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SELECTING AND WORKING WITH FOREIGN COUNSEL

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## **I. INTRODUCTION**

In these times of rapid movement toward a global economy, companies are expanding beyond traditional territorial borders. Economic globalization is the result of significant legislative accomplishments and economic developments, e.g., the North American Free Trade Agreement and the European Union. With these developments comes the necessity for lawyers to be prepared for transactions and dealings worldwide. As indicated in other chapters of this book, the need for local counsel in international practice can arise in a myriad of areas of the law and in diverse contexts.

The intent of this chapter is to suggest ways to identify potential outside foreign counsel and to provide suggestions for retaining and working with the most qualified lawyer. Basics such as selecting outside foreign counsel, working effectively with outside counsel and other advisors, and preparing an engagement letter tailored to the matter at hand will be emphasized. This advice could also be useful for outside counsel in developing business and when working with in-house counsel.

It is important to recognize that each legal matter is unique. You will encounter differences in the legal processes, the applicable laws, the documents and in numerous other elements of each deal or litigation. In addition, you will be faced with numerous administrative (non-legal) details, e.g., billing, reporting, language barriers, cultural differences, and politics, to name a few. Even the type of legal professional with whom you are dealing may differ.

The advice that follows is intended to help you sidestep potential pitfalls, avoid confusion, and provide you with the necessary tools to select the outside advisor that makes the most sense, given the type of work involved. These suggestions should enhance your relationship with outside counsel and increase the likelihood of success. Take the time at the front end to identify the best choice of outside counsel and to chart out mutual responsibilities; otherwise you will be at a disadvantage from the beginning and may be blamed for subsequent problems.

## **II. SELECTING OUTSIDE FOREIGN COUNSEL -- WHERE TO LOOK AND FACTORS TO CONSIDER**

### **A. Outline Your Matter/Expectations**

Before you interview and select outside foreign counsel and other necessary foreign advisors you may need, take time to sketch out the parameters of your international matter. What exactly are you/your client looking for? Is it researching local laws, drafting, negotiating, meeting with local government officials, handling litigation? Or is it limited to performing due diligence?

Outline your expectations. Review them with the client to confirm that you know your client's full intentions. Your client's short- and long-term objectives must be known as fully as possible, at the outset, in order to select appropriate outside foreign counsel and other advisors. **B. Identify the Type of Lawyer You Need**

Most law schools provide little or no training concerning the differences in the structure of the legal profession in different countries. Depending upon the jurisdictions involved, you may be working with more than one type of legal system. To obtain a brief background on the legal system in a particular country, you may wish to consult *The Statesman's Yearbook*, edited by Brian

Hunter, 1992-93, 129th Edition. In some systems, the legal profession is organized differently from the U.S. The U.S. lawyer needs to understand the profession's local structure to determine whom to retain to fulfill his needs.

- **Barristers and Solicitors.** The example most often used of how legal systems differ around the world is the English system (applicable in England, Wales, Northern Ireland, and the Republic of Ireland), with its two types of lawyers -- barristers and solicitors. In these jurisdictions, there is a distinct difference between a barrister and a solicitor. Solicitors generally do all of the legal work for clients including negotiating, drafting agreements, forming of companies, drafting wills and trusts and, generally, rendering legal advice. In other words, solicitors perform services which are very similar to those performed by U.S. lawyers with one major qualification: with limited exceptions, solicitors do not argue cases before the courts. Depending upon the jurisdiction, the solicitor may represent the public/client before a limited number of courts. The role of representing clients before the courts is generally reserved to barristers. The solicitor, however, actually selects and retains the barrister to handle the litigation. Barristers have a second function, which is to render specialized advice. Frequently, on important issues of law which are significant for clients, a solicitor will instruct a barrister to render a legal opinion. Sometimes the solicitors know what the answer will be in advance; but an opinion from a barrister will serve to reinforce their view and, indeed, cover them in case a problem arises with respect to the advice. In Canada, the distinction between a barrister and a solicitor is less technical, with the exception of Quebec. Quebec, unlike the other provinces, uses the civil law system; Quebec lawyers are known as "advocates". In other provinces of Canada, after being called to the bar (admitted), the lawyer takes the oath of both a barrister and a solicitor. Still, the spirit of the distinction between the two professional designations is present -- you consider yourself a barrister if you litigate and a solicitor if your practice is more in the nature of corporate work (although solicitors can appear in the same courts as barristers).
- **Notaries.** Another important example of how legal professionals differ around the globe is the civil-law notary ("notaire" in France), ("Notar" in Germany) and ("notaris" in the Netherlands) (collectively referred to as a "notary" or "notaries"). Notaries trace their profession back to Roman times. They perform a quasi-governmental function, recording and vouching for the legality of a wide variety of private transactions. They are expected to act as honest brokers and to stand behind their determinations of the enforceability of contracts and legality of corporations. The liability that they theoretically assume accounts, at least in part, for the amount of fees charged by notaries. The notary in civil-law jurisdictions is a distinct legal profession which does not exist in the United States (except in Louisiana and Puerto Rico). It is not the equivalent of the U.S. notary. The types of services a notary normally offers include: creating most types of legal entities, e.g., corporations, which require a notarial act; amending articles of incorporation; drafting and executing wills (in the absence of a holographic will); handling land transfers which require the intervention of a notary, who prepares the deed and reviews the land register (known as a cadastre); authenticating signatures on certain documents, e.g., a power of attorney; and acting for and on behalf of the deceased, which is similar to assisting in a probate procedure in the United States. A civil-law notary has much greater responsibility than a notary in the United States. Fees for a notary are generally uniform within a Civil-law country and are set forth in a table of fees approved by the respective government. Since only notaries are permitted to perform certain required legal functions and the number of notaries is limited, some lawyers in these jurisdictions may informally refer to notaries having a monopoly (which is really not the case) on handling certain legal tasks. For example, a Belgian lawyer may prepare the articles of incorporation, but would have to seek out a notary to register a company. This is not the case in the United States, where any properly trained lawyer could formally create a corporation. The education and process of becoming a notary also vary between the civil-law countries. In some countries, they even vary internally. Generally, notaries are fully-trained lawyers, appointed by the government; e.g., in Belgium they are appointed by Royal Decree, in Belgium and France, however, the notary is not a member of the bar, but could be in other civil-law countries, e.g., in northern Germany. Germany is an excellent example of how notaries may differ within a country. In northern Germany, a member of the bar in good standing, after a certain number of years, may apply to become a Notar. If accepted, the individual may remain a member of the bar in addition to being recognized as a Notar. In the southwest of Germany, a Notar must complete an educational curriculum that is quite different from a lawyer's educational requirements. A Notar in this part of Germany is not considered a lawyer. In the southeast of Germany, in contrast, after becoming a lawyer and achieving satisfactory scores on the bar exam, an individual may be appointed a Notar without passing another exam. If appointed a Notar in the southeast, the Notar can no longer remain a member of the bar.
- **Foreign Legal Consultant.** Another type of lawyer you may encounter in the U.S. and abroad is known as the foreign legal consultant ("FLC"). In recent years, a number of law firms have established foreign offices. The expatriates working in those firms may be licensed to practice local law (especially with the elimination in some countries of citizenship requirements for admission to practice), or may not. In some cases, they will be licensed as an FLC. The FLC is a lawyer who practices in a foreign jurisdiction and is licensed by that jurisdiction to practice, but not as a local practitioner. The scope of an FLC's permitted activities depends on local law, but usually does not include advising on purely local-law matters. Virtually all jurisdictions permit FLCs to advise on their home country law, and they usually permit advice on international law as well. There are differences among jurisdictions in the FLC's ability to advise on third-country law. If the FLC is in partnership with local lawyers, the scope-of-practice limitations they personally face may not be a problem. But if the FLC has to go outside his firm for advice on local law, you should consider what value hiring the FLC adds or, conversely, whether the FLC represents another layer of management. Sometimes it is useful, as when the client lacks the language skills to deal directly with the local lawyer; this is really a case-by-case issue.

### C. Where to Look for Outside Foreign Counsel

Now that you know what type of lawyer you need, how do you find the right person? Selecting the proper outside foreign counsel to represent you in your international matters can be difficult. Where do you start? Whom do you call? Are there any available

to represent you in your international matters can be difficult. Where do you start? Whom do you call? Are there any available directories to consult? Are they neutral sources or self-serving, and are they complete?

There are many sources to tap in creating a list of potential outside foreign counsel choices. The list below represents several sources that the author has found helpful:

- Word of mouth -- Often the most fruitful. Confirm what legal services the recommended lawyer performed, that the client was pleased, language capabilities and that the lawyer has no troublesome personal/professional quirks;
- American Corporate Counsel Association Foreign Counsel Directory (to order, call 202/296-4522);
- The American Bar Association Guide to Foreign Law Firms (to order, call 312/988-5522);
- Your local primary counsel. Be wary of established business relationships that your local counsel may have, as these may not provide you with the right expertise. Inquire as to the details of the relationship;
- Martindale-Hubbell Law Directory (to order, call 800/526-4902), which is on-line with LEXIS;
- Martindale-Hubbell International Law Directory (to order, call 800/526-4902), also on-line with LEXIS;
- Campbell's List -- A Directory of Selected Lawyers (published since 1879) (to order, call 407/644-8298);
- Russell Law List - 1993 - "The Aristocrat of Law Lists" - Legal Correspondents International (to order, call 410/820-4475);
- The American Lawyer -- Practice Directories (to order, call 212/973-2800);
- U.S. Customs House Guide -- Official 1995 Version (to order, call 800/669-3282) (includes an alphabetical and geographical index to law firms specializing in admiralty, customs, international corporate and international trade law);
- Official Export Guide -- 1995 Version (to order, call 800/669-3282) (includes law firms specializing in admiralty, customs, international corporate and international trade law);
- North American Trade Guide (R) -- 1995-1996 Third Annual Edition (to order, call 800/669-3282);
- Other lawyers and business professionals, e.g., accountants, in similar positions responsible for international matters;
- Speakers at CLE presentations who have impressed you;
- Authors who have provided you with useful information in the past;
- The U.S. Embassy in the relevant country;
- The relevant country's embassy in your home country -- contact the commercial attache;
- Formal or informal law firm networks; and
- Accumulated business cards -- you may have forgotten a contact from an ABA-CLE meeting two years ago.

Consult several sources, and look for recurrent names. If someone's name keeps coming up, especially from word-of-mouth, that's a positive sign.

#### D. Factors to Consider When Retaining Outside Foreign Counsel and Other Advisors

You have now prepared an outline of your expectations and know, to the extent possible, your client's/company's short- and long-term objectives. Next, armed with a list of potential outside foreign counsel, you are ready to embark on the process of interviewing outside counsel, via telephone, fax and whatever other means are possible. Of course, if you have the opportunity to meet the candidate in person, by all means do so. This is especially important if the work will be long-term, expensive or strategically critical to your client.

After making the initial contact with the potential outside foreign lawyer, ask the individual to send a short fax concerning some of the details of your discussion to test the individual's ability to communicate timely in writing. This communicate could confirm the lawyer's meeting with your local representatives, billing rates, the team involved, and/or the firm's approach to your matter. If the potential outside foreign lawyer communicates poorly or untimely, these traits could be warning signs of what to expect.

Although the interview and selection process of foreign counsel involves similar skills, criteria and methods used in choosing outside counsel in your home state/country, there are distinctions. Some of the differences include less formality associated with the relationship between you and foreign counsel, language barriers, and perhaps greater difficulty in asking the right questions and evaluating outside counsel's answers.

For the most part, your legal experience and outline of your needs/expectations should serve as guideposts. Above all, do not forget to apply your common sense. To assist you in the decision process, you might consider one or more of the factors listed below:

##### 1. The Comfort Level

Determine the lawyer's qualifications. How comfortable do you feel that he has the types of experience your transaction will require? For example, if your deal involves multiple parties from multiple countries, do you feel confident that the outside foreign counsel you are interviewing has the requisite expertise?

You might also inquire as to his education and training. For instance, will you benefit from retaining a lawyer with U.S. education (legal or other relevant graduate course work) or U.S. training? Is experience in representing clients from your home country/state important; or stated another way, is knowing the mindset from your jurisdiction important?

Is his office equipped with the technological resources needed for prompt responses and is the equipment and software compatible with your working requirements?

Does the lawyer exhibit any cultural biases? And, remember to ensure at the outset that there are no conflicts of interest (different jurisdictions have different standards).

##### 2. Existing Representatives in Your Industry

If the firm or contact lawyer represents clients in your industry, this will eliminate much time in explaining how you do business

If the firm or contact lawyer represents clients in your industry, this will eliminate much time in explaining how you do business, industry terms and paperwork, etc. On the other hand, existing representations within your industry may be a negative if the firm or lawyer represents your main competitor. In highly specialized areas of practice, it may be difficult to find an experienced practitioner that does not, especially in some countries where the pool of qualified potential counsel is relatively small.

If the lawyer has experience representing clients in your industry, he will be able to flag issues and identify more concerns in much less billable time than a lawyer who has no background in your industry. Another potential benefit from retaining a lawyer with experience is that he may apprise you of other business opportunities.

If the lawyer has little to no previous industry experience, you and your client will lose valuable time explaining the basics.

However, depending upon your client's business and philosophy, you might prefer a lawyer who does not represent clients in your industry, which would reduce the risk of a conflict of interest.

Remember, you will be expected to provide your client with the highest degree of sophistication possible, all dependent upon the economic resources at hand, the amount to be invested and the potential risks.

### 3. References

If permitted by local law and if prospective local counsel is willing, obtain a list of other clients, the contact person and/or other possible lead attorneys who he has represented.

Depending upon the jurisdiction, it may be appropriate to ask for permission to contact the references. When you do so, be inquisitive. Ask for a general sketch of what was involved in past or present matters. What were the obstacles and significant achievements? Ask about the current status and the future outlook. Evaluate this information and draw your own conclusions.

### 4. Substantive Expertise

Evaluate the prospective counsel's expertise by issue area. For instance, can he provide you with the necessary tax guidance? Keep in mind that lawyers in many countries may not be as specialized as those in your home country/state.

Are there tax incentives to help you decide where to locate the business? Will it make a difference if the principal office is located in Holland or Belgium? While you may not have a sufficient grasp of local laws to identify this question as an issue, well-trained local counsel should identify such issues during the initial consultation. Depending on your locale, you might receive tax advice from an accountant, and not an attorney.

Outside counsel, during the initial meeting, can demonstrate his abilities by identifying big picture issues and providing you with a thumbnail sketch of the project or deal to review with the client.

You may also need to determine whether one firm will be able to counsel you on the various areas of law implicated by the matter, e.g., trademark, tax, labor/employment, and environmental, or whether you will need to retain multiple lawyers/firms.

### 5. Connections

Does he know any individuals connected to your matter, e.g., the president of the company you intend to acquire, potential investors, key government officials, existing customers, potential customers, and/or the competition? For instance, if your transaction will require the government's consent, e.g., permits, you may be well served with local foreign counsel who has already worked successfully with local government officials. However, this can be a double-edged sword. He may be related to a local official and make an inadvertent disclosure. Also, beware of connections without substance (i.e., the person who is only well-connected), and of the U.S. law risks associated with payments to foreign officials. (See Chapter 14, The Foreign Corrupt Practices Act.)

### 6. Language Skills

Can you speak or read the language(s) spoken in the respective location(s) and among the major players in your deal? How fluent are you? Be honest. You could be called upon to interpret a deal-breaking provision. Be confident that either you or the counsel selected possess expert language skills. If not, this could be a disadvantage.

Regardless of the native language, excellent speaking and writing skills will of course be critical. In addition, your outside foreign counsel's fluency in your language, both orally and with the written word, will also play a key role in your success. You may want to avoid the situation where the outside foreign counsel can only speak the language and not be able to communicate effectively in writing.

Requesting a confirming fax after your initial contact with the lawyer will allow you to identify early on whether he has the requisite written language skills.

When negotiating with multiple parties, you may be at the bargaining table listening to several one-on-one discussions in various foreign languages. If your outside foreign counsel is not fluent in all the relevant languages, this may be a disadvantage. You may need to retain another lawyer who has the requisite language skills or hire a translator. A source of foreign translators is the American Corporate Counsel Association Foreign Counsel Directory, set forth by language and expertise with various documents (available to members of the Association).

Always try to arrange negotiations in the language in which you are most comfortable speaking unless there are extenuating reasons to do otherwise. Keep accurate meeting minutes. You may prefer to have those present initial the minutes indicating their agreement as to what was discussed. Lastly, take frequent breaks to review what has been discussed to ensure your understanding of the issues and risks involved.

### 7. Knowledge

What does he know of current developments, e.g., your competition and respective industry trends, that may positively or adversely affect your matter? If the lawyer is lacking in this area, what assurances do you have that he keeps current on changes in local laws and key legal decisions? Also, will you be charged for the lawyer learning the basics of your industry?

### 8. Flexibility

Will you be able to work with the lawyer on a flexible basis, e.g., on a retainer basis, or on a project basis?

What is his degree of willingness to travel work around your schedule and the time tables for the deal? Does he have the flexibility and commitment to provide quality service and be mindful of your budget? Will you be charged for travel time? Does he know how to use a computer? Will they use word processing software compatible with your own? Finally, don't make assumptions about work habits or hours (e.g., working weekends) and whether they will call you while they are on holiday.

Do you get the sense that outside counsel will consciously make decisions on whether to expend resources as if he were doing so with his own money? Listen for statements like, "Yes, we could perform that search, but I am not so sure it would be worth your money. There are other ways, which will be less expensive, to provide you with that information to enable you to make this decision."

Also, when interviewing potential outside foreign counsel, do they make it quite clear that it is not critical that they perform all of the work? They should give you the chance to prepare the first draft of documents, perform searches to the extent logistically possible, collect information, and perform other necessary tasks in an effort to hold down costs. Clarify your expectations in this regard up front.

During the course of your transaction, an indication that you are being well served is if you hear this type of response: "We are close to exceeding your budget for the due diligence work. We have four more tasks to perform. I think we should do one and two; perhaps you or one of your staff could perform three. Here's what to do. We can do without number four and this is why." Cost efficiencies are achieved, not just well intended, when there is periodic discussion of the amount of legal expense compared to the amount invested in the project or the risks associated with the matter.

#### 9. Worst-Case Scenarios

Before you and your client jump in with both feet, it is critical to assess "worst case scenarios." What does each lawyer tell you can happen if your deal falls apart or you are unsuccessful with the litigation? If two potential outside foreign counsel differ in their opinions as to worst case liabilities, seek out other counsel and call upon whatever other resources are available to draw your own conclusions.

Although the amount of the investment may dictate the type of firm or lawyer you retain, remember, you might "lose the farm" and not just the amount invested. Retain counsel who will adequately protect your client. Although hourly fees are critical, when business opportunities fall apart no one will appreciate that the lawyer you retained was \$35 less an hour than any other attorney you interviewed or that the attorney you hired adhered to the budget. Remember, at the end of the day YOU are responsible for the advice given and assistance rendered.

#### 10. Firm Brochure

Review background information on the firm's expertise, the expertise of its members and the firm's office locations by obtaining a firm brochure and any other relevant information. Consult the Martindale-Hubbell Law Directory and the Martindale-Hubbell International Law Directory to learn more about the individual lawyers, the firm and their expertise and clients. However, many foreign firms don't have brochures; some local ethics rules prohibit them or listings in publications such as Martindale-Hubbell. When dealing in the European Community, a firm with either multiple locations or firm members who have practiced/trained in more than one country may give you an advantage. This could depend upon the number of countries involved in your deal. One factor to consider is whether there is any additional cost, such as travel time and expense, by using lawyers from multiple locations.

#### 11. Fee Factors

There is no right or wrong answer when it comes to the issue of attorney's fees. However, make sure you understand from the beginning on what basis you will be billed if you retain the respective outside foreign counsel. Determine at the outset what types of services and individuals (secretary, assistant, paralegal) for which/whom the firm intends to bill. Also, specify whether you prefer to limit the number (or identity) of lawyers working on the matter. If you do not, you may find you have hired the lawyer's associates when you intended to obtain the services of a particular individual whose skills and experience you are seeking.

Also, you may be in a jurisdiction where the fees are fixed by local law for certain matters. Some countries, for instance, establish a fee scale for litigation. If so, the outside foreign counsel should make you aware of any statutes controlling fee structures at the outset of the relationship.

#### 12. Attorney-Client Confidentiality

Do not presume your communications will be treated as privileged and confidential as they are in your home jurisdiction. Find out the rules and modify your behavior, communications and expectations accordingly. Depending on the nature of your use of foreign counsel, this factor could be highly significant.

Further, in some jurisdictions client listings are kept confidential. Even if they are not, you may prefer to keep your relationship with outside counsel confidential and specifically instruct him not to disclose the relationship.

### III. WORKING EFFECTIVELY WITH FOREIGN COUNSEL

There are a number of tasks and communications which are critical to success when in-house counsel (and/or outside domestic counsel) retains outside foreign counsel and other advisors for representation in international matters. Objectives and expectations should be made clear. Although certainly not exhaustive, the list below should help avoid confusion:

- **Communication.** When interviewing potential outside foreign counsel initially, and throughout the matter, you must properly communicate expectations budgets, facts, short- and long-term corporate objectives, specific limits on authority, and special concerns, to name a few key factors. Set out preliminary parameters and ask for suggestions. Likewise, foreign counsel should be candid about fulfilling your expectations, adhering to the budget, meeting objectives, etc. Help them to understand the role (e) to be played in the transaction/litigation. They may be unaccustomed to performing certain tasks you take for granted, but

(s) to be played in the transaction/litigation. They may be unaccustomed to performing certain tasks you take for granted, but nonetheless willing, if your objectives are clarified.

- **Engagement Letter.** After selecting counsel, send a thorough engagement letter, which will serve to bring to light any miscommunications/misunderstandings from the beginning. The engagement letter should cover all foreseeable issues, from expectations, duties and tasks, and fee structure, to reporting responsibility and who has authority to give instructions on the matter. For example, matters such as monthly versus quarterly billing, budgets, etc. should be included in your engagement letter to avoid any confusion. See section IV for a further discussion of the engagement letter.
- **Thank Yous to Those Not Retained.** You should send a thank you letter to the other lawyers/firms/advisors you interviewed, but whom you will not be retaining. Aside from the obvious professional courtesy, you may need them in the future, either on the immediate matter or in another transaction. You never know when your paths will cross. For instance, the firm you select may not be able to provide you a desired service and you may need to retain another law firm to achieve your desired result.
- **Deadlines.** At the outset, establish time frames and calendar reminders to meet deadlines. Remember, the foreign counsel you retain may be a day behind or ahead, depending on locale, and time has a habit of slipping away. Obtain your counsel's home phone number. Also, whether you are discussing deadlines with your outside foreign counsel or referencing deadlines in documents, be specific about whose time zone and date you are talking about when the parties are located in different corners of the world and in different time zones. Also, make clear whether delivery is to be made by voice message, fax, international courier or in person.
- **Billing.** Make sure you have a clear understanding of how, for what, and for whom you will be billed. To whom will outside foreign counsel send the bills? Will they be formatted to meet requirements set forth by your department, accounts payable and/or internal audit?

Also, you may find that the bills are not as detailed as the bills you are used to reviewing from counsel located in your home country/state. Many U. S. companies require detailed billing with a description of how much time was spent for each task on a particular day, total hours spent by each attorney, and/or individual billing rates. If you want this same format from foreign counsel, you will want to provide him with a sample.

Be aware that the terminology used in foreign counsel bills is sometimes misleading. The billing may be phrased to include such language as "telephone attendance," implying that you are being charged for a receptionist taking a message when in fact, the attorney spent an hour with you on the phone that day, advising you about a multitude of issues.

Lastly, the bill may contain language which is necessary for the firm if there is a dispute. For instance, in some jurisdictions, e.g., New South Wales, it is not uncommon to see the phrase "care, skill and responsibility", on invoices. This language is required by local statutes if the firm intends to receive an amount in excess of the minimum statutory scale of costs/fees.

Will invoices be paid by your client or by you? Foreign lawyers typically assume that when a U.S. lawyer hires a foreign lawyer on behalf of the client, the U.S. lawyer will pay or is the guarantor.

- **Contact.** Allow your key business clients to contact your outside foreign advisor, either via telephone, in person or otherwise. Contact with key business clients allows the outside foreign advisor to get a better flavor for the deal, the dynamics and the parties involved. However, the lawyer should take whatever steps are necessary to keep you in the loop. This is critical. Make sure that your business clients understand this and agree to cooperate.
- **Central Point of Control/Contact.** Depending on the geographics of your transaction, your ability to travel and a host of other factors, it may be essential to make it clear to the outside foreign advisor that he should only receive direction from you, direct his reports to you and not to do so with the client who might be located on site. This precaution will avoid confusion, especially when outside foreign counsel will have significant one-on-one communications with in-house business personnel and your contact with outside foreign counsel is primarily via telephone/fax. You are best suited to provide clear instructions in order to limit the scope of his work to what is truly needed. Conflicting instructions should be avoided.
- **Outside Counsel Manual.** If your company has an outside counsel manual, send a copy to the outside foreign counsel you retain. Ask the attorney whether there are any problems caused by the content of the manual, e.g., provisions that are contrary to local law or practice.

If you do not have a manual, and you often retain outside counsel, you might consider preparing one in the near future. The manual should provide your outside counsel with: additional background information on your company's business; your company's philosophy on retaining outside counsel; to whom outside counsel reports (both oral and written communications); litigation management and strategies; use of attorneys, paralegals and other advisors within the firm being retained; scope of permitted research; whether prior review by in-house counsel of documents/pleadings is required; specifics about working with in-house personnel; and fees and costs. This list is not meant to be all-encompassing, but should serve as a checklist to enhance the relationship between the outside foreign counsel/advisor and your company.

#### **IV. THE ENGAGEMENT LETTER**

The use of an engagement letter in a transnational matter has the same purpose as the one you sent six months ago in your domestic acquisition. The key is to educate outside foreign counsel. set forth the specifics of what is required and avoid confusion about

The use of an engagement letter in a transnational matter has the same purpose as the one you sent six months ago in your domestic acquisition. The key is to educate outside foreign counsel, set forth the specifics of what is required and avoid confusion about such topics as billing, which no one likes to discuss.

Keep in mind that no two engagement letters need be alike. Each matter is unique. However, you will usually find core topics that will surface. In drafting an engagement letter, you should tailor it to meet your specific needs and recognize that in international matters there will be a number of differences to consider:

- **Local Laws, Practices and Procedures.** One area of concern is the different local laws. In this regard, your questions and concerns should be set forth in the engagement letter. Request outside foreign counsel to identify relevant local laws, practices and whatever differences exist compared to your local laws that he may be able to bring to your attention. Start with the assumption that the laws and practices of the new jurisdiction will be completely different from those of your own country.
- **Deadlines.** Given the geographic distances, time changes may be significant and could have an impact on deadlines. Also, depending upon the type of deadlines, the jurisdiction you are about to enter may have a different view of enforcing deadlines than you do. There may be deadlines of which you are not aware. You might ask outside foreign counsel to identify any and all deadlines and how and to what degree they are enforced. Overnight mail may become two-day airmail when you are engaged in international matters. This could also have an impact on what type of notice is acceptable, e.g., as set forth in an acquisition agreement between you and the other party(ies) that is about to unfold.
- **Opinion Letter.** Depending upon the jurisdiction, if you are requesting an opinion letter, the type of product you might receive may differ significantly from what you might receive in your own locale. If you have not already discussed the opinion letter (if one is being sought) on the telephone, spend extra time detailing what type of opinion letter you are seeking.
- **Key Individuals.** Inform outside counsel about key individuals within your organization. Although this would be something you would do in a domestic matter, it becomes more important in an international transaction where the outside foreign counsel may have more "face-to-face" contact with individuals from your company/firm located near counsel. You might never meet the lawyer, but your local client may have significant contact. Do you want to be apprised of all meetings and correspondence? If so, advise outside foreign counsel in the engagement letter as to these details and any others which you deem appropriate when it comes to communicating, either in person, on the telephone, or in writing with local representatives.
- **Communications.** Method of communications is another necessary ingredient in the engagement letter. When doing business in the U.S., the phone and fax are usually considered the most acceptable means. However, depending upon time differences, communication capabilities, and other factors, you might prefer outside foreign counsel to communicate with you via a particular method, e.g., e-mail or the Internet.
- **Conflicts of Interest.** Consider whether the standard for conflicts of interest is different from that of your own jurisdiction. The standards may differ significantly. Use the engagement letter to set forth your understanding of local laws and practices in this respect. If you have no knowledge in this area, be sure to inquire. You and/or your client may not find it acceptable that the outside counsel you have just retained may have had a relationship in the past and/or in the present that poses a conflict of interest in your mind, e.g., counsel represents a key competitor. Whether it is a recognized conflict by law or a business preference, define the parameters at the outset to avoid confusion later.
- **Billing.** Billing practices are a basic component of any engagement letter. This topic is worth a few extra lines since these practices seem to have larger variations when venturing abroad. You might request in the engagement letter to have a sample bill faxed to you to ensure that the method and billing format will be acceptable. Billing procedures, especially invoicing software differ significantly around the world. Ask to see a sample bill at the outset to avoid receiving the initial bill in a format that will be unacceptable to your company's/firm's accounts payable department. Clarify the types of expenses that you will be required to pay, the information that will be set forth in the bill, billing cycles, whether in your own currency or in some other currency, and a myriad of other features. You would be well-served to refer to the types of bills you are used to paying when preparing this section of the engagement letter. Clarify who will receive the bill.
- **Payment.** Specify the currency and exchange rates (when and where applicable). Clarify means of payment (check, wire transfer), and any approval requirements. Clarify who is responsible for payment.
- **The Audience.** Lastly, consider your audience. Who will read and rely on the engagement letter? Remember, the relationship is a two-way street and the geographic distances may make communicating more difficult. The engagement letter should shout clarity and professionalism. Also, many outside foreign counsel appreciate a heightened degree of politeness when it comes to the engagement letter, which flows from the various cultural differences. Before sending the engagement letter, switch places with the outside foreign counsel to ensure it is not peremptory and that you would be pleased to receive it.

## V. CONCLUSION

Whether you are planning a transnational deal or are on the brink of international litigation, your success may hinge on your selection and management of outside foreign counsel. The selection process is a challenge. Be prepared. Refer to these materials and other sources to identify the most appropriate outside foreign counsel. Hasty selection may result in needless headaches and obstacles.

Next your time will be well spent at the outset if you take steps to ensure the relationship with outside foreign counsel will foster open communication. For instance, a thorough engagement letter will be worth its weight in gold. Attention to routine details should eliminate a layer of confusion and will contribute directly to your success.



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Most importantly, of course, you must manage the relationship and execute on the fundamentals as discussed above. Whether you elect a "hands-on" or "hands-off" approach, you are ultimately responsible for the results obtained in utilizing the outside counsel you have chosen. In other words, your success or failure is in your own hands.

Finally, perhaps the most useful piece of advice is do not abandon your common sense at the border.

## VI. SOURCES OF ASSISTANCE

### A. Books

THE STATESMAN'S YEARBOOK (Brian Hunter ed. 1992-1993. 129th ed.).

MARCEL BERLINS & CLARE DYER, THE LAW MACHINE, 1992.

AMERICAN CORPORATE COUNSEL ASSOCIATION, FOREIGN COUNSEL DIRECTORY (to order, call (202) 296-4522).

THE AMERICAN BAR ASSOCIATION, GUIDE TO FOREIGN LAW FIRMS (to order, call (312) 988-5522).

MARTINDALE-HUBBELL LAW DIRECTORY, (800) 526-4902, which is on-line with LEXIS.

MARTINDALE-HUBBELL INTERNATIONAL LAW DIRECTORY, (800) 526-4902, which is also on-line with LEXIS.

CAMPBELL'S LIST -- A DIRECTORY OF SELECTED LAWYERS (Published since 1879) (407) 644-8298.

RUSSELL LAW LIST -- 1993 (Legal Correspondents International (410) 820-4475).

THE AMERICAN LAWYER -- PRACTICE DIRECTORIES (various dates) (212) 973-2800.

U.S. CUSTOMS HOUSE GUIDE -- OFFICIAL 1995 VERSION, (800) 669-3282 (includes an alphabetical and geographical index to law firms specializing in admiralty, customs, international corporate and international trade law).

OFFICIAL EXPORT GUIDE -- 1995 VERSION, (800) 669-3282 (includes law firms specializing in admiralty, customs, international corporate and international trade law).

NORTH AMERICAN TRADE GUIDE -- 1995-1996 (3d ed.) (800) 669-3282.

### B. Periodicals

International Corporate Law, published monthly by Euromoney. Publications; periodically reviews lawyers and firms in selected countries. Other specialized trade magazines occasionally publish service directories which include lawyers (See e.g., U.S./Latin Trade, January 1995. "International Services Directory for Latin America".)

### C. On-Line Services

As noted earlier, the Martindale Hubbell law directories are available on-line through LEXIS.

Electronic bulletin boards such as Counsel Connect, may also be helpful sources of names.

### D. Other

International bar groups are often helpful sources. In addition to the contacts that the general membership may have, the regional committees of these groups, for example, committees in the Comparative Law Division of the ABA Section of International Law and Practice, often include foreign lawyers as well as U.S. lawyers with extensive networks in the region.

[FNa1]. This chapter is written from the perspective of an in-house lawyer who was previously with a large law firm. Although many of the ideas, concerns and recommendations flow primarily from an in-house perspective, most apply to the outside lawyer/foreign counsel relationship as well. The author acknowledges the assistance of David L. Teichmann of Sybase in the preparation of this chapter.

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