

A photograph of a chessboard with a vertical line down the center, splitting the board into two halves. The left half is dark wood, and the right half is light wood. Chess pieces are visible on both sides, including a king, queen, rook, and knight. The background is a solid light blue.

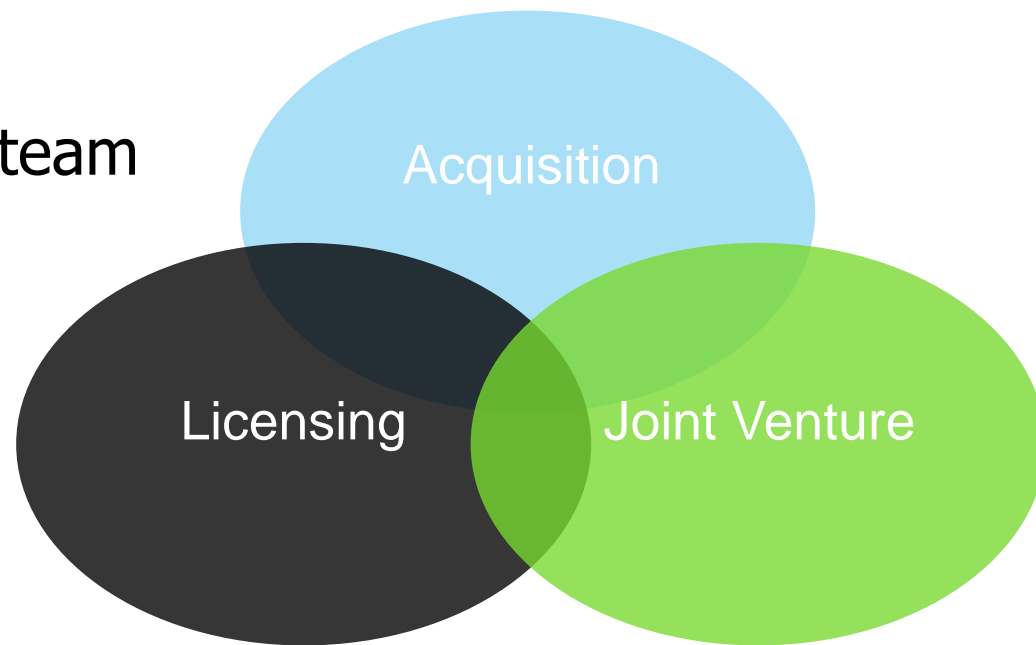
Morgan Lewis

ISSUES IN CROSS-BORDER M&A TRANSACTIONS

Bradley Edmister
March 21, 2017

Cross-border dealmaking

Myriad ways to team
and grow



TECHNIQUES AND CONSIDERATIONS

CROSS-BORDER ACQUISITIONS

A word on cultural differences



- Find out what makes your counterparty tick
- Learn who is in charge and how decisions are made
 - Timing and coordination, e.g., auctions
- Differences in legal systems and approach to legal process
 - Civil law vs. common law jurisdictions
 - Role of lawyers
- Be informed by US practice and technology, but adapt

Role of local counsel

- When to hire
- Whom to hire
- How to manage
 - Role of international firms
 - Legal technology
 - Navigation of cultural issues
 - Project and cost management



Due diligence



- Varying degrees of understanding and responsiveness
- Quality of local accountants and legal firms
 - Oversight and coordination
- Miscommunication and expectation alignment

Anti-corruption

- Heightened global scrutiny and new or enhanced legal regimes
 - FCPA, UK Bribery Act, OFAC, others
- Pre-signing and post-closing responsibilities
- Use of privilege and coordination with specialists
 - Forensic accountants, investigative due diligence



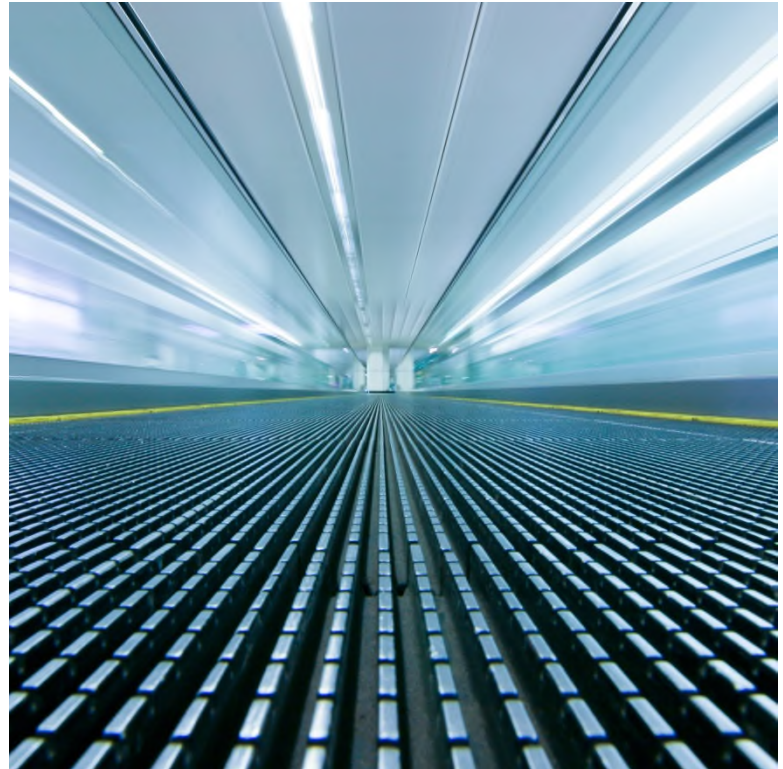
Foreign ownership restrictions



- Vary widely among countries
- Many practical solutions exist
 - VIE structures in China
 - Indirect holding structures
- Be wary of changes in law

Negotiating and drafting tips

- Cultural issues can be determinative
- Learn the counterparty's process and adapt
- Understand practical limitations
 - “Sovereign ceiling”
 - Focus on jurisdiction, enforceability, and dispute resolution early
- Differing approaches to contracts
- Issues with shareholders' agreements



Family-owned businesses



- Navigation of foreign stakeholders and relationships
 - Providing for special concerns
- Co-mingling of assets
- Management and governance
 - Retention or transition challenges
- Internal controls
- Employee relationships

Public deals

- Recognize local securities and corporate laws are critical to success
 - Early engagement of local counsel
- Identify key parameters/pitfalls in the relevant jurisdictions early
 - Mandatory offer rules
 - Purchases outside of offers
 - Interfacing with regulators (takeover panel, etc.)
 - US SEC cross-border M&A rules
- Determine alternative structures (schemes of arrangement, etc.)
- Understand potential exits and have a strategy



Post-acquisition integration



- Workforce relations
 - Countries have varying legal protections and cultural attitudes toward employee relations
- Structuring for effective management
- Role of prior owners
 - Sometimes maintain strong influence with employees even after a 100% sale
- Importance of pre-deal analysis of regulatory matters and feasibility around key strategic goals

OPPORTUNITIES AND PITFALLS

CROSS-BORDER JOINT VENTURES

Structure and purpose

- Why a joint venture?
- Structural considerations
 - Heavily influenced by tax, risks, and exit strategy
- Entity and jurisdiction selection
 - Onshore or offshore



Governance



- Board structure and meetings
 - Practical realities
- Veto and negative consent rights
 - Shareholder- and board-level stops
 - Unintended consequences
- Techniques for effective ongoing management
 - Importance of clear understanding of the role of each party in management
 - Expatriates/secondees

A word about 50-50 JVs

- Most difficult long-term structure
- Strategic drift
- Governance challenges
 - Unanimous consent / veto rights
- Planning for deadlock, divorce, or change in control
- Accounting complexities



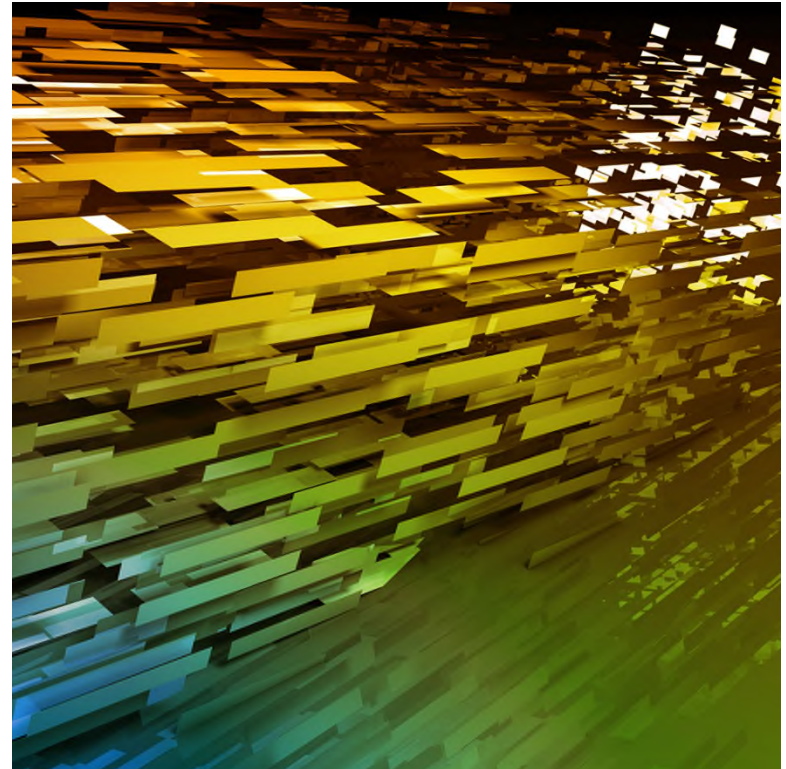
Accounting considerations



- Consolidation analysis
- Interface with JVA/SHA provisions
 - Impact of veto or negative consent rights
 - Options and convertible interests
- US GAAP vs. IFRS or local GAAP
- Future change of control

Stepping stones to control

- Toe-hold stake acquisitions
- Risks
 - Deal complexity
 - Path to control
 - Financing and other practical barriers to exercise
 - Enforcement and litigation
 - Change in plans
 - Exit rights



Deadlock and exits

- Why focus on exits?
- *There is no "market" for exit rights*

Shotguns

Transfer Restrictions

ROFO/ROFR

Drag-Along

Tag-Along

Piggyback

Agree to Agree

Options/Converts

Recaps

Puts/Calls

Deadlock and exits

- Types of mechanisms
 - Self-effectuated vs. valuation-/negotiation-based structures
- Practical impediments
 - Effects on sale processes (ROFO impact, drag-alongs, etc.)
 - Availability/quality of financials
 - Timing and consents, others



Dispute resolution



- Courts vs. ADR
- ADR clause, not just boilerplate
 - Administering body
 - LCIA, ICC, various national bodies
 - Rules to apply (UNCITRAL, others)
 - Special rules (discovery, remedies)

Regulatory

- 1940 Act: minority stakes and complex holding structures
- ERISA issues
- Special antitrust issues for JVs
- Anticorruption/sanctions
- IP protection
- Data privacy and security



QUESTIONS?

Biography



Bradley Edmister

New York

T +1.212.309.6110

bradley.edmister@morganlewis.com

Bradley K. Edmister represents US, Japanese, and other Asian clients in cross-border mergers and acquisitions (M&A) and capital markets transactions. Fluent in Japanese, Bradley handles a range of public and private M&A matters for both strategic and private equity clients, cross-border joint ventures, and global equity and debt capital markets transactions, including American depositary receipts and global depositary receipts. He also works on Japanese real estate investment trusts and ongoing listing and US Securities and Exchange Commission (SEC) compliance matters for foreign private issuers.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Almaty	Dallas	London	Paris	Shanghai*
Astana	Dubai	Los Angeles	Philadelphia	Silicon Valley
Beijing*	Frankfurt	Miami	Pittsburgh	Singapore
Boston	Hartford	Moscow	Princeton	Tokyo
Brussels	Hong Kong*	New York	San Francisco	Washington, DC
Chicago	Houston	Orange County	Santa Monica	Wilmington



Morgan Lewis

*Our Beijing office operates as a representative office of Morgan, Lewis & Bockius LLP. In Shanghai, we operate as a branch of Morgan Lewis Consulting (Beijing) Company Limited, and an application to establish a representative office of the firm is pending before the Ministry of Justice. In Hong Kong, Morgan Lewis has filed an application to become a registered foreign law firm and is seeking approval with The Law Society of Hong Kong to associate with Luk & Partners.

THANK YOU

This material is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It does not constitute, and should not be construed as, legal advice on any specific matter, nor does it create an attorney-client relationship. You should not act or refrain from acting on the basis of this information. This material may be considered Attorney Advertising in some states. Any prior results discussed in the material do not guarantee similar outcomes. Links provided from outside sources are subject to expiration or change.

© 2017 Morgan, Lewis & Bockius LLP. All Rights Reserved.