

ISSUES FACING FRENCH and EUROPEAN FIRMS WHEN DOING BUSINESS in the UNITED STATES

Throughout our 30-year professional practice advising corporate clients mainly from French speaking countries in their work setting up businesses in the United States, we have concluded that they consistently face similar obstacles and challenges.

Here are some of our observations:

① American Market Entry and Business Environment

In terms of physical size, the United States is a gigantic. The US is 17 times larger than France. There are 3000 miles (4800 km) that separate the East and West coasts and the states of Texas and California are each larger than France. The US population was approximately 327 million in 2018 of which 120 million are concentrated on the East Coast.

The American population is very diverse and includes a wide range of ethnic groups including African American, Hispanic, Asian, and Native American peoples. The American customer is not loyal in his/her buying patterns, is demanding in terms of service and flexibility, and the rate of returns on goods and products is high.

Furthermore, each product has a specific distribution channel. For example, a concrete equipment manufacturer would not sell products via the same channel as a supplier of fresh produce. There should never be any hesitation in consulting professionals to optimize sales channels throughout the United States.

In addition, entering the US market from abroad means becoming familiar with immigration laws, customs, and tariffs on imported goods, federal laws on packaging, labeling requirements, and many other market requirements. Preparation and knowledge are thus essential for a new venture to be successful in the US, especially for satisfying the particular requirements in targeted local markets. It is important to note that it is possible to make such preparation from abroad in the country of origin.

② Estimating Costs and Budgetary Requirements

While it can be said that the American business environment favors start-ups because formalities and requirements are fewer than in France, costs, on the other hand, can typically be

an unpleasant surprise to European companies. Foreign companies doing business or wanting to sell their products in the US, must think realistically about budgets and fees for professional services needed. With respect to legal services, one or more attorneys must be factored into the cost structure including specialties such as corporate counsel, immigration, intellectual property, and customs laws.

In starting out, hiring specialized professionals is indispensable and their rates are typically higher than in Europe. Lawyers, accountants, sometimes real estate brokers and headhunters can be needed to assist the fledging enterprise in every aspect of its growth and development including corporate registration, contracts, obtaining visas, and many other details. European companies are not necessarily used to such detailed steps and thus do not adequately prepare from a budgetary perspective. At the time of this writing, November 2019, it is important to note there is increasing difficulty in obtaining work visas and greater uncertainty about the duration of visas for French nationals.

Furthermore, the US minimum wage is less than the equivalent minimum in many European countries. However, since the US is at full employment and salaries are higher in the US than in Europe (especially in some industries), employers should consider offering benefits such as health and dental insurance and retirement plans to their employees to attract and retain talent even though these are not mandated by law.

It must be noted that newly-formed companies in the US must open bank accounts and that some of the larger US banks no longer want these companies as clients when their owners are not US entities or individuals.

3 Apprehension: US Laws and American Legal Context

The legal system in the US consists of three complex levels (federal, state and local). There are 51 state court systems, one for every state, and one federal court. Ignorance of laws in place or misunderstanding the consequences of ignoring them are common mistakes for Europeans and foreigners entering the US market.

The American culture is prone to legal challenges and lawsuits. While damages and interest payments awarded by courts tend to be important sums, litigation is costly because of the “discovery” phase of litigation, a procedural information and data-gathering phase that precedes trial.

American consumers and business people are typically inclined to litigate because of the large sums involved. However, the costs in initiating litigation in the US are unfathomable to the European mind. Litigation is therefore not favored as a best practice for settling disputes.

It is very important to be familiar with formalities and/or licenses applicable to a specific business sector or activity. For example, the sale of wine and alcohol requires permits and licenses.

④ Choice of Legal Entity

4.1. LLC or Corporation

Foreign investors are often faced with the choice between the Limited Liability Company (LLC) and the Corporation.

The Limited Liability Company is a hybrid entity that combines the liability of members with the fiscal transparency of the partnership. There are no taxes at the level of the LLC but rather for its members. The choice of entity depends on the project or particular situation of the prospective partners as much as on the costs and fees involved. For example, if a company will need financing from third parties, a corporation is a better choice. If the venture has one local US partner, a French one and a Chinese one, the LLC might be more appropriate.

A corporation is an entity in which there is limited liability, but two level of taxation; one for the corporation and the other for shareholders, at the receipt of dividends.

Creating a LLC in New-York can be expensive because the legal requirement of publication of the formation of an LLC in this State. Also, setting up an LLC can lead to the drafting of an “operating agreement”, a contract between its members which combines elements contained in corporate by-laws and shareholders’ agreements (such as provisions concerning the management of the company, the transfer of interests). The establishment of this contract can be costly.

4.2. Incorporation in Delaware

Many people are convinced that Delaware is the only choice as the state for incorporation. That choice is not debatable for large companies for taxes and legal reasons but is not necessarily appropriate for smaller investors.

Small companies, whose business operations are located in states other than Delaware may find it counter-productive to be incorporated in Delaware, as they will need to register in these others states anyway. As such, there is little interest in creating a Delaware entity if a business is going to be based solely in New York.

4.3. Qualification to do business

An entity created in one state can do business in others but will need to obtain a certificate of authority in the other states and pay income and local taxes in those states as applicable.

5 Collaboration with US Legal Counsel

While it can be said that the American business environment is freer of regulations than elsewhere, caution and the assistance of a legal counsel is crucial.

Given the geographic distance separating a European investor and a US business project, on-going cooperation and communication with counsel in the US for successful project development is critical for success.

Companies should not attempt to “adapt” French contracts to American law but instead work with experienced US counsel. Translating French documents into the English language is not recommended. It is necessary and in the long run cost-efficient to have a set of documents drafted in English and in compliance with American law (sales agreements, employee contracts, shareholder agreements, etc.). By the same token, contracts from an American party should be brought to US legal counsel for review in the early stages of negotiations and certainly before being signed.

6 Project Management and Follow up

Some firms tend to just forget about their US subsidiaries or groups after they are established. It is imperative that founders devote time to the US business entity with regular trips to the United States to follow up on their US counterpart activities.

Indeed, there are risks in not following up and monitoring projects. Sometimes, local managers may take extensive control of the affairs of American entities sometimes even through embezzlement.

7 Choice of American Partner

Signing a contract with a non-exclusive sales representative requires a thorough review. Without the proper incentives in place, a sales agent will not be motivated which could prevent the best distribution structure for sales results. Sales agreements therefore need to be carefully negotiated.

In the case of an exclusive representation, the definition of exclusivity is key and certain questions must be addressed such as: is the sales territory well-defined and adequate; are the goods or services well-identified; are there deadlines or time limits; are there grand-fathered rights or other exceptions to the exclusivity.

Another question to be addressed is whether it is appropriate to grant exclusivity to an agent or distributor for the whole US territory. If not, provisions regarding potential conflicts between distributors or sales representatives need to be inserted into the contract.

Sometimes the negotiation of the terms of a contract with a prospective partner will lead to determining that this particular individual or entity is not the right partner. There is no magic formula.

8 Protection of Intellectual Property

It is paramount to protect intellectual property in the US.

One should keep in mind that patent and trademark protection granted in Europe do not extend to the United States.

Further, it is necessary to conduct preliminary research as to the anteriority a trademark in the United States before starting registration proceedings.

9 Resources: Time, Money, Energy

Reputation and strength of relationships are highly valued in the US and these take time and effort. Care has to be given to brand, company, and leadership reputation and image at the outset as failure in negotiations or other missteps are rarely forgiven. A brilliant product may not reach its expected commercial success in the US if it is introduced without proper reflection, or without preparation and adaptation to its target market requirements, and without adequate investments, and/or needed follow-up.

In conclusion, the current tensions in commercial trade with the United States as well as the increased competition from local American products and markets, where typically French products are well- represented, make it crucial to take the above considerations into account. The American market is still attractive, provided your approach and success criteria are aligned.

Article dated November 26, 2019, based on a presentation entitled "Issues facing European/French Clients and their US Counsels When Doing Business in the United States" given by P. Longuet at the monthly meeting of the American Bar Association's Section of International Law, European Committee, on March 5, 2019.

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