

PANEL DISCUSSION

ROLE

OF

GENERAL COUNSEL IN M&A

4.00 pm on 3rd May at Westin, Gurgaon.

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Mergers & Acquisition: Risk Management and the role of GCs in avoiding pitfalls

Introduction - Today's business environment is very challenging and increasingly, general counsels (GCs) are being called upon to play a greater role in the operations of companies, particularly in companies that are involved in activities in foreign countries. Traditionally GCs have been accepted as people whose approval is needed on significant decisions or get involved when there is a problem. But people are looking to the GC to prevent problems, rather than just deal with problems as they occur.

- 1. Given the recent economic environment (slow domestic growth, increased outbound activity), what type of deals do you find yourself working on most often? Are these M&A, JVs, divestitures, foreign capital raising? If you could describe the business/economic factors specific to your industry or company that are driving these activities, then that would be helpful.***
- 2. How has the role of the GC changed in your organization in the last few years in terms involvement in the outbound activity you've just described? Please talk about when you get involved, how your interaction with your business counterparts has changed when evaluating, executing or implementing the deal, what type of issues do you focus on now vs. what you did previously, and other changes in your role.***
- 3. The companies that you represent have completed transactions in both regulated/developed markets such as the US and Europe and in emerging markets. What do you view as the key risks in both these geographies for the transactions you've focused on? E.g., Regulatory and labor risks in regulated markets; political and corruption risks in emerging markets?***
- 4. Can you give examples of what are some of the best practices for risk mitigation that your companies follow? Not necessarily purely legally focused, but best practices that address some of the operational risks described above?***
- 5. What suggestions do you have for your peers in terms of how they can bridge the gap that seems to exist in some organizations between the beneficial impact GCs can have and their current involvement in strategic decision making? Suggestions can be tactical, strategic, organizational. You can describe what unique skills and what business approach your office has adopted that increase its impact or how your organization has supported your role. For example, increased participation in strategic business decision making, increased overview of governance, risk and compliance issues, etc.***

Introduction

The General Counsel is the company's attorney. His/Her office is responsible for protecting the company's legal interests and managing the company's legal affairs. The General Counsel's main focus is on matters that could have legal implications for the company's policies and procedures, contractual obligations, insurance, operations, and governance.

In addition to managing the day-to-day legal responsibilities, the General Counsel plays a key role in strategy development, working closely with the CEO and CFO and providing them legal perspective early as they develop future initiatives or contemplated transactions.

As a result of today's increased complexity, the General Counsel and his/her team need to be prepared to deal with challenges to the corporate reputation generally as well as more specific areas of law – intellectual property, real estate, securities, M&A, labor, and litigation.

There is no doubt that the job of the General Counsel is tougher than it was just a few years ago. At the same time, being a General Counsel today is much more rewarding personally and professionally.

Extent of General Counsel's participation In Mergers and Acquisitions

The general counsel's role in a company's participation has dramatically escalated with the growing public enchantment and the slowing economy with vital problems like Corruption allegations, license cancellations, retroactive amendments, policy paralysis, delayed land, company and tax laws and geo-economic troubles. The general counsels have to be out there on the frontline always at the veritable corporate platform for risk management, whistle blowing, crisis management, and ethical governance.

As a General Counsel, he may be called upon to participate in M&A deals from time to time depending upon the size of the company and the role of the company. The company might engage a large firm as well as take the help of investment bankers depending upon the size of the deal but it is the General counsel who has to proof check the legitimacy and ensure that the deal goes profitably in your favor for which he has to have knowledge of the laws of mergers and acquisitions .

Changes in the role of the general counsels

Over the past decade no other executive role within business organizations has evolved to the extent of that of the general counsel (GC).Surging legal and litigation costs coupled with increasing regulatory pressure and an uncertain economy have expanded the GC's responsibilities to be not only an executive advisor, but also a risk manager and a business decision-maker handling large budgets. As a result, gaining

greater control over information and processes to drive efficiency and better manage risk is now top of mind for the GC, often dominating the department agenda. Also the reason is everything is changing around our laws and the us- laws, economy, expectation, from shareholders to stakeholders and when there are so many people looking at you, particularly listed companies and they are looking for mistakes not successes, then you need to be on your guard all the time. Now, the decisions are taken not purely from business or commercial point of view because there are implications alluded to cancellation of licenses, this is not a simple decision, for instance issue of participating in auction is primarily driven by business and commercialization of course, that should be a way but it will have its implication on other aspects. The general counsels have to ensure that they are not going to be cancelled, that they are the right policies.

Today, he has become more of a holistic risk manager and less of the one who did very technical legal vetting. There are also larger implications escalating from a public policy perspective with the change of time.

Public policy fallout of a possible decision in terms of whether a particular land which is allotted to you will be cancelled in a PIL or whether if you are entitled to a transponder on a satellite, whether if you get the transponder there could be a challenge in a High Court by business rival. There are host of such areas where you are told upon to opine which was not the case few years ago.

Even adhering to the environmental protection protocols for all matters of commercial arbitrations and Joint ventures have hugely changed and becoming more vital and mandatory to adhere to and this is the General Counsels responsibility again.

The GCs role has changed in India but the West is still far ahead. For instance, a General Electric or even Coco Cola, the Audit Committee Charter makes it mandatory for the General Counsel to interact quarterly with the Audit Committee on the companies' policies and processes. The need for such communication was codified by the American Bar Association in 2003. It mandates that the 'General Counsel meets regularly and in executive sessions with a committee of independent directors to communicate concerns regarding legal compliance matters. In India these interactions are still at a nascent stage voluntary and informal.

Key Risks of the Emerging markets

An increasingly interconnected world has blurred geographic boundaries and allowed information to spread quickly and freely. U.S. businesses have expanded into global markets and increased online communications and Web-based products and delivery channels. Such trends have brought tremendous opportunities, as well as new risk management challenges, for corporate board members and counsels.

Operational risks

Companies are looking to expand operations and benefit from business opportunities in emerging markets, where prosperity is rising but operational risk is greater. Since operations have a direct impact on corporate performance, this risk is of great concern to those in corporate governance.

The presence of risk alone should not be a deal breaker in determining where to build and which markets to serve. Instead, directors must carefully weigh the risks against the potential reward, with input from management and the general counsel.

Boards need sophisticated tools to help them weigh the risks and potential rewards of emerging markets and make informed decisions about these market opportunities.

Regulatory compliances

The increase in the volume of regulatory authorities and their protocols is a matter of concern and has to be effectively and smartly managed by the General counsel.

Corporate Reputational risks

Thanks to Twitter, social media and 24-hour news cable stations, a reputation that took years to build can plummet quickly. Details about executive compensation, labor disputes, product recalls and other corporate matters can be public knowledge in seconds.

Cyber Strategy and IT Risk

Invisible, constantly changing and pervasive, data security risk is very difficult for boards to manage. Cybercrimes have been increasing rapidly.

Cyber risk and social media developments only increase the odds that a data breach will happen to any organization—so boards should take steps to protect their company's reputation.

Legal Fees and Disaster recovery

With the increase in the commercialization, the fees of the lawyers have also escalated tremendously which is a worry most of the time to the General Counsels.

Also with the increase in the risk bearing capacities of the companies the quantitative disasters causing great monetary and financial losses are bound to happen which must be avoided and is hence the worry and responsibility of the general counsels.

Corruptions and political risks

With instances such as the Satyam Scam and the recent Coalgate scam, the risks of corruption have undeniably a matter of concern for the general Counsel.

Political risks are almost unavoidable in the type of Democratic setup we live in where immoral malpractices are bound to happen with strong effects on the economy.

Best practices for risk mitigation

If the following points are followed you can easily mitigate the risks which are mentioned above

The parties involved: You obviously know the key terminology of the M&A process. The company being sold is the "target" and the company acquiring is typically the "buyer." The merger may also be called a "purchase", an "acquisition" or a "reorganization".

Due diligence: The buyer will do due diligence on the target company. This will be like an audit, but the scope will go beyond the financial statements. In addition to your company's finances and projections, the buyer will be interested in looking at ownership interests, outstanding contracts and potential legal liabilities. As in-house counsel, you will need to gather these documents and make sure that you look over any and all legal issues you can find in these documents prior to submitting them to the buyer.

The types of transactions: The buyer might be acquiring all of the assets with cash (asset purchase) or they might be acquiring the stock (stock purchase). They might also acquire the assets and/or stock by swapping their company's stock (stock for assets transaction or stock for stock transaction).

The tax-free reorg: One common type of transaction involves the merging of the target entity into a newly formed subsidiary of the buyer (the subsidiary is usually called "Newco" among the lawyers). Newco takes the assets or the stock of the target. Eventually, Newco liquidates and the assets of Newco flow to the buyer, which is the parent company of Newco. There are some inherent tax reasons why corporate attorneys like to do the transaction this way.

Representations and Warranties: As part of the purchase agreement, you will be asked to look at a statement of representations and warranties made by your company. This is an important document and as in-house counsel, you will have a firmer grasp on these items than the outside counsel will have. Pay close attention to the details on these documents.

Financial and Monetary risks: In this changing scenario the general counsel is not only the the legal head but has a lot to do on the managerial and financial front , he can minimize the risks by proper participation and proper say in the company's financial and risk taking project matters. He can also reduce the legal expenditure , that is by having immense knowledge and himself specializing in the mergers and acquisitions, joint venture laws etc.

Cyber and IT risks : Risks can be mitigated by taking proper care and having proper security and antivirus systems which look like a huge expenditure but are rather a one time investment for all the online and IT related transactions and ensure safe cyber systems and thus mitigate the cyber risks.

Increasing the efficiency of General counsel in strategic Decision making

The role of general counsel and law departments and definition of value-added contribution by inside counsel has been dynamic over the past two decades. But in the current climate, their importance has never been greater. It is likely that the definition of best practices and critical success factors will continue to evolve in the coming months and years as companies and their inside lawyers adapt to the new business environment. The following aspects should be taken into consideration by any GC :

- Team efforts, managing juniors, Speaking the same language is vital
- Understanding the company working completely, Integrating with clients
- Determining the proper mix of inside and outside resources
- Obtaining client feedback, Communicating value
- Quality of work- skills and attributes
- Business orientation, Cost sensitivity
- Efficiency and productivity, Strategic and proactive advice
- Flexibility and versatility: speed and agility
- The new imperative: risk management capabilities and control
- Avoiding disputes and managing the disputes in the smartest way avoiding litigation
- Taking a proactive , proportional , practical and commercial approach to disputes.
- Avoiding risk environments
- Turning technology into an advantage- both managerially and commercially
- Keeping up to date knowledge and skills in all matters related professionally
- Spending time embedded in the other parts of the business
- Building relationships across the business and working collaboratively
- Be adaptable in responding to the regulatory changing environments

The Bottom Line: Smart CEOs and Boards value today's GC as more than just a lawyer. GCs are critical to tomorrow's business.

- How GCs are helping their companies succeed, including:
- today's fragile global supply networks,
- the collision of privacy rights and cybersecurity concerns in the cloud,
- the corporation under fire, from activist shareholders to activist legislators,
- the ensuing erosion of traditional protections and expectations of corporate law.
- The consequences of managing these issues well or poorly will significantly affect a company's profits and risk.
