals are not met;
- Clearly provide that exclusivity will terminate at the end of the initial term, subject to the partner making new commitments, agreeing to new goals and producing results that justify continuing exclusivity for asubsequent period.

It is generally better to have a policy that disfavors exclusive arrangements and keeps any that are entered into of very short duration.

5. Consider joint ventures - but enter into them only if necessary.

Joint Ventures area another form of marriage – and may be a shotgun wedding for the US company.

In some jurisdictions foreign companies wishing to enter the market are strongly advised or required by the local government to do so in the form of a joint venture.This can be an overt way of preventing market domination by foreign companies and subsidizing the local royal family or ruling elite.

US companies seek out joint ventures in order to gain market penetration, market knowledge and local experience without going to the expense of setting up a subsidiary. A JV can get your company more local knowledge and involvement in the market than going through distributors and channels.

The trouble is, many JVs fail in a short time, at least from the perspective of the US partner. US companies enter the arrangement with high hopes but cannot adjust to the mundane reality of running a business/investment in a foreign country. US employees quickly realize that being assigned or volunteering to work in the JV has the effect of putting their career at the US parent on hold, so the most ambitious managers are not interested. The foreign JV partner also realizes that it will get all the advantages it can from its US partner in 3-7 years, so it may not have a long-term horizon.

US companies frequently fail to properly staff the JV with their own people so they learn very little about operating in the country. After 4-5 years the US company will be on its 3rd or 4th expatriate manager while the management team from the foreign partner has been in place and involved from the planning sessions on - so the foreign partner understands and dominates all the long-term relationships and runs the entire show. Management in the US has forgotten why they started this venture in the first place and is no longer interested in building up a long term position with a JV that is not returning significant quarterly profits. A frequent result is a quiet takeover by the foreign partner. Joint ventures can work out well, but your company must actively staff and manage the operation.

6. Maintain responsibility for Finance, Legal and Compliance.

A US company will have Compliance, Financial and Legal obligations under US law and regulations that apply to its foreign operations. Even if your local employees speak fluent business English, it is doubtful they are going to understand the unique cultural intentions behind a US company’s Rules of Business Conduct, the nuances of ethical constraints on US businesses, the reality of laws such as US Export Controls or the Foreign Corrupt Practices Act or the need for accurate financial records and US

GAAP accounting. The training provided by US companies for foreign employees in these areas is usually inadequate - if it is done at all. Does anyone really believe an employee has been“trained” on the Foreign Corrupt Practices Act by going through a 30-minute on-line program?

In order to avoid diluting the corporate brand and the company's message, it is important to inculcate foreign employees and operations with the company culture and actively push the idea of company identity. Without continuous and concerted efforts, most company's foreign operations will be a string of disparate local operations run as local businesses with little connection to the US parent and no connection to each other. This can result in legal issues and ethical violations, and in creative if not downright false record keeping and financial practices.

Local finance people in some countries routinely keep false records and evade taxes. Local lawyers in some countries routinely bribe local judges and court clerks. And in most countries, the US concept of "Compliance" does not exist. Indeed in many countries, including major Western European countries, local management will be dismissive of the extraterritorial impact of US laws in their local jurisdiction. Under resourcing or outsourcing Compliance, Finance and Legal can be very dangerous.

7. Understand Local Law and its Role in Society.

Americans often think that because Japan has very little litigation, Japanese companies are not concerned about contracts and legal rights. That is an enormous cultural misunderstanding that can lead to major business mistakes. In fact, Japanese businesses are very legalistic and concerned with preserving their rights - though they are not litigious, in part because the Japanese court system is slow, expensive and cumbersome.

The US is one of the bastions of English Common Law. The vast majority of countries in Asia, Latin America, Africa, and of course Europe, have European Civil Law systems. In the 21st century the legal system of the United States has become so different from that of other countries that virtually no other jurisdictions, including other Common Law countries, look to the US for legal precedent on any subject. The European Union is the thought leader in jurisprudence, and the US is a quirky outlier, clinging to its quaint 18th century constitution, complex state/federal legal systems and other legal relics from the past.

US lawyers who are involved in international business need to have a basic understanding of Civil Law and of the European Union's legal and legislative system. The relative size of the US economy and the clout of the US in international trade have been shrinking for decades and will continue to shrink in coming decades. Foreign business people and lawyers are afraid of the complex and idiosyncratic US legal system with its high incidence of costly litigation and enormous judgments.They will become less and less likely to submit to US law. The burden will be on US companies to make sure they are complying with US law and the laws of the other countries where they are doing business. US lawyers involved in international business need to understand Civil Law and the legal systems of other countries to provide effective legal advice.

In addition to understanding local law, companies are well advised to find or develop expertise in international business law. I once was asked by a US company starting operations in Latin America to draft their standard distributor agreement. I asked the business managers how much time they wanted to spend negotiating their distributor agreements. They said,“none if possible,” so I drafted a distribution agreement that gave the other side all the back-offs the US company would normally grant in a lengthy negotiation - except for 2 areas of corporate risk that had beenmandated by the board of directors as non negotiable.And I insisted they mandate that no agreement would be for longer than one year. Over the next 3 years an entire network of over 25 distributors entered in to this agreement with almost no negotiation, and the same basic agreements were still in place 10 years later. The company never had a serious dispute with a single distributor.

American lawyers understand US law, contracts and the distribution environment. German lawyers will understand the same for Germany, Japanese lawyers for Japan and Indian lawyers for India. It takes many years and many multi-country transactions for a lawyer or businessperson to build up expertise on international distribution. International business law was always a very small specialty and has grown smaller in the last 15 yeas as international communications have been revolutionized and US companies increasingly go directly to foreign lawyers.

8. Show Up.

In foreign countries, American business people are famous for being the ones who show up, act very busy for a short time, make a lot of promises, then leave and are never seen again. That is, if they ever show up at all.

Communication with most parts of the world has become instantaneous and it is cheaper to do business by phone, fax and the Internet.Cheaper is not always better. Emails coming out of the net from an unknown person with a vague title are not likely to get as much credibility as future dealings with a colleague you have met. Credibility and trust take time to develop. I was involved in an investigation in Russia and asked the foreign regional business manager who had been responsible for his company's Russian operation for several years who he trusted among their roughly 120 employees in Russia. "No one." he replied.The same could probably have been said about operations in Brazil, India and many other countries. It is a sad, but normal, situation for many companies.

Face to face meetings are important. The business culture in the US is often not a good measure for dealing with foreign business people. It is not an overstatement to say that in many situations a person is not real until you have met them face to face and assessed them as a person. Whatever his failings may be, Greg Mortinson was right on his key point – taking the time to sit with a person and drink those 3 cups of tea and learn something about who they are and where they are coming from is necessary to achieving understanding and respect. That understanding and respect can get you a lot further in resolving disputes than even the best contract. It will help you explain why a well-written contract and compliance with ethical standards are important to you as part of American business culture.

Showing up, making connections and continuing to show up to keep them in place requires patience, time and expense. It helps if you have an actual interest in finding out something about the cultures in which you are doing business. No matter how boring and ritualistic some of the interactions may seem, you can open your eyes and look for the underlying cultural reasons and learn things that will benefit you personally and your company.

9. Protect your business by Respecting the Foreign Corrupt Practices Act and setting up a real compliance program.

Bluntly speaking, in many parts of the world and in many industries, bribery and falsification of business records by US companies and their subsidiaries are very common. Even though most US lawyers and businesspeople know that paying bribes and falsifying company records are bad for business, the mentality of "Don't ask/Don't tell" is alive and well when it comes to corruption in international business. Corporate lawyers need to recognize this reality and stop kidding themselves that they work for clean companies who hire only ethical employees. Conduct that constitutes a felony violation of the Foreign Corrupt Practices Act is common and companies are well advised to set up a strong anti-corruption compliance program.

Fortunately for US companies, the past few years there has been very clear guidance from the Department of Justice detailing what a company needs to do to have an adequate FCPA compliance program. The paradox is that while elements of a good compliance program have been clearly stated, many companies have chosen to not set up effective compliance programs.

This failure to set up compliance programs may be because it is still extremely unlikely a company will be caught in a violation. A lot of noise has been made in the past few years about the vast number of FCPA cases that have been brought in the US. In reality, FCPA enforcement can only be said to be high if one's standard for enforcement of felony criminal law is extremely low. In the past 5 years the DOJ and SEC have managed to get a lot of publicity and press from a few cases, but they bring only about 30 cases under the FCPA a year, a drop in the bucket when you consider the many thousands of incidents of bribery by US companies overseas every year. There have been estimates that over 95% of FCPA incidents that have been investigated internally by companies are never reported to the SEC or DOJ.

The threat of prosecution remains remote, and effective compliance programs are thought to be expensive, but the bribery and falsification of records that constitute FCPA violations are corrosive, damaging and costly to companies even if they are never prosecuted. Nearly every US company has internal ethical rules of business conduct that prohibit employees and management from falsifying corporate records and bribing government officials or private individuals. Routine violations of those rules are serious and cause employees, business partners and investors to lose faith in management. If your employees are willing to falsify corporate records to disguise corrupt payments, they are probably falsifying records for other reasons as well.

When companies or their business partners are paying bribes, employees on the ground usually know what is going on and are profiting from the corrupt activity. It has been estimated that only about 1/3 of the amount of money taken out of a company to pay bribes to government officials actually makes it to the government official. Employees, business partners and bag-men, all of whom want to be well compensated for playing a role in illegal activity, take the rest as cuts. Also in many cases private corruption, kickbacks and pay-to-play schemes, can represent a more serious financial loss to a company than government bribery. It is not unusual to find employees, even senior managers, in foreign operations who make more money in kickbacks than they do in salary.

10. Conduct a Thorough Risk Assessment for your international business and keep it up to date.

Very few companies do a complete risk assessment before entering into new international business. This includes decisions to do business in extremely corrupt countries such as Russia, Vietnam, China and many other countries, where the legal systems are not impartial or free from political influence and where courts are not particularly good for resolving business disputes between local citizens, let alone cases between foreign companies and locals. Senior Management and Boards of Directors, and General Counsels should insist that their companies make a good faith attempt to understand and quantify the business and legal risks involved in their international operations and devise reasonable ways to reduce that risk to an acceptable level.

Knowing your company’s specific risks and assessing the true costs of dealing with those risks is good business practice.Risk can include, criminal activity, money laundering, export violations, bribery, tax evasion, false financial records, extortion and other activities that are both expensive and disruptive to a business.

For example, an opportunity to earn incremental profits by jumping on an opportunity to do business in Nigeria may prove to be an illusion when the costs of compliance are included. Whether it is true or not, the general opinion is that a US company cannot do business in Nigeria without paying bribes. If you, the general counsel or commercial counsel, believe business cannot or is not being done in Nigeria in compliance with US law and your company’s Rules of Business Conduct, you owe the company a fiduciary duty to inform management and insist that all business is conducted in a compliant manner. The business team must factor the full cost of compliance into its cost of doing business.Of course, many general counsels do not do this. They see themselves as a “business partner” to the sales team and are under constant pressure to not stand in the way of business, so they minimize what they believe and make little effort to educate themselves.

Global business is not static so risk assessments need to be updated periodically. One way to do this is to build risk assessment into procedures the company is already doing. It is cost effective to build some of theongoing risk assessment into your regular audits of the foreign operations. It is also possible to build some risk assessment aspects into the renewal process for distributors and other third parties. Your annual reviews of foreign managers and employees are another existing process that can include ongoing risk assessment elements. The manager in charge of risk assessments needs to tie all of these elements together to keep management and the board properly informed so they can make decisions based on facts and data, not guesswork.

advice and references for the busy in-house practitioner and other readers.

http://www.acc.com/legalresources/publications/topten/ttdadfucdbi.cfm