Charting Your Course: Ensuring Language Compliance Beyond and During the Deal

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This article is part of our two-part series on what foreign buyers of, and investors in, business ventures need to know about the Charter of the French language (the "Charter") in the context of a business transaction involving operations and employees in Quebec. The first instalment focused on French language issues during the due diligence process. Reference is made to the following hyperlink for access to part one.

Continuing our exploration of the Charter in the context of merger and acquisition transactions, this part two focuses on the importance of language compliance during and after the deal-making process, from incorporating language obligations into representations and warranties to post-closing strategies for addressing compliance issues.

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6. In the Deal-Making Process: Your Closing Documents

Representations and warranties in transaction documents shall generally address language-related matters. For example, the target corporation may be required to represent and warrant that it has fulfilled its language obligations as imposed by the Charter. As a foreign buyer/investor, you may want to ensure that findings from the due diligence investigation are incorporated into the representations and warranties of your share or asset purchase agreement.

As you prepare your closing agenda, it is of utmost importance to assess whether the principal and accessory agreements themselves will be subject to French language requirements. For example, it will be advisable to translate into French restrictive covenant agreements or intellectual property assignment agreements that will be applicable to Quebec-based employees or other agreements that may be deemed contracts of adhesion. The requirement to translate any agreement or documents following the results of the due diligence analysis can be included as a closing deliverable in a form satisfactory to the foreign buyer/investor.

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7. Post-Closing: Addressing Language Compliance Beyond the Deal

Obviously, not all aspects of French language compliance under the Charter will be addressed during the merger and acquisition transaction itself. Potential areas of non-compliance noted during the due diligence stage can give dealmakers a roadmap of steps to undertake after closing to mitigate risks. In recent transactions, there has been a growing need for law firms to provide post-closing support in French language matters.

If a purchase price adjustment clause is included in the share or asset purchase agreement, a buyer/investor could benefit from using the costs associated with rectifying any translation defaults as a lever for the negotiation of the price to be paid. This could also include any penalties imposed by the OQLF on the target corporation. Recent amendments to the Charter have significantly increased the fines that a corporation may face for non-compliance with an order issued by the OQLF, which range from $3,000 to $30,000. These fines are doubled for a second offence and tripled for subsequent offences. If an offence persists for more than one day, it is considered a separate offence for each day it continues.

Additionally, directors of the corporation are presumed to have committed the offence unless they can demonstrate that they exercised due diligence by taking all necessary precautions to prevent the offence.

In cases of complaints, our experience indicates that the OQLF tends to prioritize achieving compliance rather than imposing fines when companies are responsive to complaints. This presents a positive outlook for foreign buyers/investors, as it underscores that the intent of the new Charter and its enforcement provisions is not to penalize foreign buyers/investors, but rather to reaffirm the status of the French language as the official language of work and business in Quebec.

Conclusion

Prospective foreign buyers/investors may question the wisdom of doing business in Quebec, given its Charterrequirements. However, achieving Charter compliance can provide a distinct competitive edge. By embracing it, you open doors to the predominantly French-speaking market in and outside Quebec, unlock opportunities in thriving sectors like mining, renewable energy and aerospace, and

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pave the way for lucrative partnerships with the Quebec government.

However, considerations relating to the French language shall not be overlooked when it comes to due diligence or other phases of a merger and acquisition transaction as compliance is key to accessing the thriving Quebec market. Moreover, failing to address these aspects could result in various challenges to a buyer/investor’s entry into the market, such as the unenforceability of restrictive covenant agreements with key employees, potential fines, penalties and director liability. A reputational risk can also be associated with non-compliance with the Charter, in light of the media attention that surrounds this type of issue in the Quebec landscape.

By adhering to the requirements of the Charter, foreign buyers/investors can position themselves as responsible corporate citizens and set the stage for successful ventures in Quebec's dynamic business landscape.

As more guidance becomes available regarding the application of the new provisions of the Charter, and as we gain practical experience from upcoming transactions with foreign investor/buyers, additional instalments to this series will be published.

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