Role of In-House Counsel in Transnational Operations

PHILIP D. KESSACK
Senior Counsel, Americas Business Lines, AECOM, UK

A fundamental role of in-house legal counsel is to assist the operations teams in identifying, assessing and tailoring their procedures to ensure compliance with applicable requirements and to address the risks associated with the business and legal environment in which the company’s products are to be sold or services are to be performed. This role is especially critical for transnational companies who are looking to sell products or perform services in a foreign jurisdiction (Host Countries). Failure to invest the necessary time, money and effort to identify and understand the unique conditions and requirements impacting such work in a given Host Country not only jeopardizes the profitability of the company, but can expose the company to substantial civil and criminal penalties for failure to comply with the applicable requirements.

There are many reasons that companies focus on the pursuit of opportunities in Host Countries, especially those in the emerging geographies. In some cases, manufacturers view the Host Countries in Africa, Latin America and Southeast Asia as evolving and relatively untapped markets for their products and services. In other instances, the more developed countries see the emerging geographies as a critical source of needed raw materials and other resources. This often results in a heavy investment in extraction, transportation and related infrastructure within the Host Countries to obtain access to those resources. This need for infrastructure development then attracts architects, engineers, construction companies, investors and others. In addition, major international sports events such as the World Cup and the Olympics frequently attract investors and major providers to a Host County, both for the purpose of creating the needed infrastructure to support the major sporting event and for the purpose of subsequently using that expanded infrastructure for long-term national development within the Host Country. Finally, significant investment opportunities may arise from nation building efforts on the part of international banks or as a result of aid by governments and charitable organizations to support disaster response and recovery operations following a major natural or man-made disaster.

As companies face increasing competition in their existing markets, the management teams often view opportunities in Host Countries as the next logical step in the expansion of their marketing of goods and services. Unfortunately, many of these marketing and business managers who have developed substantial skills and experience in their own home markets are under the false impression that they can simply apply that same expertise and approach to the markets and projects located in Host Countries. As a result, they frequently fail to anticipate the full impact of taxes, security issues, political risks, language barriers, currency considerations, license requirements, laws preferential to the local inhabitants and other critical realities impacting their plans to expand operations.

Ideally, the decision to pursue work in a given Host Country will be based on a solid and well-conceived strategic business plan, where the nature of the proposed work is identified in advance, and appropriate resources will be dedicated to carefully identify and evaluate the business and legal environment in the specific Host Country in which
such work will be pursued and performed. You, as in-house counsel, will have adequate
time to identify local legal counsel, obtain tax advice, run your due diligence compliance
checks, determine which form of legal entity is to be used to perform the work, verify
that your firm complies with the applicable registrations, your personnel will have met
the applicable licensing/permit requirements and you will have the time to coordinate
your activities with both the operations teams and the various corporate support functions
responsible for addressing their related issues. In addition, the company will have clearly
defined procedures, management tools will be in place that are tailored to transnational
operations and the project teams will be experienced in identifying and adapting to the
Host Country requirements.

Unfortunately, the “ideal” rarely occurs. Most pursuit managers identify a specific
pending “opportunity” in a Host Country and immediately begin to pursue the project,
often before the in-house legal counsel is even aware of the pursuit. Once alerted to the
pursuit, your only recourse may be to either “kill” the project or scramble to determine
whether you can even legally propose on the project and then try to determine what has
already been done and what needs to be redone in order to at least comply with the most
basic requirements applicable to the project. In many cases, the proposal may even have
been submitted to the client before compliance with applicable registration requirements
can be confirmed, tax advice can to obtained and the range of other potential impacts can
even be considered and factored into the proposal. This frustration is often compounded
by “rogue” managers who have adopted the mantra that it is “easier to seek forgiveness
than to obtain permission” in order to proceed with the proposed activity. As a result,
companies often find themselves in a position where significant corporate resources and
senior executive management time has to be diverted from other more cost effective
pursuits to address gaps in the planning and compliance. They must also address financial
exposures where the company has already committed to a price that did not adequately
reflect the actual cost of performing the work in the Host Country. This can also lead to
significant damage to the firm’s reputation and negatively impact future business
opportunities in the Host Country.

So, what do you do now?

In most cases, the in-house counsel is not the ultimate business decision-maker. Thus, the
ability of the in-house counsel to have a real impact on the business will center on the
ability of the in-house counsel to develop and maintain credibility with the project and
executive management as a knowledgeable and trusted advisor. While this is generally
true of all of the in-house counsel’s activities, it is especially applicable in those
circumstances where the executive management and project teams themselves lack a
clear understanding of the business and legal environment associated with transnational
contracting and fail to consider the potential impact of those requirements on their new
business strategy.

One would hope that the in-house counsel has already developed a solid understanding of
the company’s services and products and has a good understanding of the underlying
industry. It is difficult to imagine that the business leaders would give much credence to
an advisor who clearly lacked an understanding of their own business and the
environment in which the company normally operates.

It is also important that the in-house counsel be viewed as a problem-solver rather than as
a bureaucratic obstacle that simply points out what the team cannot do. Ultimately, the
role of the in-house counsel is to protect the interests of the company, but that can
frequently be accomplished by helping the team to identify the applicable requirements
and risks and then by providing insight into how the goals can be achieved within that
context. If the project teams and management have confidence that the in-house counsel understands their burdens and is willing to work with them to help them succeed, then they are much less likely to sideline the counsel or disregard his/her advice.

Finally, it is critical that the in-house counsel be able to clearly demonstrate that he/she has a fundamental understanding of the unique aspects of transnational contracting. Again, one can hardly expect project and executive management to give much credence to the advice of in-house counsel if that person clearly lacks an understanding of even the basics of such transnational activities.

In the context of transnational operations, the in-house counsel’s primary focus should be on compliance and risk. These and the more technical legal/contractual issues are at the core of the in-house counsel’s responsibilities. However, the in-house counsel also needs to develop a broad understanding of the overall aspects of transnational contracting as it impacts other business operations in order to identify and address the applicable compliance and risk issues. Therefore, the in-house counsel needs to develop at least a baseline understanding of transnational contracting and needs to integrate his/her actions with the other members of the operations and corporate support teams to identify and address such exposures.

Transnational contracting will inherently involve a whole new range of skills and knowledge in addition to the normal skills associated with working in one’s home country. Issues such as value added taxes, restrictions on the use of expatriates, visa restrictions, political risks, currency fluctuations, cultural issues, data rights, compliance with ethical requirements, security, etc. will have to be assessed and addressed as a normal part of the process. The in-house counsel may not necessarily know all of the answers, but must understand the questions that will need to be asked to ensure that the company identifies and complies with the applicable requirements on a cost-effective basis.

Unfortunately, there is no single source where an in-house counsel can go to identify and rapidly assimilate the many issues inherent in transnational operations. However, there are many resources available to in-house counsel to help him/her develop a fundamental understanding of the considerations that will need to be addressed. Many useful tools and checklists can be obtained or developed from information available from the internet, trade and professional associations, external law firms, consultants and from internal corporate resources.

One major resource is likely to be the company’s own internal functional support teams (e.g., Human Resources, Finance & Administration, Tax, etc.). Your colleagues in those other fields of expertise are likely to either have some level of knowledge of transnational operations as it relates to their respective fields or at least have access to external advisors and resources that possess such expertise. For example, the tax department should generally be aware of issues such as double taxation, value added taxes, withholding requirements, etc. These issues in the transnational context can have a devastating impact on the net profitability of a project unless those potential costs are identified early and factored into the price. The in-house counsel does not need to be an expert on the specific elements of the tax law. Those issues can be assigned to persons with the associated expertise. However, the in-house counsel should at least be aware of the fact that tax issues are critical in a transnational context and know the person to contact to ensure that the tax issues are raised and properly addressed.

This is true for each of the primary corporate functional areas. By developing a general understanding of the types of issues associated with transnational operations, the in-house counsel can then work with the other functional areas to develop a checklist or internal
procedures to help identify potential issues and see that those issues are then assigned internally or externally for proper resolution. While the overall direction on business issues will come from executive management, the in-house counsel needs to be sufficiently knowledgeable of the various requirements to properly advise management on those potential issues and the available resources and possible solutions. Such knowledge is also needed to enable the in-house counsel to realistically identify and address the compliance and risk issues.

In addition to ensuring that the broader functional issues (tax, human resources, etc.) are being properly identified and addressed, the in-house counsel must also develop the knowledge and skills necessary to address the significantly different spin on fundamental contract issues within the transnational context. For example, if the work is to be performed in a country that uses a different language, one of your first considerations will be to determine which language will be used for interpreting the intent of the parties in the contract. Each language has its own nuances that can be difficult to translate to another language. Yet the wording and the associated intent in the contract language is essential. While the parties may seek to compromise on this issue by having both the language of the company’s home country and the language of the Host Country apply, this does not solve the problem. It is critical that both parties agree to a specific language to control the interpretation of the contract so that the intent of the parties is clearly expressed in the controlling language. In those countries where the Host Country’s courts will require that the local official language be used for legal interpretation, you should either designate that language as the controlling language or at least have local legal counsel confirm that the local language translation from the home country language is accurate and consistent with the intent of the parties.

Another important consideration in transnational contracting will be to decide which country’s laws are going to govern the terms and conditions of the contract. This can have a significant impact on even the basic enforceability of the contract since the specific requirements (e.g., authority of the signatures, notary/apostille requirements, witness signatures, etc.) can vary widely. In addition, how the contract language will be interpreted, and whether certain provisions are even enforceable, will be contingent upon the selection of the governing law. As a practical matter, most Host Countries require that the Host Country’s courts will require that the Host Country’s laws govern the terms and conditions of the contract.

This raises the related question of how disputes are to be resolved under the contract terms. The in-house counsel must carefully examine the judicial system that will be used to enforce the contract. In many cases, especially in newly emerging Host Countries, the judicial system may simply lack the sophistication to handle complex commercial issues. In addition, there is always the risk that the court system may be corrupt or that it may be heavily biased in favor of the Host Country party.

In many cases, the only viable alternative may be for the parties to select an independent neutral alternative disputes resolution process such as the International Chamber of Commerce or some other neutral disputes resolution process. However, even this approach requires careful consideration as to where the dispute is to be heard, the governing language, the procedures to be applied, the selection of the arbitrator, the enforcement of the decision, etc.

Another key consideration will relate to how you are to be paid for your services. For example, what is the currency in which you are to be paid? In some cases, the currency may not be readily convertible to another more common currency. In other cases, the currency may be subject to significant value fluctuations, which may make it exceedingly
difficult to manage your cash flow or to determine the financial viability of your project or the value of your products.

What is the reliability of your client for timely payment of their obligations? At a minimum, it will be important for you to confirm that your client in the Host Country has the means and reputation for timely payment. However, confirming such information may be difficult as even the more traditional confirmation sources such as Duns & Bradstreet often lack such information or the information they do have may be substantially outdated, incomplete or potentially unreliable.

In many cases, businesses or contractors may require advance payments, backed by letters of credit. Government insurance for political risk may also be an option under certain circumstances. These types of safeguards require specialized knowledge and expertise, so the in-house counsel should be prepared to work closely with their Finance & Accounting counterparts to ensure that such documents have been carefully reviewed by someone well versed in such arrangements.

Parent company guarantees, performance and payment bonds and related assurances are also very complex and require careful review. It will be important for the in-house counsel to work closely with executive management to ensure that they understand the associated risk exposures and cost of meeting such requirements. For example, the parental guarantee will essentially waive the normal corporate protections of using a subsidiary corporation. Many parental guarantees are drafted so that the holder of the guarantee can immediately seek recovery directly from the parent corporation without going through the time and expense of seeking recovery first from the subsidiary corporation. Such guarantees need to be carefully examined.

Similarly, insurance will be an important consideration. Do the company’s existing policies cover work in the Host Country? Is the company’s insurance carrier authorized to provide insurance within the Host Country? Does the company have the appropriate types and levels of coverage for the intended work in the Host Country? For example, many Host Countries in Latin America and Africa involve decennial risk (strict liability for certain design/construction services), which is generally based on civil law. This type of exposure does not generally apply in North America, so special decennial insurance may need to be considered, depending on the nature of the services.

It is also important to note that in some Host Countries you cannot contractually limit your liability for your own negligence, even if the potential risk substantially outweighs the potential benefits of the activity. The burden is on the in-house counsel to identify these types of risks that may not even be a consideration in their home country, but which may pose a substantial risk when providing the same products or services in a Host Country.

Compliance with import/export restrictions, sanctions, illegal boycotts, anti-bribery restrictions, etc. are also critical issues that must be addressed by in-house counsel. These issues are of special concern within the transnational environment where violation (or even an allegation of a violation) may subject the company to substantial civil and legal penalties, including suspension of existing contracts, debarment from future contracting, imprisonment and substantial fines.

Ethics issues themselves may be source of concern. Certain activities that are viewed as unethical from the perspective of the employer from a home country may be viewed to be acceptable by employees within the local culture. Theft, misuse of company equipment and resources, nepotism in local hiring/promotion decisions, distortion in the reporting of
marketing and sales information and other issues may directly impact the efficiency and net profits of the undertaking.

Another important area of concern relates to data rights and the protection of intellectual property. Although the impact may vary depending on the type of products or services involved, the lack of consistent laws and enforcement can result in theft or infringement of critical data rights without any meaningful legal recourse.

Health and safety can also be of significant concern. Labor protection standards vary widely. In many Host Countries, the company’s employees may potentially be exposed to serious diseases or other hazards with little or no medical facilities available to address those hazards. The risk of terrorism, high criminal activity, dangerous roads and unsafe public transportation, political instability and other risks must be considered in advance and addressed accordingly. In addition, appropriate security and emergency evacuation plans may need to be put in place.

Labor relations issues may also be of significant concern. In many Host Countries, the cost of the social fringe costs/taxes may be substantial. This may include guaranteed annual bonuses, profit sharing rights and significant training investments. In addition, once an employee is hired, it may be cost prohibitive to terminate their employment, even if the employee performs poorly or the company does not generate enough business to keep them employed. These factors must be carefully evaluated before the decision is made to hire local employees and those conditions of hire take effect.

Even more mundane issues may become problematic in the transnational environment. For example, are measurements to be made using the metric system? Which time zone governs the schedule? Which calendar is applicable to the contract? What impact will local holidays have on your schedule? Are there local customs or religious restrictions that will impact the work? Are there restrictions on your ability to bring in home country staff to work on the contract? Is the local electrical service compatible with your equipment? Is the water safe to drink? These are all issues that may potentially disrupt the efficiency of your operations and will need to be considered when you are evaluating the risk of pursuing/performing work in a transnational environment.

In addition to the general considerations inherent in overall transnational operations, it is important for the company to understand that each individual Host Country is unique and has its own set of legal and business requirements. For example, a company experienced in pursuing or performing work in Brazil may become convinced that it now understands how to pursue and perform work in neighboring countries such as Peru or Colombia - despite the significantly different national histories, cultures, languages and different business environment and legal requirements of those respective countries. Such failure to recognize and adapt to those different business, economic and legal conditions can again result in substantial financial loss and exposure of the company to penalties for breach of the applicable requirements.

Therefore, as an initial step, the company needs to identify the specific Host Country or Countries in which it intends to market its products or services so that in-house counsel and other key managers can identify the applicable Host Country requirements before investments are initiated. In order to most efficiently apply the resources to help the company pursue work in targeted Host Countries, the in-house counsel should encourage the executive management to first develop a strategic plan that will identify the company’s related goals. That strategic business plan should clearly define the nature and scope of the products or services that the company intends to provide in the Host Country; identify the target Host Countries to be served; where multiple markets are identified, prioritize the efforts to be provided to support the activities in the targeted...
Host Countries; identify the budget and schedule for pursuing those activities and assign responsibility for implementation. A well thought-out strategic plan should enable the in-house counsel and other functions leaders to develop their plans and apply their resources in a coordinated manner so as to most effectively position the company for success.

One of the first issues confronting in-house legal counsel as it relates to pursuing sales or services in a given Host Country will be to determine whether to establish a formal legal presence in that Host Country (e.g., subsidiary company, branch office, joint venture, consortium, etc.). The nature of the legal entity will, in itself, have potential ramifications relating to technical registration requirements, tax exposure and many other issues, so care must be taken to select the structure most suitable to achieve your goals. In some Host Countries, you may be able to provide limited services for short durations without establishing a formal legal entity in that Host Country. However, the requirements vary widely by individual Host Country, and in some Host Countries even submitting a proposal before you are registered to conduct business in that country may violate applicable procurement requirements. It would be extremely frustrating to win a project only to discover that you inadvertently failed to properly register the company and will not only lose the contract, but may be barred from future contracts and may be subject to additional penalties for violation of the Host Country’s procurement laws.

Therefore, before you initiate activities in any Host Country, it is critical that you obtain local legal advice and guidance to ensure that you understand and are complying with the applicable requirements. The local law firm may also be an excellent resource for identifying potential local partners and subcontractors and for assisting in the conduct of the appropriate due diligence to ensure that the appropriate compliance requirements are properly met.

Fortunately, there are several ways to identify local legal counsel who are familiar with the applicable requirements and who can provide insights into the business and legal environment of the targeted Host Country. Such local law firms can often be identified by checking with your industry counterparts, local bar organizations, associations such as the Association of Corporate Counsel, organizations such as Lex Mundi or other legal search resources. In addition, business developers and managers of your own company may have local contacts that may be of assistance in identifying local legal advisors.

Once you have determined the type of legal entity to be used in the Host Country to pursue and perform work, it will be important to identify and obtain the applicable registrations and license requirements that will impact your operations. This will often depend on the nature of the products or services that you seek to provide. It is important to remember that Host Country requirements vary considerably and that many require registrations and permits not only at the national level, but at state/province and local/municipal levels as well.

If you are providing professional services, you also need to determine whether you can obtain the required professional licenses in the Host Country within the needed time frame, whether you can hire local individual employees who hold or can obtain the required licenses, or whether you will need to subcontract certain services to local firms that have the required licenses. It is important to keep in mind that many of the Host Countries are very protective of their indigenous professionals and often have stringent regulations or other restrictions that are heavily biased in favor of the local professionals.

Another major area of emphasis by in-house counsel needs to be compliance with the various anti-bribery restrictions (U.S. Foreign Corrupt Practices Act, United Kingdom Bribery Act of 2010, etc.) and other corruption-related restrictions. These requirements are of increasing importance and failure to comply may have significant negative impacts.
on the reputation of the company and subject the company to substantial penalties, including being barred from performing work funded by various governments and development banks. These restrictions require extensive due diligence checks and other activities on the part of the company. This is an increasingly important issue for in-house counsel to ensure that the appropriate safeguards are established and followed.

Rather than have each individual assigned to the pursuit spend time developing a general understanding of how to operate in the Host Country, the company should consider developing a baseline summary for each priority Host Country. This summary abstract can then be made available to each individual who will be pursuing or performing work in that Host Country. The baseline summary should focus on key information such as the company’s local legal entity (if any) and related key personnel contact information. It should also include information on registration and license requirements, security considerations, tax issues, labor requirements, import/export restrictions, repatriation of profits, disputes resolution processes and other key business considerations. It should also draw in information readily available on the internet to identify the potential corruption risks and other information relating to the ease of conducting business in a particular Host Country such as the level of effort needed to set up a business, contract enforcement risks and other information. Free internet sources of information such as the World Bank, Transparency International’s Corruption Perceptions Index and the Heritage Foundation’s Index of Economic Freedom provide relative ratings of such risk exposures.

The Host Country abstract should also address many of the practical business considerations associated with working in the Host Country, such as the Host Country’s international dialing code, time zone(s), visa requirements, local transportation options, medical facilities and local health risks, normal business hours, access to ATM’s, currency restrictions, departure fees, etc. In addition, the summary should address the local cultural issues to help the project team to better understand issues related to appropriate clothing, greeting their potential clients and partners, local gestures, attitudes toward punctuality, eye contact, how to conduct meetings, negotiation strategies and religious practices and other issues of cultural sensitivity. Finally, some internal mechanism would need to be established to ensure that the summaries were periodically updated to maintain their accuracy and reliability.

Finally, the unique factors associated with working in a transnational environment will need to be integrated into the company’s normal marketing and project manager training programs and procedures for those individuals who are likely to be directly involved or will be supporting the transnational activities. This training needs to address matters such as compliance with applicable requirements, import/export considerations, use of local and expatriate staff, dispute resolution options, tax impacts, currency issues, insurance and other factors that must be viewed from a transnational perspective.

The bottom line is that working in a transnational environment requires a new set of skills and a significant investment in time, money and effort to understand and address the many new potential risks associated with such actions. However, with the proper investment, the in-house counsel and the company will be positioning themselves to achieve success in this complex environment.

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Philip D. Kessack, Esq. Graduated from the University of Kentucky College of Law in 1980 after having served as a Captain in the US Marine Corps. He has over twenty years of in-house counsel experience with global billion dollar consulting engineering firms as well as two years of experience with a major law firm and several years of experience at the director level in state government. He is currently Vice President and Senior Counsel for Americas Business Lines with AECOM where he currently oversees and coordinates the legal support of operations in Latin America and provides support to other AECOM Legal Counsel in Africa and other emerging geographies.

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