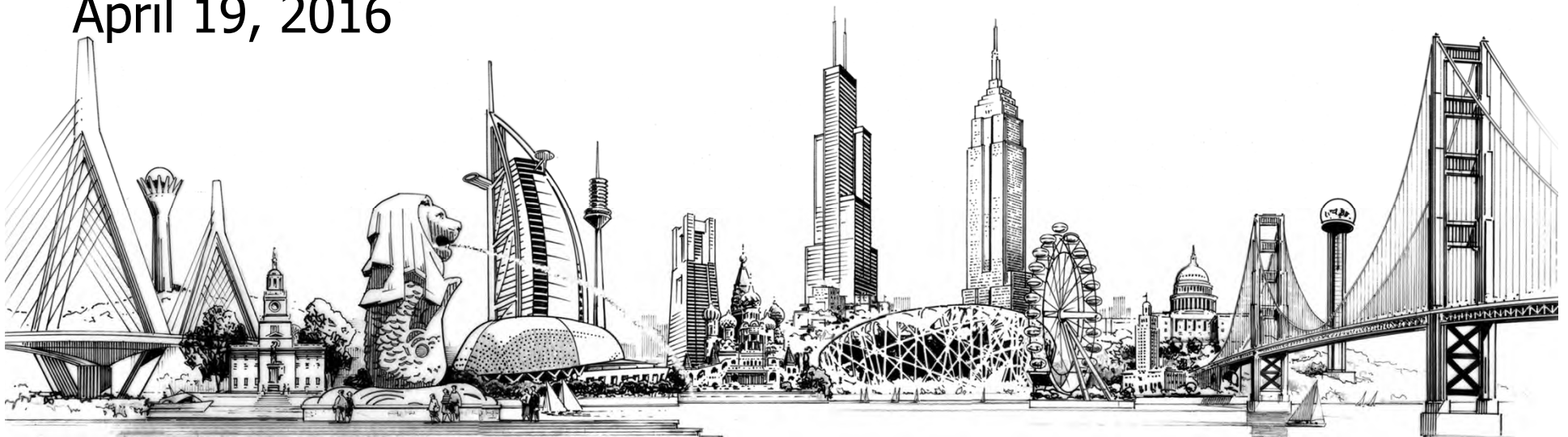


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# **ISSUES IN CROSS-BORDER M&A TRANSACTIONS**

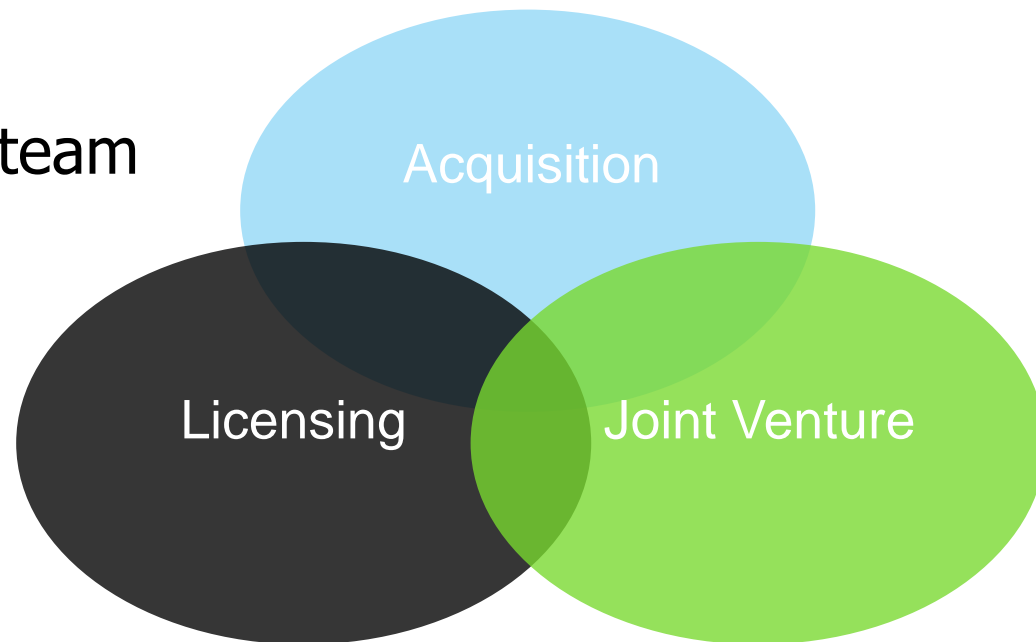
Bradley Edmister

April 19, 2016



# Cross-border dealmaking

Myriad ways to team  
and grow



**TECHNIQUES AND CONSIDERATIONS**

# **CROSS-BORDER ACQUISITIONS**

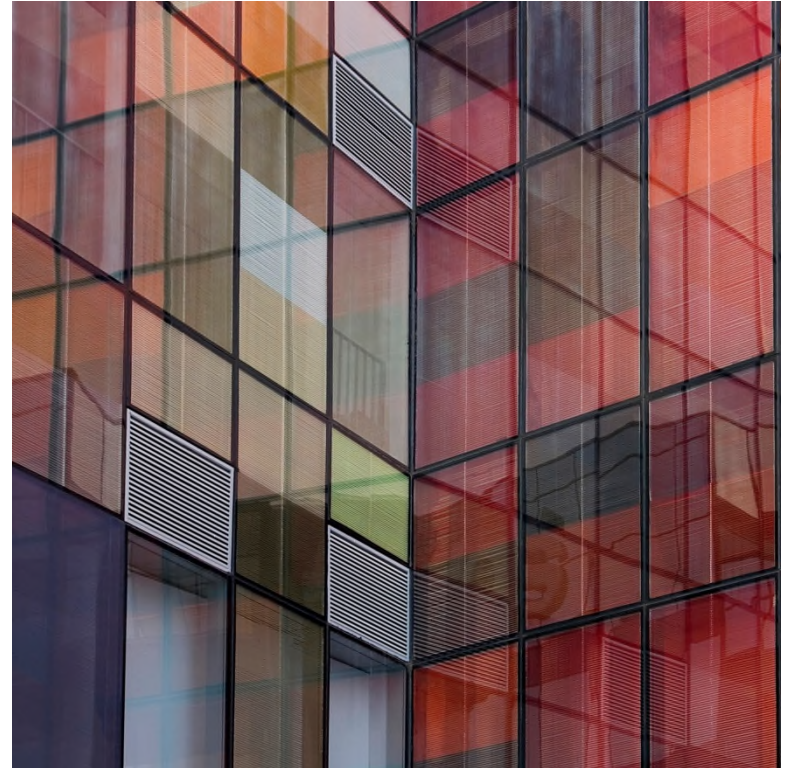
# A word on cultural differences



- 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





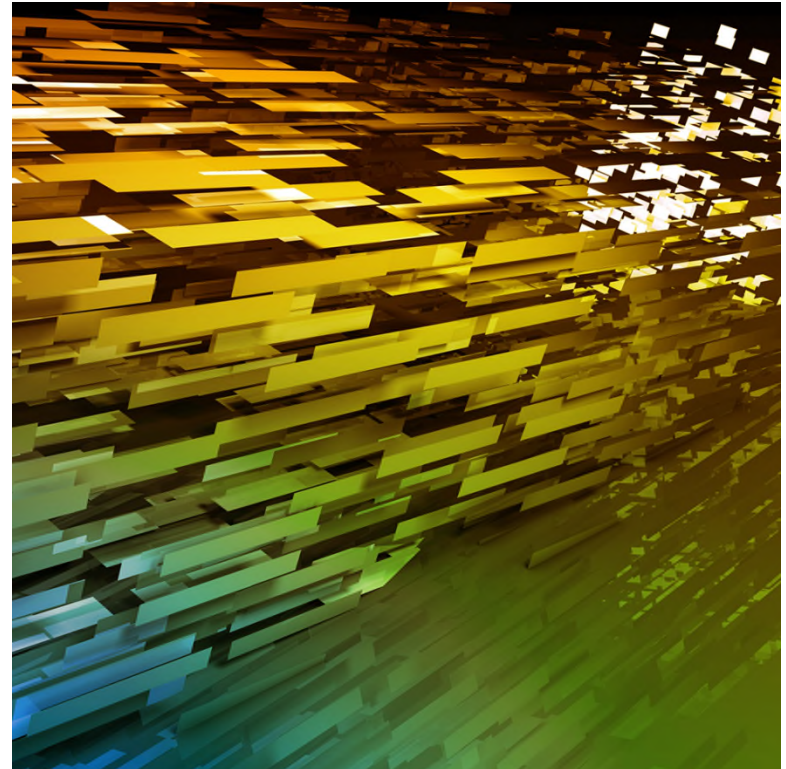
# Accounting considerations



- 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



# Biography



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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.

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