

Expanding Globally

Top 10 Legal Issues



Osborne Clarke's international lawyers have been advising US clients on their overseas legal needs for many years from their offices in New York and California.

Osborne Clarke's US teams are highly experienced in the issues facing US businesses expanding internationally and set out below a checklist of the Top Ten Issues US Businesses often need to consider when expanding globally into overseas markets.

1. **Subsidiary or not?**

Many businesses assume that by not establishing an entity overseas, they will not be bound by laws and regulations of the markets in which they are operating. This is almost always wrong – especially if you are selling to consumers. Individuals generally are protected by the laws of their own country: whether under consumer laws, employee regulations or data protection rules. Allowing access to your website is likely to trigger local obligations and actively selling within a market will lead to a permanent establishment requiring registration and filings...as well as tax. Failing to put in place the correct structure can lead to filing obligations relating to US financial information which private corporations usually prefer to keep confidential.

2. **Employees**

Most European countries have similar laws to the US relating to distinguishing between contractors and employees. Generally, if an individual is under the management and direction of your business (and has office space and/or business cards and an email address with your business name), then they're likely to be categorized as an employee. As well as filing and payroll obligations, the employee is protected by the laws of their country of residence. You should therefore ensure you provide them with a local employment contract and definitely not a US offer letter: European employment laws offer significant protection to employees and as an employer the contract is there to protect you and clarify the terms under which the employee has been hired (and can be fired).

3. **Stock Options**

If you plan incentivizing your employees using stock options, you should check the local tax laws to ensure you localize where required and check if there is a tax efficient plan which can be used for your overseas employees. Failure to do so can lead to unnecessarily large tax bills for the employee AND employer on exercise of options. Certain countries have such harsh tax rules that employees prefer not to accept options as part of their remuneration (because they are often required to pay tax on their value on grant rather than on exercise – when it's possible that they're worth a lot less!)

4. **Intellectual Property**

Your IP (trademarks, patents and design rights) should be registered in the markets in which you are operating – they are not protected by your US filings. If you plan to sell into 3 or more European markets, you should consider applying for EU-wide protection, but individual country filings are also possible if you plan focussing on limited markets.

5. **Terms of Service/Sales Contracts**

Localization of terms should be considered. If you are selling to consumers, you will need to ensure you localize your terms legally as well as translate them into local language. Failure to do so will allow complaints to be filed and considered on terms which you have not dictated (and worse under which you have not limited your liability). B2B contracts need not be localized legally, although may need to be if negotiating with larger overseas customers who insist that their local laws govern your contract.

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6. Acquisition

If you plan buying an existing business overseas, you should definitely take local advice – even if you plan acquiring under a US contract. At a minimum, due diligence will require a local expert's review and many of the reps and warranties will need to be localized to make sense under local laws. Market standards can vary considerably, so it's definitely worth spending time with the seller and ensuring you are both aligned on basic terms of the acquisition.

7. Tax

Taxes vary from country to country, but one consistent approach is that every Tax Authority prefers to maximize the contribution it receives from businesses operating within its borders. Tax structuring advice can help minimise tax obligations and inter-company agreements can clarify responsibilities under global transfer pricing rules. Local payroll taxes and social security payments often need to be deducted at source (and can be managed by payroll providers) and many sales need to have sales tax or VAT added (and often quoted in prices).

8. Data protection

Europe has strict data protection laws which require businesses that receive or process personal data to follow strict rules regarding its receipt, retention and use. Specific consent or disclosure needs to be made to the owners of the data and may not be transferred outside the EU without appropriate registrations being made to ensure its protection and proper use.

9. Real estate

Short term flexible office space is widely available overseas but advice should be taken when taking larger space – whether office or manufacturing real estate. Obligations on tenants are not the same globally so it is important to understand what your rights and responsibilities are whilst occupying the space and after you move out.

10. Disputes

Obviously everyone hopes to avoid disputes and by entering a market with eyes open (and proper advice) can minimize the circumstances for things to go wrong. However, if they do, early advice should be taken to ensure you don't expose yourself to unnecessary liability and if a dispute does become serious, most international jurisdictions have dispute resolution procedures and options for arbitration over litigation. Enforcement of judgements across borders can often be achieved, but may require additional steps or filings.



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