CULTURE: THE OFT FORGOTTEN INGREDIENT FOR A SUCCESSFUL INTERNATIONAL M&A TRANSACTION
PERSPECTIVES

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David Fubini, a lecturer at the Harvard Business School recently wrote of his M&A observations thusly, “Management is usually shocked to find the degree of differences that exist between their two, soon to be merged, organisations – and too few actively consider these integration challenges before the deal”.

While the difficulties encountered by management in domestic M&A transactions are substantial, the omnipresence of culture pervading an international M&A transaction brings an added dimension to the already difficult obstacles faced by parties. And yet, culture is too often given the short shrift in an international M&A deal, with the end result being disappointment and unrealised expectations by both parties.

Consider, for example, the Japanese buying spree of US landmarks such as Rockefeller Plaza and Pebble Beach in the late 80s and early 90s. Cultural awareness gave way to capitalist avarice with the acquired assets managed by internationally immature executives. The subsequent losses...
incurred by the Japanese buyers provided the international community with stern lessons of what not to do when acquiring internationally.

But, what is this thing called culture? Consider the following allegory. There are two young fish swimming along, and they happen to meet an older fish swimming the other way, who nods at them and says, “Morning, boys, how’s the water?” The two young fish swim on for a bit and eventually one of them looks over at the other and asks, “What the hell is water?”

Well, water is the culture – it surrounds us without our ever being aware of its presence. It is ‘our’ shared beliefs being different from ‘their’ shared beliefs. It is ‘our’ language, rather than ‘their’ language. It is ‘our’ world’s view rather than ‘their’ world’s view. Commercially, it is the sum and substance of the person or team sitting across the negotiating table from you whose commercial world view may be quite different from yours.

The Japanese have an expression: dooshoo imu – same bed, different dreams. While the parties may be attempting to negotiate an M&A arrangement, their cultural differences or different dreams may either preclude the arrangement from coming to fruition or result in an arrangement wherein neither party is happy and the forecast for the survivability of the newly formed enterprise is tenuous, at best.

Nowhere in the M&A process is culture so vital as when the parties attempt to forge a dispute resolution agreement. When attempting to plan for the resolution of the eventual disputes that will arise post-closing, myriad considerations should come to the fore. For example, what is the method of dispute resolution to be used? Arbitration? Litigation? Where will the resolution process take place? In one of the parties’ home country? A neutral location? What law is to be used – both substantive and procedural? What language to use?

M&A dispute resolution clauses are often unique from the more typical dispute resolution provisions in that they are bifurcated – one part of the dispute resolution clause contains provisions for arbitration to resolve most general matters, while the other part provides for expert determination used to establish valuations of technical matters as well as accounting matters, especially the establishment of final closing accounts.

In sum, each side must be as
introspective as possible to determine the differing cultural proclivities that will make a difference as to how their international commercial disputes will be resolved. Each side should not only understand how their cultural propensities will affect dispute resolution but the cultural proclivities of the other side, as well. To illustrate, an Asian company was well counselled not to enter a particular EU market. The company was warned that the cultural chasm between the soon to be inherited workforce and the Asian company would be too large to bridge. Differences in language, law, cultural practices and respect for management’s investment all weighed in against the success of the acquisition. A year and a half later the acquired facility was closed due to absenteeism, lack of productivity and the spurious activities of a union thrust upon the Asian company without their consent or foreknowledge. The fact is that all the ills that befell the company were predictable and could have been avoided pre-acquisition with time, research and patience.

Time, research and patience are commercial virtues to be applied in most any cross-border transactions. They are especially relevant when dealing with dispute resolution matters in China. China has a millennia-long tradition of preferring consensual processes such as conciliation and mediation to the confrontation of litigation. This preference was an important part of Confucian philosophy, which laid emphasis on harmonisation and the avoidance of conflict. In this context, litigation was considered to be disgraceful conduct, with the result that mediation was not so much an alternative but rather the cornerstone of China’s legal culture.

Not to suggest that dispute resolution processes that call for arbitration are not prevalent – they are. The Chinese International and Economic Trade Arbitration Commission (CIETAC) is one of the busiest arbitral commissions in the world. But, what is suggested is that less confrontational dispute resolution methods may pay off in the long run with a lasting commercial relationship.

An example of a country in which less traditional methods of dispute resolution will find cultural favour is Japan, a country well known for the
avoidance of litigation by its commercial citizens. The Japan Commercial Arbitration Association (JCAA) is, compared to similar organisations in the region, quite underutilised. Even the new JCAA make it unlikely that, in the near future, Japanese parties will adopt a more litigious attitude toward the resolving of disputes, in general, and M&A disputes, in particular.

It is maddening to see dispute resolution provisions relegated to the back of an M&A agreement where the legal boilerplate resides. Parties to any business arrangement, especially an international venture, and even more especially an Asian commercial venture, must consider which laws will be applied when the inevitable dispute arises. And it is, indeed, laws, in the plural – for the legal calculus must include the substantive law governing the agreement, the law governing the arbitration agreement itself, and the law governing the arbitral proceedings.

In order to deal with the demands culture puts on ‘M&A deal making’ and its aftermath, it might be well to consider the use of well vetted foreign lawyers to help smooth the legal-cultural obstacles typical to an international M&A transaction. Be on guard not to use a big box lawyer who is on rotation through the office to acquire international experience. Better to use local legal staff who better understand the cultural implications of doing an M&A deal in their country. Parties to an international M&A arrangement might also consider the use of cultural experts in those parts of the world where the parties are situated. University staff are often quite helpful. The writings of Geert Hofstede and E.T. Hall are instructive, as well.

And lastly, do not limit your cultural horizons to only two methods of dispute resolution: litigation and arbitration. Why not consider compulsory negotiations, mediation, conciliation, Med-Arb – especially in the Asian world where such methods are culturally more suitable. On a final note, Confucius wrote, “human beings draw close to one another by their common nature, but habits and customs keep them apart”. Cultural considerations can help bring them together.

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