From the Non-U.S. Perspective: Legal Risks in the U.S.

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From the foreign investor or buyer's perspective, one of their top concerns in doing deals in the U.S. is the sheer number of lawsuits, especially frivolous litigation that can be both time consuming and costly, ^] which drives down the value of the target company and ultimately may become a reason not to acquire or invest in the company. Relative to other countries, litigation is so frequent and pervasive in the U.S. such that it is an enormous cost of doing business here, which tends to turn away foreign investment. Although the litigious environment in the U.S. is well understood around the world, investors certainly do not want their target companies to suffer the massive losses and expenses, as well as reputational damage, resulting from lengthy and high profile litigation, especially class action labor and employment lawsuits and intellectual property infringement claims, which takes years to resolve and involves high stakes. Even if a defendant is able to prevail in litigation, the cost of victory may not be worthwhile. Just the legal fees in defending against a shareholder derivative suit or an IP infringement suit can range in the millions, and the extensive discovery process in U.S. litigation can be both distracting and expensive for any foreign investor. In an M&A context, the worst outcome of any deal is post-closing litigation, not only because of the resulting liabilities and costs but also because any deal that ends up in litigation is viewed as evidence of a bad deal. To illustrate the depth of this problem in the U.S., as well as the validity of a non-U.S. buyer or investor's concern, consider these statistics: For four consecutive years from 2010 to 2013, over 90% of M&A deals in the U.S. valued over $100 million resulted in litigation; and in 2013 alone, 94% of all such deals were litigated for a total of 612 lawsuits filed by plaintiffs across the U.S. ^] Although most of these lawsuits are settled, the hefty cost of defense and the negative PR that ensue can be alarming for foreign investors and often turn them away to acquisitions in the U.S. Even if a foreign buyer prevails in M&A litigation in the U.S., there is a lot of "face saving" that must be done in order to justify the deal to its shareholders and other stakeholders, and the corporate development manager who recommended the deal in the first place will invariably suffer internal pressure and even a demotion for a deal gone awry. With this backdrop of looming litigation in the U.S. and the risk of post-closing rescission, it is worthwhile to review both pending and potential litigation, and do everything possible to circumvent litigation in the U.S. For pending litigation, one approach that may be acceptable to the buyer is to exclude all on-going lawsuits from the deal and have the seller continue to defend these suits on its own. This approach may be what is necessary to get the deal done. For potential litigation, it will be essential to disclose the facts and circumstances of this potential risk so that the buyer is well aware of the risks and closes the deal with its eyes wide open. This disclosure will go a long way to preventing any post-closing attacks by the buyer in an attempt to unwind the deal based on non-disclosure of material risks. Remember that omission of important information regarding the business or key assets (both tangible and intangible) can be viewed as a type of fraud. Editor's Note: this excerpt was taken from the article __ *Doing Deals With A Non-U.S. Investor Or Buyer*, originally posted on VC Experts, March 10, 2015. Read the full article here.