

SPECIAL ADVERTISING SUPPLEMENT

# Travelers' Checks

Attorneys offer tips on navigating the legal, cultural and language barriers of partnerships abroad

BY NANCY HENDERSON ILLUSTRATIONS BY [ISTOCKPHOTO.COM/MHJ](https://www.istockphoto.com/MHJ)



**James Bruno has seen plenty of cross-cultural faux pas while mingling with executives in other countries on behalf of his American clients—including his own. Once, at dinner with some businesspeople in Japan, he joined a group toast. "I don't drink alcoholic beverages, so I raised my water glass, and they started laughing," says Bruno, an attorney at Butzel Long in Detroit. "I didn't know that the kamikaze pilots used to toast with water before they went to [their deaths]."**



Although embarrassing, a social miscue like toasting with the "wrong" glass is likely the least of your worries when doing business in another country. Contracts are tricky,

foreign laws can puzzle even the most educated American attorney, and a language barrier can throw a wrench into everything from casual conversation to trade agreements.

"Even though we know at some intellectual level that things will be different when we go to a foreign country," says Rich Cicchillo, a mergers, acquisitions and joint ventures attorney at Kilpatrick Townsend in Atlanta, "we sort of automatically still revert to assuming that deals are done and businesses are run the same in other places as they are here, or that our method of doing it is self-evidently better and they should follow the way we do it."

The ever-changing world, its laws and political climate, make international business even more daunting.

## **TIGHTENING BORDERS**

American business owners must now comply with more stringent privacy laws in the European Union and take care when storing and using personal information about employees. Local labor law changes, such as recent wage increases in Mexico, can impact a company's bottom line. And some countries are responding to higher customs duties imposed by the U.S. with their own tax increases.

The current political climate has greatly affected the way global business is done, according to international business attorneys. "With the rise of what I'll call populism and a return to nationalism in the U.S. and abroad, barriers to investment are becoming more common," says Cicchillo. "For the first 20 years of my practice, the trend was probably toward barriers coming down; but as we have made it harder for foreigners to come into the U.S., there's a sort of tit-for-tat situation going on internationally—both with the very mundane, like visas for entry, to the more detailed. As we tighten our borders, it doesn't go unnoticed abroad."

James Hsui, an international business attorney in New York City agrees, noting a protectionist business climate in which the U.S. is clamping down on laws that apply overseas. "Be aware," he says, "that the government now would be more likely to enforce things that in the past they might sort of let go."

Sam Mawn-Mahlau, a corporate attorney at Davis Malm & D'Agostine in Boston, says that in the past, his clients never needed to "sell" the U.S. as part of a business pitch. "Where before, the strength and stability of the U.S. were simply a given, today you've got a risk that something unexpected, something you can't anticipate, will occur because of the political environment. The last tax bill was one of those things. ... Suddenly we had alerts going out to clients abroad about a tax regime that would change with two weeks' notice."

## **CONTRACT PLAYERS ON A LEVEL PLAYING FIELD**

Fortunately for Americans, English is considered the standard for most international business contracts, although some are conducted in multiple languages. A few exceptions, such as real estate agreements, must use the local language, since they will become part of the public register.

Given this, it's worth hiring an attorney who's not only experienced in foreign transactions but is bilingual, and who demonstrates an ability to look at issues from different points of view. "If someone is a litigator who puts a stake in the sand, that's probably not the person that you need to bridge cultural divides," says Bruno.

It's also a good idea for your attorney to consult with a knowledgeable counterpart in the other country—ideally a foreign lawyer with experience or training in the U.S.—especially since their laws will likely also apply. "Under international law, the country always, always, always has the right to decide what goes on in its country, what activities are legal, what activities are not legal, and how they're done," Hsui says. "It's important to have the right advice both on this side of the border and the other."

Adds Mawn-Mahlau, "Think of them as another smart person on your team." Your U.S. counsel should have contacts overseas, or be involved in organizations such as International Lawyers Network and/or international trade associations to find reputable foreign attorneys.

Hiring experienced advisors is of utmost importance for small and midsize businesses hoping to compete in the global marketplace, Bruno says—including attorneys, accountants and bankers. And hiring with diversity in mind can likewise be a boon.

"Hiring immigrants and those with diverse backgrounds is a great way to prepare yourself to conquer the world," Mawn-Mahlau says.

There are several government agencies here and abroad meant to assist in foreign trade, Bruno adds. The U.S. Department of Commerce has various offices that assist small and medium-sized American exporters to navigate foreign regulatory systems and find credible local partners, for example. "Obviously, finding a lawyer or business adviser who knows that market, its customs and its people to assist you is very advisable. Trying to do it on your own ... that's where people get into trouble," Cicchillo says.

"A lawyer can assist with the formation of the foreign entity, assist in the integration of the parent's process into the operations of the foreign subsidiary, coordinate the funding and tax strategies, and assist in anticipating and solving issues that may develop in the establishment of the foreign entity," says Bruno.

The American practice of drawing up detailed contracts has seeped into the global marketplace, although there can be vast differences in how international contracts work. "Because there are some regions and countries where enforcement is similar to their traffic laws, the written contract is more of a suggestion than a commitment," Bruno says. "So you have to figure out whether your proposed business partner is one that is likely to adhere to the contract as signed or whether they will continue to come back and ask for concessions."

Employment agreements, which constitute the norm in Europe, can cause confusion for Americans, since non-union workers are considered at-will employees in the States. "Every time you add an employee in France, you need to be very thoughtful about being certain about how long you're going to need this position, because once you've created the position and filled it, unless you've done it in a particular way, it could be very, very difficult to eliminate the role without significant time and cost," says Cicchillo.

Another thing to consider is that a signed contract might be void if doesn't jibe with the laws of the other country. "To avoid rendering the entire agreement or part of the agreement unenforceable under local law, local counsel's involvement, even if it is just a sanity check, is important," says Ying Deng, a corporate and securities attorney at Baker McKenzie in Chicago.

In the United States, a contract clause stating that it's terminable in 90 days' notice will likely be valid, Cicchillo says, but may not be the case in the sales representative or distribution context abroad. "You can put that clause in your contract, but it's not worth the paper it's written on because the law says you can't terminate without good and just cause, like some failure on the part of a distributor," he says.

## BEFORE THE DEALING'S DONE

Quick tips from international business attorneys in the U.S.



Likewise, injunctions are virtually unheard of in some other countries. Courts and judges seldom recognize agreements designed to force the other party to fulfill a contract or follow through with a merger. If you try to get a court order to stop a business associate in China from sharing your trade secrets, for instance, you'll most likely run into a brick wall.



## BABEL BATTLES

So whose country's laws should, and do, govern your business transactions? And which court will oversee a dispute?

In some cases, legal authority may default to one of the few internationally recognized agreements governing business transactions, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed by more than 160 countries; or the United Nations Convention on Contracts for the International Sale of Goods, which is often used in lieu of the United States' basic Uniform Commercial

Code. The new Singapore Convention on Mediation is expected to open for signatures in August 2019, giving those doing business in participating countries an alternative to filing a lawsuit or seeking an arbitrator.

It's never too early to plan for potential disputes. Once you have a serious disagreement with your overseas business partner, it's too late to add a procedure for handling it to your contract. Think about all the *what ifs*. "Sometimes you run the risk of two different parties going to different courts trying to stop a proceeding in the other court from happening," says Hsui. "It gets really, really messy if you don't have a really well-thoughtout plan."

In general, international contracts lean toward arbitration, rather than litigation, to settle disputes. In some situations, contracts specify that it be done in a neutral country. "We think litigation takes a long time in the U.S.," says Cicchillo. "You should try countries like India and Mexico. They make our litigation system look like a model of speed and efficiency."

Another distinction between many domestic and cross-border contracts is that global contracts often include an "executive review" clause. If the managers from both sides can't agree on a resolution, one of them can call for a meeting with the C-level executives of the opposing company before the matter goes to court. "A lot of times the person running the business in Brazil doesn't really want the CEO of the public parent company to have to get involved," says Cicchillo. "The fact that before we can go to dispute resolution it has to go to the CEO may motivate people to get it resolved."

Plus pulling rank with U.S. laws may not be in the best interest of the company. "We always tend to select the law that we know best, but in fact that law might be less protective," says Bruno. "In the U.S., perhaps the law on the sale of goods might be tilted a little bit more toward the buyer, whereas in Germany, it might be a little less tilted toward the buyer."

The best way to avoid a messy legal battle—other than having a bulletproof contract in the first place—is to focus on the business relationship, says Mawn-Mahlau. "Most disputes in contracts are solved by one person calling up another person before they even involve the attorney. Any international dispute costs three times as much as a national one because you're going to fight it from your perspective, you're going to fight it from a foreign perspective, and then you're going to spin your wheels a third time



trying to make the two of them interrelate to each other. There is really a premium on knowing how to solve your problems before they go to the lawyers."

## UGLY AMERICANS NEED NOT APPLY

Although doing business in another country poses challenges, navigating two cultures and languages isn't as difficult as it used to be, Mawn-Mahlau says. "It's a misconception that you must walk on eggshells to avoid cultural faux pas. The world understands American culture. You're going to get into trouble by being a jerk, not by being an American." Because English has become so pervasive, he adds, "The language barrier is 'the last generation's problem.' It has been a long time since I have had a serious language problem in international negotiations."

Granted, in some cultures, if you touch your plate with the communal chopsticks or fail to shake someone's hand, you might offend. And you probably won't avoid every blunder, no matter how hard you work at it. Cicchillo still has trouble remembering when he's supposed to kiss a colleague's cheek in France or how many pecks are the norm in Belgium. "The issue, though, is to be seen as always trying to be attentive," he says. "Be observant and come across as someone who cares about these customs and then tries to conform to them as soon as they're brought to your attention."

Instead of focusing on trying not to embarrass yourself, show a genuine interest in the other person. Immerse yourself in the culture: Read a novel or see a movie from the other country; sample the food; and respect time zone differences when calling.

"Often we look at it from our perspective of, 'They're so difficult to understand,'" says Bruno. "I think it's important for us to remember that they are facing the same cultural challenges we are."

**“Contact the consulate of the country that you’re trying to do business in. They have a customary role of promoting trade relations for their country. That’s really a good, good source, so reach out so you can get a meeting with the consulate general or someone under the consulate general.”**

**– JAMES HSUI**

