INTERNATIONAL STRATEGIES FOR YOUR SMARTER BUSINESS EXITS

DESIGNING FOR SALE FROM THE BEGINNING

WILLIAM B. BIERCE

INTRODUCTION AUX LECTEURS FRANCOPHONES

Votre Entreprise Internationale Américaine

Bienvenu aux « Sorties Plus Intelligentes » : Cession – Acquisition – Transmission –Différends entre Actionnaires (États-Unis) –

Vous êtes français(e) (ou francophone) en Amérique, entrepreneur ou investisseur, fondateur ou repreneur, PDG ou chef d'entreprise. Vous cherchez à transmettre ou à reprendre une entreprise américaine (filiale ou société mère). Ou bien, si vous avez des copropriétaires, vous avez peut-être à résoudre un différend entre actionnaires sur la gestion, la structure ou les personnages. Ou bien on cherche à vous racheter vos actions afin de vous expulser de l'entreprise. A tout le moins, il convient de penser à changer l'organigramme de votre entreprise.

Bienvenu au livret électronique pour « **Les sorties plus sages** » dans le domaine du commerce international. Au cabinet d'avocats américains de Bierce & Kenerson, P.C., notre mission est d'utiliser notre savoir-faire, notre « intelligence pour la sortie d'une entreprise » pour vous aider à créer, croitre, étendre, gérer bien et transmettre ou acquérir, soit une entreprise américaine, soit vos parts sociales ou actions d'une telle entreprise. Avec des connaissances transatlantiques, nous restons soucieux des aspects humains, patrimoniaux, sociaux et familiaux. Depuis longtemps, nous accompagnons les français (et d'autres étrangers) en Amérique pour établir, grandir, protéger, céder, transmettre ou fusionner leurs fonds de commerce ici sous les meilleures conditions.

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Pour le repreneur, nous adressons également aux obligations de non-concurrence, non-sollicitation, des services de consulting après la cession, des séquestres, et les conventions de garantie d'actif, de passif et d'autres obligations du cédant. Nous pourrons vous aider avec la mise en place de la structuration financière de l'acquisition, constitution de société holding de reprise et la levée de fonds auprès des établissements de crédit. On pense également à la transmission MBO (management buyout) et vente à Private Equity par LBO (leveraged buyout).

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RESTRUCTURING STRATEGIES FOR YOUR SMARTER BUSINESS EXIT (e-book, 2020, available at https://smarterbusinessexits.com

PROFESSIONAL SERVICE FIRMS: BUSINESS OWNER'S CONTINUITY, SUCCESSION PLANS AND BUSINESS Divorce (e-book, 2020, available at https://smarterbusinessexits.com

Multiparty Contractual Networks: New Tool for Global Entrepreneurship and Supply Chains, in International Business Law (Int'l Bar Assoc., Sept. 2019)

Dedication

To Martha and Katharine.

To business owners everywhere, who pursue the journey, pilot the ship, navigate the perils, maintain optimism and support their business, partners and communities.

To investors, who share the journey, encourage entrepreneurship, risk loss and change the world.

To professional advisors, the crew helping to trim and guide the ship.

'Loving each other is not looking at yourselves face to face. It's looking together in the same direction.'
– Antoine de Saint Exupéry, *The Little Prince*

Acknowledgments

In this book, the lessons, classic scenarios and legal and tax frameworks target American businesses that have successfully pursued international markets. But a much wider world inspired me. Many universal truths of *business exit intelligence*™ flow from my working with fellow 'business travelers' from many countries including Australia, Brazil, Canada, China, England, France, Germany, India, Ireland, Japan, Romania and Switzerland among others. Indeed, my career path as an international technology and business lawyer would never have ripened (or yielded this book) without the Rotary Foundation's 'Ambassador of Goodwill' scholarship program, which financed my post-graduate studies at a French law school.

A few individuals helped me crystallize my toolkits on a real-time transactional basis and commented on how the book captured insights. Warm thanks to former partners and colleagues including James Sitrick, John Huhs, Jeffrey Hertzfeld and Pierre de Ravel d'Esclapon (to name just a few) and to foreign lawyers with whom I have had the pleasure of collaborating on cross-border investments and commerce. I also appreciate the contributions of serial entrepreneur André Pagnac, a foreign-based international CEO, with whom I shared a business sojourn from in one country to multiple countries, and from start to joint exit.

Contents

Business Owner's Strategies for Selling an International Business

1. Business Exit Intelligence™ for Future Sale of Your International Business

Your journey starts with organizing the business. In Chapter 1, you learn about organizational design with the author's framework and methodology for '*business exit intelligence*'™ and exit-targeted corporate governance, as applied to your international business. Along your journey, you have designed for expansion across borders. You have dealt with foreign markets, competitors, suppliers and supply chains, service providers, employees, managers and investors. Your family may be immigrants, expatriates or of mixed nationalities.

This little book is designed as a framework for understanding your international business and re-evaluating the suitability of your past decisions on organizational structure, governance, compliance and risk management. A retrospective analysis can help re-design for optimal exit by sale, merger or succession.

Transformative strategic thinking for '*smarter business exits*'™ at all stages can avoid or mitigate internal conflicts and crises. Such thinking has three components:

- '*Business exit intelligence*'™ promotes effective relationships among owners and with all stakeholders for a smooth joint exit. Such intelligence addresses all forms of any change of ownership.
- '*Business divorce intelligence*'™ (also known to as '*corporate divorce intelligence*'™) addresses the particular situations of a hostile or disputed exit by a co-owner. Business divorce intelligence can help achieve better financial and emotional results without destruction.
- '*Succession planning intelligence*'™ concerns the process of transition of business management from one CEO to the next. Such transitions may involve a change of ownership, or they could be just another aspect of a family's intergenerational ownership and control of a family business already transitioned to a family holding company or trust. When the founder moves away from day-to-day control, others can learn, adapt, plan and build for the next generation's future.

You can make mistakes at startup by working on the wrong exit model or with the wrong people building the wrong business and managing it in the wrong way. So you should look for a smarter exit strategy from the start.

2. Special Exit Issues for International Businesses

An international business has many advantages. Globalized businesses are more attractive to many buyers due to the broader customer base and the positioning for global branding. As a result, many entrepreneurial businesses are created and managed by co-founders who are either citizens or residents of different countries. Without rapid expansion across borders, the privately held business could be a dinosaur.

When preparing for a sale or other exit, an international business faces many possible disadvantages, including risks of governmental opposition to the particular change of control. International business owners thus must plan for resolving political risks in every country where the business conducts its operations, reconciling conflicts of laws and planning for the other consequences of selling to a particular foreign buyer. This book concerns selling your international business.

2.1 Peripatetic Cross-Border Owners

2.1.1 Impact of Change of Control on the Founders and Key Employees

Cross-border immigration, work permits and visas are generally authorized based on employment or investment control. In the United States, employment-based non-immigrant visas such as the L1-A or L1-AB (intra-company transferee) lose their validity upon a change of control of the employer or its foreign affiliate. Similarly, a change of control of the foreign affiliate or the U.S. employer will invalidate an investment-based non-immigrant visa (E-2 treaty investor).

For employment-based immigrant visas, the change of control of the employer appears to have no impact on the visa. An EB-1 visa depends on the foreigner's entry into the United States to continue service in a managerial or executive capacity with the same employer, an affiliate, or a subsidiary of the employer. The other employment-based immigrant visas do not depend on continuity of the same ownership.

2.1.2 Impact of Change of Control on the Entity

For a startup's strategic positioning, some founders move from one country to another for proximity to startup ecosystems, such as incubator coaching and survival funding, VC funding for 'proof of concept' and large national markets for rapidly scaling sales. A change of control of a startup normally has no impact on the entity, except for changes that might affect a key employee's visa qualifications.

2.1.3 Family Businesses and International Intergenerational Wealth Tax Planning

Inter-generational wealth transfer planning and asset protection strategies should begin when the senior generation starts a business in the United States.

The owners of privately owned companies face significant tax burdens upon the transfer of control. Personal income taxation may be mitigated by classic deferral techniques such as installment sales and, with business exit intelligence, personal tax planning upon the formation and growth of the company and its affiliates.

Sadly, a worse surprise might occur when a principal owner dies or wishes to give away substantial ownership. 'Death taxes' can be mitigated by advance planning. Tax planning can include the use of trusts, domestic and offshore holding companies and gifts during one's lifetime. Family offices can be set up, domestically or abroad, to administer the operations of intergenerational wealth planning.

As a result, before launching or investing in a foreign company, you should consult a tax planner to address personal taxation on income, gifts, estates, successions and transfers of assets to a trust, holding company or other intergenerational wealth planning vehicle. Some countries do not permit too much tax planning (such as the use of trusts), but planning from the start is critical to a satisfactory tax result upon exit.

The original planning will require revision when family members change domiciles or nationalities. Family businesses must adapt to peripatetic multi-lingual children or siblings of the scion founder. Family travels lead to offshoots of a family business. Cross-border re-domiciliation offers new opportunities for growth, training, risk-taking, family cohesion and a wiser succession plan for transmission of the business to the next generation.

2.1.4 Stock-Based Incentive Compensation Plans

Commercial firms and professional service businesses must service clients across the world. To credibly enter a new market, such firms hire locals as key employees in each new market. Top managers locally often get stock options (or other incentive compensation such as phantom stock or stock appreciation rights) in the parent company or the local company. In the U.S., an employer offering options for shares in a foreign parent satisfies the conditions for a U.S. qualifying incentive stock option plan. Thus, you can use U.S. stock options as incentive compensation for the foreign employees of your foreign subsidiaries.[1] However, under Section 83(i) of the Internal Revenue Code, deferral stock is not available to employees of the U.S. company working in a foreign affiliate.

2.2 Conflicts of Law; Extraterritoriality

International business is replete with conflicts of law arising from the connections of owners, management, employees and operations in different countries. A conflict of laws, however, only arises when the laws of two countries would reach different legal outcomes based on the same facts. Happily, there are principles and treaties for resolving such conflicts. But principles of extraterritoriality of national laws defies such principles, so there could be a conflict of sovereign authority over your company.

In the field of business divorce, such conflicts occur in commercial regulations, taxation, imports and exports, sanctions, bribery and corrupt payments. Such conflicts can create post-exit liability for the company and for selling owners.

2.3 Territorial Limitations on Insurance Coverage

Your smarter exit invites a special post-sale global insurance policy covering your operations worldwide. If your company's or personal insurance is limited to one country, it's time to call your insurance broker.

2.4 Intercompany Transactions

In selling your company, you will be required to confirm there are no hidden tax liabilities. If your company has foreign subsidiaries, you will need to ensure that intercompany transactions have been duly accounted for and reported on IRS Forms 5471 (U.S. subsidiary of foreign company) or 5472 (foreign subsidiary), or both (based on deemed ownership rules). Normally, owners do not disagree on such compliance matters. However, where owners are citizens or residents of different countries, they might disagree on tax and accounting issues, leading to conflicts.

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1 26 U.S.C. § 422(a)(2).

3. Foreign Legal Frameworks

3.1 Normal Governance under Foreign Corporate Laws

At inception, business owners should understand the rules of corporate governance for their foreign branches or subsidiaries, as well as related tax treatment.

3.1.1 Entity Selection

Foreign legal entities have their own unique structures for ownership, governance, taxation, incentive compensation and limited liability. Entity selection invites careful consideration for the impact on you and other stakeholders, depending on your nationality, residency, domicile and role.

3.1.2 Separate Entities; Intercompany Transactions

Most expanding businesses establish a foreign subsidiary, not a branch. The separate legal entity of the foreign subsidiary helps limit liability to third parties, though principles of piercing the corporate veil apply especially if the same individuals manage both parent and subsidiary. The separate legal entity also limits the taxing jurisdiction and tax audits of foreign tax authorities. It helps localize branding, employees and local operations. Care should be taken to ensure that the foreign subsidiary's separate existence is respected by arm's length intercompany agreements, including licensing, sales, employee services, administrative services and ownership of any R&D services undertaken by the subsidiary at the parent company's risk.

3.1.3 Force Majeure Emergency: Mobility of the Corporate 'Seat'

Under foreign laws, the corporate legal framework could require special accommodations for business owners who want a 'world-class' quality of corporate governance, including succession planning for changes in significant owners and key employees. In the foreign legal context, corporate laws reflect local public policy for the protection of minority owners or specially treated 'stakeholders' such as workers, unions and representatives elected to represent workers in corporate strategic decision-making.

3.2 Privacy and Other Extraterritorial Foreign Laws

If your company deals in goods, services or technologies with customers or suppliers abroad, you must adopt a compliance program to respond to extraterritorial laws, even if you have no foreign offices. The European Union's General Data Protection Regulation catches non-EU companies that fail to honor the individual privacy rights of European nationals. Similarly, the California Consumer Privacy Act of 2018 has extraterritorial application outside of California. Such laws may impose fines and result in damages under class action litigations.

3.3 Antitrust and Competition Laws

Foreign countries may wish to review any proposed acquisition of your company by a foreign company to ensure compliance with local anti-competition laws. This could delay or kill an acquisition.

3.4 Human Resources Laws

American law requires 60 days' notice before a 'plant closure' or 'mass layoff' (reduction in force), for employers with over 100 employees.[2] The conditions of such protections do not apply to termination of a small administrative or internal service function. Thus, such protections can largely be ignored after your sale of your business, so long as your buyer retains over 50% of the employees of a single site of employment (a 'plant') or that retains more than 67% of employees of that site.

In sharp contrast, foreign labor laws may protect foreign employees from termination of employment in a post-merger integration process.[3] Such laws may prevent your buyer from terminating 'administrative' or 'non-essential' workers employed by your foreign affiliate, unless the employee continues in the job for a number of years or the employer pays a severance indemnity equal to such years of post-merger employment.

To prepare your smarter business exit under such labor law, you should adopt smarter business exit strategies from the beginning. First, be prudent about filling a new position until there is a strong economic need for someone to do that work. If not, you might have an 'employee for life.'

Second, centralize your internal administration in a country that is more flexible in case of a change of control of your company. A 'centralization' solution enables right-sizing of employment rosters across different countries locally, or having the 'home office' in the United States perform back-office, administrative and technical services under a shared services agreement.

4. Legal Variables across Borders

Seen only from the business exit perspective, what differences might exist between a simple, 'classic' corporate legal framework designed to serve shareholders, and a policy-driven corporate legal framework that nurtures special stakeholders?

4.1 Corporate Governance

Foreign corporate law may define unexpected frameworks for corporate governance.

4.1.1 Shareholder Voting Rules.

The minimum percentage vote for shareholder voting for the Board of Directors or for the authorization of major corporate restructurings could be higher than a majority. You cannot simply expect that foreign law will be the same as your home country's law.

From the Case Files

Before setting up a foreign business, you should ask a lot of questions that might seem crazy under your local law until you discover that foreign law is crazy too. It helps to have a business advisor who uses 'beginner thinking' to identify potential disasters and navigate into calmer waters.

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2 Worker Adjustment and Retraining Notification Act ('WARN Act'), 29 U.S.C. §2101 et seq. (60-day prior notice requirement).

3 In Europe, see the 'Acquired Rights' Directive and related national laws (Council *Directive* 2001/23/*EC* of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001L0023 (accessed Sept. 14, 2019), implemented in the United Kingdom at the Transfer of Undertakings – Protection of Employment Act ('TUPE').

Our client, a New Jersey-based business services company, wanted to develop a 'back office' service center in India. One of its employees, an Indian citizen, proposed to enter into a strategic partnership with the company where the Indian would move to India and act as general manager of the Indian subsidiary. The Indian employee proposed that the Indian subsidiary be owned 75% by the New Jersey company and 25% by the Indian citizen.

Under the laws of Delaware, New Jersey, New York and California, this ownership structure would give the New Jersey company total voting control, subject to the usual fiduciary duty for prudent business judgment and a duty of loyalty to avoid self-dealing. So our client agreed.

In consulting with Indian legal counsel, I asked the question what privileges a 25% owner has under Indian corporate law. Answer: such a minority owner has a statutory veto on mergers and acquisitions by the Indian company. To prevent a dispute now or later on who controls the terms, timing and conditions of an exit from the business, we restructured the ownership. We set up a New Jersey corporation owned 75-25. In turn, it established and owns 100% of the Indian corporation. This neutralized future roadblocks to a sale of the Indian company separate from any sale or change of control of the New Jersey parent company.

4.1.2 Proportional Ownership: Pre-emptive Rights.

Local laws might not grant pre-emptive rights to shareholders. Such rights enable incumbent shareholders to maintain the same proportional ownership in case of a future issuance of new shares. New York's Business Corporation Law requires pre-emptive rights unless the certificate of incorporation nullifies this statutory presumption. Delaware's General Business Corporation Law does not require pre-emptive rights, but it allows pre-emptive rights to be set forth in a certificate of incorporation. Foreign laws may offer similar choices.

4.1.3 Fiduciary Duty.

Laws defining the duties of the majority and the managers may be more flexible in some jurisdictions. In New York, corporate directors and officers and LLC managers must honor fiduciary duties to put the interests of the business ahead of personal interests (no self-dealing). In Delaware LLC's (but not Delaware corporations) a special rule authorizes the members of a Delaware LLC to expressly waive any such fiduciary duty of the LLC managers or managing members, without impairing the implied contractual covenant of good faith and fair dealing.[4]

4.1.4 Worker Participation in Corporate Decision-Making Bodies.

In Europe, workers may participate as members of the board of directors or other governing body. Such participation flows from the political views that employees should have a shares or incentive compensations, that core wages should not suffer from such incentives and that any increase in capital for new investors should not dilute the employees' interests. Such views stem from concerns that, for private companies, there is no liquidity for an employee to sell shares, and in case of

[4] Del. Limited Liability Company Act, §18-1101(c) (2013).

financial distress leading to restructuring or liquidation, salaried shareholders lose both their shares and employment.[5]

4.1.5 Laws on Foreign Direct Investment, Exports, Boycotts, Corruption

Many countries have always prohibited certain foreign investments and restricted others. Local export controls, anti-boycott, anti-money-laundering and anti-corruption laws may apply both to your subsidiary and your American company. If you set up a foreign subsidiary, you should identify such laws and get help in compliance. Some countries, such as Germany, require disclosure of the ultimate beneficial owners of the foreign company and any changes in control.

4.2 Escaping from Foreign Laws by Changing Corporate Seat

International business exposes your company to the whims of foreign legislators and governments. The stability and predictability of the legal environment is critical. Sometimes you will want to move out of a foreign country, either to escape threatened nationalization or political oppression or to access foreign investors in a new country for your next capital raise. Many British companies re-incorporated outside the United Kingdom in anticipation of Brexit.

4.2.1 Emergency Cross-Border Transfer of Corporate Seat: Re-domiciliation

Florida and Delaware each enable foreign corporations to change their place of organization so that they become re-domiciled in such states. This is useful for foreign private companies that are expropriated in their home countries, such as happened in Cuba in 1956 and was adopted in South Africa in 2016 but abandoned in 2018.[6]

4.2.2 Intentional Cross-Border Transfer of Corporate Seat: the 'Corporate Flip'

A foreign corporation may change is domicile by flipping, in a tax-free reorganization, from a foreign subsidiary of a U.S. corporation to a U.S. parent with a foreign subsidiary.[7] The flip is done when the foreign corporation elects to merge into, or exchange shares with, a U.S. corporation. Such 'corporate flips' may become necessary for raising capital from a particular U.S. investment fund, or where the owners wish to relocate business and their personal domicile to the United States.

While a 'corporate flip' to effectively re-domicile the portfolio company in the U.S. has several perceived benefits, certain problems remain. In a flip, the intellectual property rights ('IPR') will remain owned by the foreign operating company that becomes a subsidiary of the U.S. holding company. Some U.S. investors (especially early-stage investors such as business angels and incubators and accelerators) might worry that leaving the IPR in the foreign operating company will backfire, and foreign laws might change to deprive the U.S. investor or the U.S. parent company of the right to freely use or sell such IPR.

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5 Raphael Amélie, *PERFORMANCE ET GOUVERNANCE DE L'ENTREPRISE* (Journal Officiel de la République Française, avis et rapports du Conseil économique, social et environnemental) (May 2013).

6 'South Africa withdraws land expropriation bill passed in 2016,' https://www.reuters.com/article/us-safrica-land/south-africa-withdraws USKCN1LD1O3.

7 26 U.S.C. § 351.

Indeed, certain incubators may require such an IPR assignment from foreign subsidiary to U.S. parent. They do so at their peril, since such a transfer must be taxed at fair market value, and the seller (foreign operating company) probably lacks the funds to pay the high value that the IPR might represent, assuming the sale price actually reflects the valuation definition of a 'fair market price.' I suspect that this issue is one that incubators practicing this approach might use to reduce the valuation and increase the incubator's percentage of ownership in the startup. Certainly, each case should be considered on its own merits with an understanding of the impact on future financial flexibility and future dilution by the co-founders.

5. U.S. Legal Framework

5.1 Foreign Direct Investment Regulations

The U.S. Committee on Foreign Investment in the United States ('CFIUS') regulates foreign direct investment in the United States. Expanding on the Defense Production Act of 1950, in 2018, CFIUS received a broadened mandate to review, for national security risks, all foreign investments in, and 'covered transactions' with, U.S. companies with sensitive data or technologies, with a regulation proposed in 2019.[8] American businesses must therefore submit to CFIUS prior review and approval 'covered transactions' (whether commercial transactions or a sale of your business).

Is your business covered? Quite probably. Do you 'maintain or collect, directly or indirectly, sensitive personal data of U.S. citizens'? If so, you are considered a covered 'technology, information and data' company, and your investment, data transfer and partnering transactions with foreign nationals will require you to notify CFIUS and get prior review.[9] You can ask your digital media department or service providers which might have a database of 'personal information on U.S. citizens. Your real estate will be covered if it is near a U.S. airport, maritime or military installation. Your company is also covered if your technologies support stock exchanges, securities dealers, banks, energy producers or supplier and other critical infrastructures.

Are you entering into a 'covered transaction' with a foreign person? Any investment, merger, acquisition, takeover, consolidation, acquisition of an ownership interest or conversion of a

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[8] Under the Foreign Investment Risk Review and Modernization Act of 2018 ('FIRRMA'), P.L. 115-232 (H.R. 5515), § 1702(a), amending 50 U.S.C. § 4565(a), 'covered transactions' now include any deals that are likely to exacerbate U.S. cybersecurity vulnerabilities, including enabling a foreign government to engage in malicious cyber-enabled activities, or expose sensitive national security matters or law enforcement agencies to an unauthorized foreign person. FIRRMA requires CFIUS review of:

> (iv) Any change in the rights that a foreign person has with respect to a United States business in which the foreign person has an investment, if that change could result in foreign control of the United States business; or (I) owns, operates, manufactures, supplies, or services critical infrastructure; (II) produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies; or (III) maintains or collects sensitive personal data of United States citizens that may be exploited in a manner that threatens national security.

Page 132 STAT. 2178, https://www.congress.gov/bill/115th-congress/house-bill/5515/text/pl?overview=closed. See proposed Treasury Dept. Rule, '*Provisions Pertaining to Certain Investments in the United States by Foreign Persons,'* to amend 31 C.F.R. Part 800, available at https://home.treasury.gov/system/files/206/Proposed-FIRRMA-Regulations-Part-800.pdf.

[9] 31 C.F.R. § 800.248(a) (proposed by Dept. of Treasury, Sept. 11, 2019).

contingent equity interest would be covered. So are long-term leases where the foreign lessee decides on substantially all business decisions.[10]

What must you disclose? Your disclosure to CFIUS must include information describing the structure, terms and value of transaction (investment, commerce, partnership, and so on), percentage of voting interests and economic interests that will be acquired by the foreign party, how many classes of ownership your company has or will have, closing date, sources of financing and any stipulations in your deal documents relating to CFIUS.

5.2 Export Controls (Especially for Cyber Security and Cloud Computing)

Like other countries adhering to the Wassenaar Arrangement, the U.S. has several export regulations to prevent the export of certain technologies for political and security reasons.[11] Like the CFIUS regulation, export controls also limit opportunities for conducting business with certain foreign countries or named individuals or named entities. Such targeted persons and entities thus cannot invest in U.S. tech companies. If your company has sensitive technologies such as encryption and cybersecurity software, set up a compliance program on cross-border investments and exports.

5.3 Boycott of Friendly Foreign Countries

American tax, securities and investment laws prohibit American companies from participating in a restrictive trade practice or boycott of a friendly foreign country. If your company is engaged in the export of goods or technology or other information, you cannot refuse to take actions that 'further or support' such practices.[12] Further, to the extent that you (or your controlled foreign corporations) participate in a trade boycott, your payment of foreign taxes will not be eligible for a U.S. foreign tax credit.[13]

5.4 Extraterritorial U.S. Laws

By setting up foreign operations, you and your foreign operations may be subject to U.S. laws that target misconduct offshore.[14]

5.4.1 Anti-Corruption; Foreign Corrupt Practices Act

Thus, you cannot engage in bribery of foreign governmental officials, but there may be exceptions for 'facilitation' payments to expedite an approval that was going to be granted anyway.

5.4.2 Foreign Data Controlled by American Companies: CLOUD Act

Under the CLOUD Act[15], a U.S. provider of electronic communication service or remote computing service (such as a cloud-computing platform) must assist in U.S. law enforcement. Such services must preserve, backup and disclose the contents of e-communication (and any record or other

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10 31 C.F.R. § 800.249 (proposed).

11 See U.S. Export Administration Regulations, Export Control Reform Act of 2018, International Trade in Arms Regulations and FIRRMA.

12 48 U.S.C. § 4841, adopted by P.L. 115-232 (2018).

13 26 U.S.C. §§ 901, 908(a), 952(a)(3), and 995(b)(1)(F)(ii) and 999.

14 See, for example, U.S. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 *et seq.*

15 Clarifying Lawful Overseas Use of Data Act, H. R. 4943, 115th Cong., 2nd Sess., adopting 18 U.S.C. § 2713(a) *et seq.*

information pertaining to a customer or subscriber) within its control, regardless of whether such communication, record, or other information is located within or outside of the United States. In short, U.S. cloud platform providers must disclose such information even if stored in foreign servers owned or controlled by a foreign subsidiary.

Happily, U.S. e-commerce platform operators may seek judicial relief from a governmental request to deliver personal information of its subscribers or customers. You can thus file a motion to modify or quash the legal process where you provider reasonably believe that the targeted customer or subscriber is not a United States person and does not reside in the United States; and that the required disclosure would create a material risk that the provider would violate the laws of a 'qualifying' (approved) foreign government.[16]

Like other U.S. laws, the CLOUD Act invites foreign competitors of U.S. companies to provide cloud-based e-commerce platforms that are not subject to this U.S. law. The CLOUD Act might feel like 'Big Brother' watching, but it merely facilitates U.S. law enforcement gathering of data where no mutual legal assistance treaty governs inter-governmental data collection.

In short, if you are selling a U.S.-based cloud services platform, your company's value might be reduced by the impact of such laws. You might consider whether this police power might encourage you to sell off your foreign data collection and e-commerce platform, or partner with a foreign service provider that would have 'control' for CLOUD Act purposes.

6. Impact of International Ownership on Business Exits

When co-owners come from different countries or move across continents, they may have a higher incidence of business exit.

6.1 Cultural Gaps and Ownership Conflicts

Cultural differences can create conflicts at any phase of corporate operations: startup, operations, growth, decline or business exit. Cultural differences might limit the opportunity for optimizing value for all parties. Assuming the foreign majority owner is a citizen of Country X, for example, the senior executives of the Country X majority owner might not want to take any action that might 'lose face' or embarrass their individual reputations for probity and wisdom. So, rather than adopt a wise decision to sell off the U.S. subsidiary to the U.S. managers in a leveraged management buyout, the Country X managers might just allow huge losses, blame it on the American management team and delay resolution.

6.2 Loss of Cohesion among Founders

As with long-distance romances, co-founders in cross-border businesses can easily become distracted, disaffected or disillusioned with a distant co-founder.

From the Case Files

In the international context, loss of cohesion among founders led to business divorce. Two foreign co-founders (visionary marketer and operations manager) might join the other (tech developer) for a stint in a California incubator. After the 'graduation,' the developer returns to the foreign home base and continues finalization of the 'proof of concept' and Beta versions of an e-commerce SaaS service that begins to generate revenues and thus needs only incremental tech improvements for the

16 18 U.S.C. § 2713(h).

future. The two U.S.-resident foreign co-founders felt the foreign-resident co-founder was not sufficiently agile to adapt to new realities of a market pivot or a re-design of the SaaS solution for a new marketplace. I helped the parties negotiate an exit with payment over time secured by company assets, and the payments were made on time.

6.3 Immigration and Business Work Visas

As noted above, business exit could result in the loss of a business visa for the exiting co-owner. Planning and implementation should take into account the needs for finding substitute employment in the U.S. to enable continuous presence for the expelled co-owner and family.

6.4 Supply Chain Dependencies

Your international business is vulnerable to shocks in your supply chain (as well as your value chain to your customers).

If your company is a subsidiary of a foreign company, and you own any shares or options, your enterprise value must reflect unique risks of political intervention, failure of the foreign majority owner to invest in new product or service development for U.S. customers or internal management struggles abroad. In such case, as a minority owner, you need exit planning from the start.

Minimizing losses depends on the calendar of cash flow and ongoing liabilities. In a declining trend, shareholders may have to choose between additional capital contributions (to keep staff and operations) and negotiating premature termination of one or more key contracts with customers. For example, what should the shareholders do when a foreign-based technology outsourcing services provider becomes dependent on one client and cannot support its sales efforts. The U.S. sales and services affiliate has signed a long-term service contract to support a large corporate client. Such contracts normally contain life-cycle management and relationship management provisions, making the service provider captive to the client's operational requirements, funding flows and one-sided contract terms. Any disruption or early termination could result in large penalties, not to mention reputational damage.

Where the enterprise is subject to penalties for early termination, it could choose to wait until contract expiration, not renew and complete transition to a new services provider. Or it could renegotiate an early exit, losing valuable revenue and maybe even paying for a substitute services provider in the interim until normal expiration.

In this scenario, the majority owner, a foreign-owned foreign company, might allow the U.S. senior managers to buy out and recapitalize the U.S. affiliate. A sale would eliminate guaranteed future losses and avoid distractions (and potentially embarrassing review by the majority owners' ultimate shareholders). However, the price would be low, probably with assumption of liabilities and indemnification against future claims by the U.S. client for any losses due to future operations.

In lieu of a buyout, the majority owner might accept the losses until expiration of the client's outsourcing contract. It might use the predicted timing for winding down operations to cut losses.

6.5 Political Risk Management

Your supply chain may also be subject to political risks. Such risks may reflect international competition or merely a health risk. Unless mitigated by diversification of sourcing, your business value would need to reflect such risks.

From the Newspaper Files

Political risks increased when President Donald Trump began imposing retaliatory tariffs on Chinese goods. Companies in manufacturing, wholesale or distribution began a scramble to diversify away from China.

Beyond politics, the need for such diversification could occur due to health and sanitary measures. In 2020, the coronavirus originating in Wuhan, China, required political controls to limit the spread of a potential deadly epidemic. According to certain sources, the Chinese government adopted a regulation to stop exposure of its citizens to the virus. Under this rule, after the Lunar New Year 2020, when a case of coronavirus is identified in a factory, the factory must shut down to prevent the spread of this disease. If you are dependent on suppliers subject to such political risks, your failure to diversify might impair your enterprise value as well as your ability to support your value chain.

6.6 Loss of Possible Synergies

Due to political risks or cultural differences, an foreign buyer might not be enjoy access to the same customer base or supply chain as the American-based company.

6.7 International Risk Management Plan

Here are a few tips on international business:

- Get to know your proposed foreign business parties, investors and buyers from a perspective of national security risks and other political risks.

- Identify any technologies, information and data that you maintain, or that your subcontractors provide, that might pose national security risk. A mitigation plan would require it to be sold separately to a U.S. buyer.

- At launch and at all times, be wary of engaging with a Chinese investor or buyer. Recently the Chinese government is reported to have required a governmental official to have ongoing access to every company's operations.

- Consider political risk and adopt a backup plan in case of breakdown in foreign investment or supply chain.

- Use mediation and arbitration clauses, or local forum selection clauses if you prefer. Happily, international mediation settlement agreements and arbitral awards have the same value as a local court decision, where the country in question adheres to applicable inter-governmental conventions for enforcement.

7. Tips for Your Smarter Exit in International Business

Use your international platform to drive core business value in your home country. The home base can provide administrative support and overall vision, mission, strategy and governance, as well as core products and services.

Use your foreign operations to *internationalize* what you have *institutionalized* in your home country. A global platform with common technologies, products and corporate culture will be more attractive as a potential consolidation platform for any buyer.

To go international, you can minimize your risks by using a local office with only a few people and a network of independent contractors, whether as service providers, sales agents or distributors. Over time you can fine-tune your network to integrate such external operators, perhaps giving them equity or quasi-equity for retention and incentives.

Finally, be careful internationally. Understand the business and political culture of your offshore jurisdictions. Stay alert to changes and be flexible to adapt, expand or contract.

8. Your Professional Advisers

For international business, you must have advice from professionals in each country where you do business, with someone (such as you or a bilingual, bi-cultural attorney) acting as overseer of bilateral or multilateral internal and external operations. You will need to consult attorneys in international business, corporate governance, mergers and acquisitions, sanctions, trade regulation, anti-corruption, employment, immigration and visas, product compliance, consumer safety, e-commerce and perhaps dispute-resolution. Accountants, customs brokers, insurance brokers and personal wealth advisers should likewise be on your team. Finally, investment bankers and business brokers should be consulted long in advance of the date of a proposed exit.

9. Your Self-Assessment

- How does the international footprint of your business operations affect the structure of your organization? Do you have separate entities for each territory? Are they wholly-owned or do they include other local owners?

- Does your business sector involve technologies that might be considered by any government as a 'national security' asset?

- Have you adopted a 'global platform' approach to efficient operations that apply simplified core procedures that are adapted to each local market territory? How have you harmonized your internal and supply chain operations to deliver a 'global customer experience,' with global quality and global branding?

- How have you protected your global supply chain (and your global value chain to customers) from political risks? How do such protective measures impact your strategies for either succession or exit?

- What international political, economic, tax and operational considerations will determine whether you can sell your company to a foreign buyer at the best possible price and best terms?

Conclusion

This brief book reflects my personal experience in assisting domestic and foreign companies conduct cross-border business and buy and sell American and foreign companies.

Timing and cohesion are critical in any business. This book was written from an end-point perspective. But it offers the greatest value at inception, when you form and activate your new business. As bilingual international business owner, board director and technology lawyer for founders, companies, investors and acquirers, I wrote it (and other books) to help founders and investors understand the legal and operational frameworks for surviving, thriving and achieving liquidity in your closely held business.

As advisor, I also listen to other perspectives from different advisors. As owner and board member, it is your duty to do likewise. This explains why each chapter in my book **Smarter Business Exits: Strategies and Toolkits for Corporate Divorce, Succession Planning and Joint Exits** (Leaders Press, Amazon.com, 2020) identifies other professionals for guidance, inspiration and legal protection at different phases in the business lifecycle.

I wish you the best of luck in your journey in business. While this book focuses on management succession planning and changes in ownership, the prize lies in building and solidifying your business from launch till exit. The change of control culminates one cycle and opens the door to your next venture, whether as owner or investor. If you have any questions, please feel free to e-mail me at wbierce@smarterbusinessexits.com or contact me at www.biercekenerson.com/contact-us.

About the Author

An award-winning international business and technology attorney, William B. Bierce assists companies, their owners, boards and investors throughout a company's business lifecycles and key changes. As international business lawyer, he advises on organizational design, business formation, capital raising, equity compensation, governance, risk management, crisis resolution, resiliency planning, compliance, roll-ups, corporate sales and divestitures. As a technology lawyer, he assists domestic and foreign clients on digital transformation, e-commerce, privacy, cybersecurity and strategic transactions.

Bill has extensive experience in domestic and cross-border transactions for leading global companies in investments, banking and finance, consumer products, managed business services, transportation and digital media. He concentrates on mid-market niche companies, specialty manufacturing, services industries, family businesses, international businesses and tech companies.

In addition to legal services, Bill has also served as a business founder, corporate director, officer, litigation settlement negotiator, arbitrator, mediator, licensed insurance agent, graduate business professor of international business and tax law, mentor, executor, trustee, expert witness, investor, bar association committee chairman, public speaker, camp counselor and deckhand on a towboat pushing barges. Bill is U.S. delegate to the United Nations (ECOSOC) for a French-based non-governmental organization of experts, counselors and arbitrators. He has published over 80 articles on law and business in four languages. He has published over 80 articles on law and business in four languages.

Fluent in French, Bill has an undergraduate diploma from Yale and law degrees from New York University and the University of Grenoble, France.

BUSINESS OWNER'S STRATEGIES FOR SELLING AN INTERNATIONAL BUSINESS

Transferring control of your equity in an international company may be essential to your family financial plan, your career and retirement. But it's even more essential to make sure you are well prepared, so that everything happens smoothly, on schedule, with no surprises or mistakes.

Read in conjunction with the author's book on ***SMARTER BUSINESS EXITS: STRATEGIES AND TOOLKITS FOR CORPORATE DIVORCE, SUCCESSION PLANNING AND JOINT EXITS,*** this book anticipates many hurdles before your optimal business exit, whether by retirement, sale or dissolution. Read this book (in conjunction with *SMARTER BUSINESS EXITS*) to make sure you've got all bases covered – from redemption or buyout of a co-owner, to family business succession or joint exit. Using your ***Business Exit Intelligence***™ explained in the companion book and applied here, you can:

- design and later restructure your business and various agreements for smarter exits
- build an agile, valuable, self-protected, high-performance and transferable business, attractive to multiple prospective acquirers
- plan your business continuity, exit or succession
- choose smarter dispute resolution techniques
- optimize your timing, price and terms for a smooth M&A exit sale to the right buyer.
- think through 'Day One' post-transfer transitional requirements for a clean transfer with no clawbacks or regrets
- choose the right professional advisors
- avoid getting it wrong

William B. Bierce is a successful entrepreneur and lawyer. His passion is to help build, grow and transition leading closely held companies. He advises owners and boards of directors. He helps build and safeguard value at each step of the business lifecycle, from startup to viability, growth, globalization and sale or restructuring. He designs and implements strategies for high growth and international development, strategic alliances, governance, risk management, compliance, preparation for sale, self-rollups, management buyouts and acquisitions and divestitures.

Where to buy your copy of my book to begin your journey for *Business Exit Intelligence*™: https://www.amazon.com/Smarter-Business-Exits-Strategies-Succession/dp/1943386781 or contact me.

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- When delivered as legal professional advice, *Business Exit Intelligence*™ services are tailored to particular situations of the client(s) to help achieve particular goals and accommodate particular constraints.

To hire the author for consulting and professional advisory services using his *Business Exit Intelligence*™ strategies and toolkits, contact William Bierce at www.biercekenerson.com/contact-us, or call +1 212 840 0080 for complimentary introductory discussion now (East Coast time zone, USA).