International Projects:

By Bill Ferreira

REFLECTIONS FROM COUNSEL

As a lawyer in the grants and contracts practice of a law firm with 40 offices around the globe, who with colleagues from Jeddah to Johannesburg has advised on sponsored projects at dozens of foreign outposts, I see firsthand the complexity of transnational initiatives. Myriad institutions are engaged in public health research, technical assistance, and capacity building projects abroad, and although for each of them the greatest and most important challenge is achieving the program's scientific and technical aims, each must also solve another very practical problem — how to implement a legally compliant operation in a new or unfamiliar part of the world.

Following are lessons drawn from observation and experience with sponsored projects that involve foreign on-the-ground activity. The lessons identified here are broad, in that assorted business and legal considerations may influence the approach to any one compliance area. As such these reflections are illustrative; they hardly exhaust the twists and turns that arise in foreign transactions. But perhaps this discussion will serve to remind and inform the administrator of principles that underlie professional judgment in these projects.

Where projects proceed in an oversight vacuum, trouble usually follows. Consider this scenario: Recently an organization undertook to inventory its foreign on-the-ground activity. It learned that a principal investigator (PI) had contracted two dozen foreign nationals to work on a sponsored project in a remote African village. Upon knowledge of these contracts, the general counsel engaged host country advice and learned that, under local law, to issue such contracts was subject to a substantial daily fine. What ensued was a hectic scramble to obtain proper local documentation, to understand why it was omitted, and to articulate a corrective action plan to the organization's fiduciaries. It's tough enough to monitor projects at home; to manage activity seven times zones away demands an intensive governance strategy.

Respect the "doing business threshold." To administrators long experienced in foreign projects, discussion of this topic is a broken record. But incredibly, some institutions still plunge headlong into boots-on-the-ground projects without consideration of foreign "legal status"—i.e., foreign business registrations, licenses, or other permissions to conduct programs in a host country. The consequences are startling. Increasingly evident is the ability of foreign regulators to discover (often through mysterious means) an institution's blind eye to registration and related tax and employment law. Penalties often follow. It would be hazardous to assume that nonprofits enjoy "grace periods" for noncompliance. Activities that trigger registration obligations or other legal status in the host country may include, among others:

- Employing foreign nationals, or posting U.S. employees to positions there
- Executing a lease for office space, or owning real property
- Opening a bank account
- Dispensing medications or controlled substances
- Purchasing equipment, vehicles, or insurance for these assets
- Enrolling subjects into a clinical study

It takes only one employee. Engaging just one foreign national abroad, or posting just one U.S. citizen to a foreign country, may trigger financial and legal obligations there. As a general

rule, host country employment law applies to foreign nationals and to U.S. expatriates assigned to foreign positions. It may then seem convenient to engage overseas staff as "independent contractors" or "consultants" as opposed to employees, to avoid entanglement with foreign labor law, overseas payroll, and tax withholding. But this can be a trap. Many countries disregard the "contractor" designation if the substantive arrangement between the parties suggests that an employment relationship exists. Mischaracterizing the relationship has generated fines and unpleasant proceedings. Similarly, foreign HR-related documentation such as "Staff Manuals" and "terms of service" are ripe for dispute when drafted without inquiry into local labor law.

Carefully structure separate legal entities. Increasingly, public and private institutions structure foreign activity through the incorporation of a wholly-controlled affiliated legal entity—i.e., a special purpose entity (SPE)—in the United States or in a foreign country. SPEs may serve an important function. Experience with and observation of these SPEs suggests that (a) various factors motivate their establishment, including legal, business, organizational, administrative, social, cultural, and diplomatic considerations, and (b) the weight afforded to any particular consideration may vary depending on the nature of the program and the risk entailed. Operation through a SPE, or Federal funds awarded directly to a SPE, raises important but manageable federal grants and contracts compliance implications, including implications for direct and indirect cost recovery. Related to this is the next observation.

Foreign costs attract special attention. Unique costs in international projects include, among others, foreign housing and living expenses, value added taxes, consular and visa fees, currency fluctuation, relocation, security, and severance payments to foreign nationals. Allowability of these costs may differ across sponsors and within sponsors. Where allowability is ambiguous, grantees have not enjoyed the benefit of the doubt from sponsors. The new OMB Supercircular offers new or revised guidance on some of these costs. For example, pursuant to the Supercircular, housing allowances and personal living expenses—which may be customary benefits to expatriates and foreign employees—apparently will be allowable as direct costs only if expressly approved in advance by the sponsor. This may merit changes to the way such costs are identified in budgets.

Evaluate and monitor foreign collaborators. Issues have been traced to unwarranted assumptions about the suitability of prospective collaborators. Typically, it's useful to know in advance that your proposed partner is financially distressed or embroiled in a lawsuit with another nonprofit. Due diligence on foreign entities is possible through public searches, discreet reference checks, and even investigative firms, none of which are necessarily expensive or time-consuming. Often these checks yield precious information on the counterpart's reputation, motivation, business experience, and finances. Linked to this is the foreign subrecipient monitoring process—a classic "easier said than done" situation, but evidence of which is increasingly demanded by federal sponsors.

Tailor cross-border contracts. It's tempting to repurpose domestic-focused templates for overseas research and other activity. But the result may be contract or subcontract terms that are impractical, unlawful, or barely comprehensible to foreign parties. Take, for example, a simple "termination for convenience" clause. Various foreign jurisdictions do not recognize a termination for convenience concept. To maintain the clause may call into doubt the transaction. Flowdown of sponsor terms also merits care. Consider carefully a claim that flowdown is achieved through simple attachment of the prime award to the subaward. Having participated in many compliance inquiries involving foreign counterparts, I can attest to the importance of clear and comprehensive subcontract terms in cross-border agreements.

Anticipate aggressive data privacy law. Sensitive information routinely is generated or collected abroad in connection with foreign employees or clinical projects. But institutions are often unprepared for robust data privacy regimes, particularly in Europe and Asia. Unlike U.S. law that tends to protect data only in certain industry sectors (such as FERPA for education or HIPAA in healthcare), foreign data privacy law may apply broadly to all personal data. Strict collection, processing, and use rules can apply. The concepts of "processing" and "use" may cover nearly anything one can do with information that relates to an identifiable natural person, including the transfer of data to third parties or to the United States. Certain categories of personal data, such as racial or ethnic information, political opinions, religious or philosophical beliefs, trade-union membership, and health data may be subject to special protection, particularly in Europe.

Scrutinize awards from foreign governmental and non-governmental sponsors. Institutions have paid a heavy price for failure to grasp the terms of foreign sponsors. This lack of knowledge figures especially where subordinate administrators hesitate to second-guess ambitious PIs who crave new funding for their work. Fundamental questions deserving of early inquiry include, for example: Are the intellectual property terms consistent with our expectations? What kind of financial audit is expected? May we record effort in percentages? Will we be paid in foreign currency or U.S. Dollars? How will currency fluctuation affect the final amount? Are we subscribing to foreign tax obligations?

Legal advice from non-lawyers is risky. Amazingly, some organizations take as sound legal advice anecdotal assertions offered by local contacts, such as "This is the way it's usually done." Foreign law advice should come only from trusted, reputable counsel. Beware of lawyer lists supplied by embassies or memberships in legal alliances, which do not necessarily establish credibility or capability. Place a premium on appropriate experience, responsiveness, and transnational standing.

All told, trial and error can be costly. The array of foreign project issues astonish even the most experienced institutions. Myriad more topics, from export control to immigration to bilateral treaties, are worthy of mention here. Though the compliance issues are many and outcomes are not perfect, globalization is imperative in the modern research environment. And so we endeavor to appreciate the risks entailed.

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