

Proper Preparation for Doing Business in a Foreign Country

What happens when one of your firm's clients wants to build a new facility in Poland, Peru, or Palau? What if that client wants you involved in the project? While your firm may be no stranger to doing business overseas, you've never been to this particular country. You're not even sure where to find it on a map! Still, it's a good client, you want to foster the relationship, and your firm could use the work.

Before you say yes—or no—you need to do your homework. In this article we discuss what you should ask and where you can find information about doing business in any given country—in other words, how to determine if the reward will be gold, or only fool's gold.

Right Advisor

Your first step should be finding a good local advisor with practical, hands-on experience in the country where your client's project is located. One likely candidate is an international law firm, either with a strong presence in the foreign country or domiciled in the United States and with offices in or near the foreign country. There are both U.S. and foreign-country laws, regulations, and customs that your firm must navigate to be successful in this new venture. There are several law firms that specialize in representing design and construction firms overseas.

U.S. Laws and Regulations

There are a number U.S. laws and regulations that govern your firm's operations overseas. Perhaps the most prominent of these is the Foreign Corrupt Practices Act of 1977 (FCPA) and the various subsequent updates to this federal legislation.

What is and is not permitted depends in large part on the country in which your firm intends to operate. You are not permitted to do business wherever you choose. There are total economic sanctions against some countries, such as North Korea and Iran. In other countries, such as Syria, your firm can engage in certain activities, but not in others. This can change quickly—what is permitted today may not be permitted next month and vice versa.

The Office of Foreign Assets Control (OFAC) administers and enforces economic and trade

sanctions based on U.S. foreign policy and national security objectives. Many of the sanctions are based not just on U.S. policy, but also on U.N. and other international mandates. In addition, the Department of Justice, the Treasury Department, and the Department of Commerce—to name just three—may all have regulations and restrictions with which your firm must comply.

Even in countries not subject to any economic sanctions, there may be causes for concern. For example, in some developing countries, bribes are common practice, but the FCPA forbids bribing any foreign official to obtain or retain business. Your firm may feel trapped between a rock and a hard place in trying to navigate foreign waters without violating any U.S. regulations.

Paying strict attention to all U.S. rules and regulations is no joke. For example, the January 18, 2010, issue of *ENR* reported "PBSJ Discloses Internal Probe of Overseas Work in SEC Filing" (page 7). Apparently, there was some question as to whether a subsidiary violated FCPA and other laws.

As subsequently reported on January 8, 2011, in "Top Ten FCPA Investigations of 2010," www.infosecisland.com, when PBSJ put itself out for bid, this unresolved issue resulted in PBSJ's having to accept the lower bid, as the higher bid was contingent on the outcome of the FCPA investigation.

Poor publicity alone is probably not good for business, not to mention any fines and penalties that may arise out of any violations. It's far better to take the time to create systematic processes and procedures to avoid trouble in the first place.

As part of your decision-making process, it's good to have a sense of the level of corruption you can expect to find in a given country. Transparency International (TI), a global civil society, issues *The Global Corruption Report*, which ranks countries by the level of corruption in each country. The free report can be found at www.transparency.org.

The bottom line is that you need to look in many different directions to get a picture of whether and how your firm can operate in a foreign country without contravening any U.S. laws and regulations. And that's just one side of the puzzle. The foreign country will have its own legal hoops through which you will have to jump.

Foreign Business Laws and Regulations

Not surprisingly, foreign laws often differ from and sometimes conflict with U.S. laws. Beyond your garden-variety laws, there may also be special laws and regulations that pertain to certain professional activities, such as those performed by design professionals.

As a first step, your firm needs to know the administrative framework for starting a new business in a foreign country. The World Bank is one good source of this type of information. The Web site www.doingbusiness.org "provides objective measures of business regulations...in 183 economies..."

Some issues to consider are how long it will take to open a business and how long it will take to close it. Your firm must establish who it is, what it does, why it is qualified to do so, and that it will do so in a professional and honest manner. Even in an area as business-friendly as the United Arab Emirates (UAE), this can take months and months. It may take more than a year to get a business license, and the bar for design professionals is pretty high.

An alternative to going through this lengthy process is to form a joint venture (JV) or other alliance with a local firm, but this can also have its downside. You may pay for the convenience by being stuck with a less-than-optimal partner for the duration of the venture.

Whether a JV or other alliance makes sense depends on a lot of factors: the length of the project; the complexity of the project; the difficulty or ease of forming your own entity; and so on. Each country has its own rules and customs. You will need help in determining what business structure—corporation, JV, partnership, or other—makes the most sense in a given situation.

If your firm does opt for a JV or other alliance, you should discuss risk management and insurance with your alliance partner to be sure that the company with which you're partnering holds the same attitudes toward risk and insurance as your firm.

Another issue is joint and several liability, a legal concept common in the United States. However, not every country imposes joint and several liability on joint venturers or even on partners. A country may view the foreign company as more culpable than the local, or liability may be apportioned by size of firm or some other scheme with which you're not familiar or comfortable.

Employment Laws

Foreign employment laws may pose an additional hurdle, and some of them may be in conflict with U.S. employment laws. For example, you may be required to give Muslims time off for Ramadan, but non-Muslims may not get the same time benefit. Shorter hours may be required for women. The laws in some countries are less "blind" to religion, sex, and color. Workplace hierarchies may be based on culture or race. Yet following these local laws and customs may run afoul of U.S. laws and your own corporate best practices.

Dispute Resolution

Dispute-resolution mechanisms vary widely from

one country to the next. Resolving disputes can be particularly difficult with clients in the UAE and in any developing country. You cannot expect to handle dispute resolution the way you do in the United States—for example, by mediating or arbitrating pursuant to contract. You need to ask what the dispute-resolution and claims culture is in each specific country.

In many countries, one way or another, you're really doing business with the government. And dispute-resolution provisions against the government, even if the contract is well-drafted, may not protect you very well. Even if you get a judgment in your favor, will the court enforce it against the government? Argentina has proven to present problems in this area, as have Russia and China, to name just three.

Thus, your decision to operate in a particular country must be made with full awareness of business and political reality. Choosing international arbitration also may not always suffice. If the other party to the contract is either the government or someone else with a lot of clout, you may be out of luck.

To compensate for such potential problems, don't let your work get way out ahead of your payment. And don't be afraid to walk away if you are not being paid or are otherwise not being treated fairly.

Tax Issues

Tax is a particular area of concern, an issue unto itself. Your firm must consider the U.S. tax ramifications from repatriating overseas profits. There may be foreign tax implications to engaging U.S. staff to work in the foreign country. What makes sense depends, in part, on income-tax regimes in foreign countries. For example, U.S. companies can sometimes benefit from employing nationals of countries that have more favorable expatriate income-tax laws than the United States.

Another factor is the overall tax attitude of the country. For example, the UAE is viewed as tax-friendly. There is no

corporate tax except in the oil and banking industries. However, this is a matter of custom, not statute. There are corporate tax laws on the books, but they are not enforced and not expected to be enforced in the foreseeable future. However, things can change suddenly and sometimes without warning in many countries, especially those that are monarchies or dictatorships. You should think long and hard before making substantial long-term investments based on laws and/or customs that may not hold over the long term.

Cultural Customs and Norms

Last, but certainly not least, you need to understand the customs and cultural norms. Do you make eye contact, or is that too forward? Do you shake hands or bow? Do you address new acquaintances by first or last name?

Remember, too, that your foreign counterparts may also be trying to determine your own U.S.-based expectations, so small errors may be overlooked and forgiven. But the greater your command of local custom, the easier it may be to do business with local people.

The Right Insurance Broker

A good insurance broker will have access to information about international insurance issues and may also have a relationship with one or more local insurance brokers in the country you're exploring.

The right insurance broker can help you navigate through the various ways of buying insurance in a given country, as well as which coverages are mandatory and which are optional.

Many firms that operate overseas start with a foreign package policy. Such a policy may fulfill your insurance requirements or may serve as a conduit to local policies, which may be required in some circumstances. Typically, a foreign package will include such coverages as hired and nonowned auto, general liability, workers compensation, and kidnap and ransom.

Many policies—including professional liability—purport to offer worldwide coverage. However, we offer a note of caution: Be sure that any such coverage is considered valid by the local jurisdiction.

Some Basic Terminology

There are some basic terms you'll need to understand foreign insurance transactions:

- **Admitted Insurer:** This is an insurer licensed and permitted, by law, to sell insurance in the country. It could be an insurer actually domiciled in that country, or it could be an insurer domiciled elsewhere that has passed muster with whatever regulatory body oversees insurance in the specific country.
- **Nonadmitted Insurer:** This is an insurer neither licensed nor registered to sell insurance in the country. Some countries allow you to purchase insurance from a nonadmitted insurer; others do not.
- **Fronting:** This is when an insurance policy is issued by insurer A, but insurer B is actually providing the coverage and paying the claims through insurer A. In international insurance, this often means a U.S. insurer providing insurance through an admitted local insurer.

An insurance program in any given country may involve some or even all of these mechanisms.

Mandatory Coverages

Most countries will have mandatory coverages, but they are not necessarily the same as the coverages we've come to view as mandatory in the United States. For example, workers compensation insurance is compulsory in Botswana, but not in Cambodia. Fire and earthquake insurance is required for common parts of apartment blocks in Colombia, but there are no required property coverages in South Africa. Further, some mandatory coverages—most commonly workers compensation or its equivalent—are sometimes government-run systems, funded with payroll

taxes or by other means, with private insurance not permitted.

Optional Coverages

Generally, whatever coverages you purchase in the United States are available in other countries, either from local or from international insurers. The tricky part is determining from which insurers to purchase which coverages, both in terms of what makes economic sense and what is acceptable to local firms with which you are doing business. A knowledgeable insurance broker can also help you identify appropriate forms for specialty insurance coverages, as well as determine whether you will need Defense Base Act coverage and what the appropriate limits are for kidnap and ransom coverage.

Consistency Within Your Insurance Program

Your firm's domestic insurance program not only reflects the legal requirements in the United States and in the particular states where you operate, it also reflects your philosophy about what risks to insure and what risks to retain. Do you buy high limits? Do you assume risk through high deductibles and retentions? Do you insure the risk of physical damage to vehicles, or do you assume the risk? Are there coverages you would not purchase were it not for the legal requirement to do so? Just as your domestic insurance program reflects your firm's philosophy of risk, so should your international insurance program.

But you may not be able to match limit for limit, coverage for coverage, between policies available in the United States and elsewhere. For example, decennial liability insurance is required for construction risks in Tunisia, but is not generally available—even on an optional basis—in the United States.

Where mandatory foreign insurance is broader than what you can buy in the United States, you have no choice but to have an uneven program. But more often than not, the coverages available to your firm for purchase domestically will be

broader than what's available elsewhere. To stretch your international coverages to equal your domestic coverages, your firm should consider difference in conditions/difference in limits (DIC/DIL) policies. A number of insurers that operate internationally can provide this type of coverage.

- The DIC policy will fill in the gaps in coverage. For example, your firm's U.S. property coverage may include flood and earthquake, but your foreign property coverage may not. A DIC policy can fill in this difference in conditions between the two policies.
- The DIL policy will fill in the gaps in limits. For example, if your firm's U.S. general liability policy provides \$1 million per occurrence, but you are only able to purchase \$500,000 per occurrence in a foreign country, a DIL policy can fill in this difference in limits between the two policies.

In some cases, the basic policies that you purchase in the United States—including a foreign package policy—may also provide DIC/DIL coverage for your foreign operations.

In Closing

There are good and bad opportunities for the design and construction community beyond our borders. The trick is finding the gold and avoiding the fool's gold, a venture that will cost you more than you will make.

Whether an opportunity will work for your firm depends on many factors, and the ease or difficulty of doing business in a particular country is a big part of that. Finding the right advisor can make all the difference between success and failure.

Once you make the decision to accept a project in another country, you need to be sure all your insurance and risk management needs will be met. As with your advisor, your insurance broker can make or break the deal for you.