

When Strategy Meets Emotion – How to Succeed in Cross-Border M&A for SMEs

Why do cross-border sales fail despite good figures? And how do you make a family business truly “M&A-ready”? Mirko von Bieberstein, an expert in international transactions, offers insights into the complex world of cross-border deals.

Interview with Mirko von Bieberstein, M&A lawyer at Cleary Gottlieb Steen & Hamilton LLP

Mr. von Bieberstein, M&A succession planning is a complex undertaking – all the more so when the “cross-border” factor is added to the mix. In your experience, what interests need to be balanced here?

I frequently advise on transactions between German companies and foreign buyers, often from the U.S. In doing so, I regularly encounter a classic conflict of interest: a family-run German company usually has very clear, often non-negotiable ideas about the purchase price – even before the buyer has even started due diligence (DD). If succession is to be resolved through an M&A process, this is highly emotional for the owners, as the company is, after all, their life’s work. Of course, rationally speaking, the aim is to maximize the price, but there are also many intangible factors at play. For instance, German sellers want guarantees regarding the retention of the workforce, the locations and often the brand as well. They are therefore concerned with the continued existence of a well-established corporate culture. This is a deeply emotional process that goes far beyond mere figures.

What, in turn, is the situation like on the buyer’s side?

Here, worlds collide. The first point of friction in cross-border M&A involving SMEs is often cultural differences. Foreign investors often operate at a completely different pace and with different expectations. Moreover, they often lack an understanding of the regional significance and the social role that a German company plays in its home region. Let’s take a strategic investor as an example: they want to expand, gain market access, and, above all, secure the technology. Preserving a brand steeped in tradition is not necessarily a value-adding factor for them. This inevitably leads to misunderstandings. Another key issue is the future role of ownership – particularly in SMEs, we have an extremely person-centered customer relationship – the so-called “key man” or “key woman risk”. If the buyer demands that the current manager remains on board, complex role conflicts often arise that need to be resolved.



You mentioned the example of a strategic investor. What distinguishes this type of investor, and how does it differ from a financial investor?

These two groups of buyers differ fundamentally. A strategic investor – such as a supplier, partner, or competitor – knows the market. They aim to grow through the acquisition, leverage synergies, and gain expertise. Often, the acquisition of the company brings additional value due to these synergies. Because of these synergy effects, they can offer a higher purchase price – the so-called strategic premium. This can be very financially rewarding for the seller. A financial investor (private equity), on the other hand, usually thinks in terms of a time horizon of four to ten years. Their aim is to increase value and subsequently sell on at a profit. The advantage here is that PE firms often significantly professionalize the company, bring in industry experts, get the business back on track, or provide the necessary financial resources for growth spurts. In this model, the former owners often remain with the company for longer, as their expertise is indispensable during the transition phase.

Let's return to the cultural differences between the seller and buyer sides. To what extent can you mediate here in your role as a consultant and solicitor?

Our role is by no means limited to legal work; rather, we also provide cultural translation and act as intermediaries. Professional advice is absolutely essential here to prevent the atmosphere between the parties from deteriorating. In cross-border deals, there must be experts on both sides who understand the other's language – both literally and figuratively. We act as communicators and translators to ensure that no irreversible rifts arise before the contract is even ready for signing.

What specific advice would you give to German companies looking to become “M&A-ready” when searching for buyers abroad? What should family-owned businesses pay particular attention to?

Preparation is everything. You should plan for “M&A readiness” well in advance, ideally up to two years ahead. Often, several family members are involved in the business, which makes setting objectives more difficult. You have to ask yourself honestly: what do I actually want to achieve? Which objectives take priority? Around six to 12 months before the actual sale begins, a comprehensive “vendor due diligence” should be carried out.

What exactly does such “vendor due diligence” involve?

You scrutinize your own company through the eyes of an outsider to identify risks and eliminate them in good time. Unclear ownership structures or incomplete documentation from the past are often major stumbling blocks. Structures such as silent partnerships, trust arrangements, or complex shareholder loans are indeed widespread, but must be properly documented in advance or, ideally, dissolved. Documentation of intra-group relationships

and transfer pricing must also be prepared with precision; otherwise, there is a risk of significant price reductions later on due to tax risks. Compliance issues such as ESG (Environmental, Social, Governance) are also central, particularly for U.S. clients. Listed American companies cannot and will not take on the risk of sanctions. An appropriate structure must be put in place here that takes all stakeholders on board. This is virtually impossible to manage without professional advice.

Let's talk about the most critical issue: price. How do you prevent the gap between the desired price and the offer from widening too much?

A certain “valuation gap” is almost impossible to avoid. The key, therefore, is how to deal with these differences. The commercial side sets the pace here, but price always remains the biggest challenge. The seller sees their life's work; the buyer sees an information asymmetry and wonders: what risks am I buying into? If the seller is unwilling to allow comprehensive due diligence and at the same time refuses to provide extensive guarantees, things become difficult. However, there are tried and tested tools for risk sharing.

Can you give some examples?

One example is the earnout: the initial purchase price is lower, but the seller shares in future value creation if agreed key performance indicators (e.g. revenue targets) are met. The risk is shared. In practice, however, this is prone to disputes if the parameters are not clearly defined. Then there is the so-called phased sale. For example, one might first sell 75% of the company and dispose of the remaining 25% at a later date. The rollover is also a tried and tested method. In this case, the seller disposes of everything but reinvests part of the proceeds directly with the buyer. In this way, they remain a stakeholder in future success and signal to the buyer their confidence in their own company.

What specific legal pitfalls lurk in cross-border transactions?

The list is long. The key areas are warranties and liability. A thorough due diligence process is the essential foundation for the buyer's warranties. Many SMEs are initially reluctant to have their business scrutinized so closely, but it is the only way. Warranty and indemnity insurance (W&I Insurance) is now a standard tool. Insurers assume the risk of breaches of warranty. This takes the pressure off both sides. Furthermore, one must not underestimate the regulatory risk, such as foreign investment controls under foreign trade law. The federal government can scrutinize acquisitions by foreign investors and, where public order and security are at risk, restrict them and, in extreme cases, even prohibit them. This is a particularly sensitive issue, especially with regard to investors from China in the technology sector. During the process, both sides must arrive at a realistic

assessment of the risks, and the seller will attempt to pass on the risk of a prohibition or restriction to the buyer in the transaction documentation.

What does the timeline and structure of an M&A process ultimately look like?

From a purely operational perspective, the process usually takes between six and nine months. For the seller, however, the work begins much earlier with the process of ‘dressing up’ the company. We divide this into three phases. The first involves internal planning. This covers the selection of advisers, the formulation of objectives, and the structuring of the process. A decision is made: do I approach a single buyer directly, or do I opt for a bidding process? A “teaser” (exposé) is drafted and circulated. Phase two is referred to as the “market phase”: the other side comes into play, and teasers are sent (often via banks) to interested parties. Once confidentiality agreements have been signed, more detailed information is provided, and the first non-binding offers are received. The lawyers begin drafting the purchase agreement and, experience shows, four to five serious prospective buyers remain for the due diligence process. Finally, the process is finalized: a reasonably binding offer is submitted, followed by tough negotiations and, ultimately, the signing and closing of the purchase agreement.