Skadden

# Preparing for the Unexpected: Problematic Partners, Forced Exits and Extractions

- Boards need to ensure that their companies understand who their foreign partners are and that there are legal provisions in place in case the company is forced to exit a business or region on short notice.
- Directors should make sure that management has contingency plans for the possibility that employees and their families need to be extricated from a country quickly.
- Management should prepare for alternative sources of vital components in the event of disruption.
- Internal and external communications strategies for geopolitical disruptions need to be mapped out ahead of a crisis.

Companies with international operations have had to face a series of unexpected and largely unwelcome geopolitical events in recent years. Globalization and the 24-7 news cycle means that regional and even local events can trigger corporate crises and cause headaches for even the most experienced board. Given the near impossibility of avoiding the impact of global politics, directors can and should ensure that the companies they guide are as prepared as they can be. Here are suggested questions they can ask to test preparedness.

**Who are our partners?** It is very common for international investments to be owned through partnerships or joint ventures, either to comply with a local regulatory obligation or to access knowledge of the relevant market. But ownership interests can be transferred indirectly through opaque structures and governments can, directly or indirectly, nationalize or exert control over what was previously a private enterprise. This needs to be monitored as closely as possible.

Directors should confirm that processes are in place to verify the ultimate beneficial ownership and reputation of local partners, and to verify those on a regular basis.

Commercial partners can become subject to sanctions (and counter-sanctions) in various jurisdictions, sometimes overnight. Companies should have a process in place to determine if any partners, including counterparties, become subject to sanctions as those proliferate and are updated.

**Can we exit at speed if necessary?** Most joint ventures include restrictions on the transfer of interests. These typically give the other partner, at the very least, a right to be notified of an intention to exit and a period of time to formulate an offer, and they often include detailed formulations for an exit process.

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Directors should ask management to review important existing partnership agreements to determine whether transfer restrictions cease to apply if the other partner becomes subject to sanctions, and directors should ask management to consider requiring that future partnership agreements include such provisions.

Corporate representatives appointed as directors of a joint venture company that becomes subject to sanctions may need to step down immediately to avoid incurring personal liability for continuing in the role. (At the very least, they will need to seek legal advice.) Are there other contractual rights in the joint venture agreements that allow your company to continue to monitor and control the JV? Or is the exercise of control rights entirely through having one or more representatives on the board of the JV?

Even with these protections, dealing with a counterparty that is subject to sanctions presents practical issues. The sanctioned person or entity will usually be unable to utilize banking facilities outside of their home territory and the company itself may be severely restricted or even prohibited from negotiating or dealing with the sanctioned party.

Beyond the legal protections, directors should ask about the practical issues that would need to be resolved and verify that management has anticipated them and has a plan in place to address these.

**Can we get our people out?** It is common for international companies to have expatriate managers in their overseas operations and joint ventures. These roles are often interesting and rewarding career options. If there is a change of the local or international political situation, though, companies may need to bring their staff and their families home quickly. There may also be local nationals in an affected territory who are vital to the wider business or who may face reprisals for having worked for a business now on the opposite side of a diplomatic divide. Companies are likely to face a business need, and feel a moral obligation, to extricate these people as well and find them new homes in a new country.

Boards can do their part by confirming that there are contingency plans in place to extract important or vulnerable employees and that the robustness of those plans has been tested.

**Do we have alternative sources and markets?** Maintaining diversity of customers and suppliers is standard good business practice. Recent events have highlighted how quickly situations can change and jurisdictions or regions that seemed stable can, overnight, close down.

Boards should query management about resilience and fall-back options for critical supplies of raw materials, key components and personnel. Directors should also test whether a business has become overly reliant on customers in a particular territory or region and whether the company can pivot to find new customers if operations must cease abruptly.

**What will we tell our customers, our people, our investors and our regulators?** In a crisis situation, a misjudged statement or comment, however well-intentioned, can do lasting damage or lead to legal expense. Directors should ensure that crisis management and communication plans are in place. Marketing, human resources, investor relations and government relations teams should be involved in the scenario planning process so that they can communicate with their respective constituencies in a coordinated manner quickly and accurately when events break.

**Can we find some good in the bad?** Change brings opportunity. If a business has to withdraw from a territory, will that open up new markets and create new jobs, either in the home market or in other jurisdictions?

Directors should ask their management teams to assess, as part of their contingency planning for withdrawal, where new suppliers, employees and customers could be found. Businesses should be cautious and plan carefully, but they should continue to look for new opportunities for growth and value creation in areas where they have competitive advantage. They will benefit from the wisdom and experience of their directors as they do so.

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