

The Latest Developments in Cross-Border Transactions

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This issue of the Bloomberg Law Special Reports offers the latest insights on how new policy, regulations, and court actions are impacting international corporate transactions. We look at key areas of uncertainty, including Brexit and the European Union, and the coming impact on business and law practice.

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U.S. Litigation Poses Risks to Foreign Companies

By Lisa Singh

For foreign firms with U.S. operations, the prospect of U.S. litigation is increasing, along with a wide range of regulatory requirements in different industries. To manage the risk, businesses will need to start with a comprehensive legal strategy.

The threat of U.S. litigation is increasingly real.

“The ever-changing and increasingly complex body of regulation and case law in the U.S., coupled with the broad reach of U.S. regulators and courts, is making it more challenging for foreign companies to navigate,” said Edward Kirk, a partner in Clyde & Co’s New York office.

In dealing with globalization, intellectual property issues, and policy uncertainty, both stateside and abroad, companies face a widening range of worldwide liability – hastened in some cases by the growth of litigation funding vehicles, notes Andrea Neuman, partner with Gibson, Dunn & Crutcher.

In this environment, the threat of U.S. litigation is increasingly real for nearly any business with stateside operations.

“The more business you do in the United States, the more likely it is that you’ll be sued here,” said Atif Khawaja, partner at Kirkland & Ellis in New York. However, the effects of litigation will vary across industries.

“A new, foreign entrant in our consumer goods market is likely to find itself facing a products liability suit one day,” Khawaja said. Industries with a few large players will continue to spark antitrust attention, he added, while companies on the cutting edge of science and technology will face additional intellectual property disputes.

In the decade since the financial crisis, regulatory reach has broadened to include scrutiny of foreign firms with operations in the U.S.

“Many of the largest U.S. regulatory settlements involving violations of the Foreign Corrupt Practices Act, anti-money laundering, sanctions, and other regulations have been paid by companies based outside of the U.S.,” Kirk of Clyde noted. Companies that issue securities on a U.S. exchange or that engage in U.S. transactions regarding other securities are increasingly likely to face a U.S. securities class action, he added.

Nor do litigation risks show any signs of abating under the current administration, as demonstrated by various sanctions regimes spearheaded by the Office of Foreign Assets Control.

“The threat of U.S. litigation to enforce the U.S. criminal and civil laws incident to trading with OFAC-sanctioned countries cuts across all industries of international stature within each sanctioned country, and remains a significant commercial risk,” said J.P. Douglas-Henry, global co-chair of DLA Piper’s litigation and regulatory practice.

The impact of lawsuits is likely to be felt almost immediately, according to Bloomberg Law.

The recent decision by the Trump administration to implement Title III of the Helms-Burton Act, allowing U.S. nationals to seek damages in U.S. courts from foreign companies that operate on properties seized by the Cuban government, also holds far-reaching implications.

Even as lawsuits may consume years in the legal system, their impact is likely to be felt almost immediately, said Peter Harrell, a fellow at the Center for a New American Security, a Washington-based research group, as reported by Bloomberg Law.

As regulations increase litigation risk, companies may face potentially onerous discovery obligations that can occur on several fronts.

Despite varying case law, U.S. courts continue to grant application for discovery under Section 1782, in some cases to a foreign-based subsidiary, involving documents used in foreign proceedings. "1782 presents ongoing and expanding risk because, as the U.S. follows the possession, custody, and control rule, a lot of companies, for business reasons, are moving to unified platforms for information sharing," Neuman of Gibson Dunn said.

Meanwhile, mounting U.S. litigation risk ensures discovery will remain a challenge for foreign firms – compounded by the prospect for conflicts with home country legal systems, particularly where data privacy laws diverge.

"In the United States, broad rights [of litigation parties to] compel each other to produce large amounts of records pose potential problems with, for example, European companies whose records may be subject to the GDPR," Khawaja said. Even stateside, companies face conflicting legal requirements that heighten litigation risk.

Divergent privacy laws may drive conflicts with home country legal systems.

"In areas where there is no overarching federal law, foreign companies may find it particularly difficult to understand the applicability of state laws and their interplay with federal regulations," Kirk said, citing varying data breach disclosure and notification laws. "As customers may reside in various states, companies may be subject to a wide range of different rules and regulations."

Formulating a coherent legal strategy at the outset is essential, experts say. This is imperative as companies often underestimate the fees associated with managing litigation requirements. "While the complexity of the case will determine the likely costs of discovery, those costs frequently exceed parties' expectations," Douglas-Henry said.

"The key really is proactive planning [across] three areas," Neuman said, citing jurisdiction, corporate separateness, and information management considerations. "It's critical to be well-informed on the rules of engagement, both locally and globally."

As a first measure, companies should monitor and understand their level of contacts with the U.S. – for example, whether a company has a physical presence and customers stateside, Khawaja said. He stresses that the obligation to preserve evidence exists where there is even reasonable anticipation of litigation.

Further, beyond retaining counsel with cross-border litigation expertise, companies can minimize cost and exposure through due diligence.

"A lot of litigation can be avoided with advance planning," Khawaja said, "and by paying closer attention to U.S. law before a dispute ripens into a full lawsuit."

Lisa Singh is a writer specializing in business and technology matters.



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