



The legal maze of solar globalisation

New market regulation | Solar companies are always looking for new markets in an effort to remain competitive. Monica Wilson offers some advice on how developers and contractors should navigate the legal labyrinth that will face them as they go global

As the utility-scale solar market continues to expand and globalise, project developers and engineering, procurement and construction (EPC) contractors increasingly find themselves considering unfamiliar jurisdictions. A new project or new business opportunity is exciting – but successful entrepreneurs will measure this excitement with thorough analysis of all aspects of the opportunity, including accounting for the diverse and unknown risks of operating in foreign markets.

First and foremost, a company considering this type of expansion must build a foundation for operation in the new jurisdiction. The underlying principle for achieving success in

new markets is to develop an understanding for and respect of local culture and customs. Understanding and accommodation of a new culture communicates a company's good faith and motivation to partner with that culture in mutually beneficial, long-term business relationships within that jurisdiction. Conversely, lack of understanding of cultural norms in foreign markets may lead to significant friction, loss of productivity and, ultimately, hostility that could prevent continuing successful business relationships in foreign markets.

Developing familiarity with and respect of local culture requires time and investment in the new jurisdiction. For many companies, hiring a local representative will serve

both to educate the company internally but also to project an image locally of the company's commitment and investment in the new market. A well-respected local representative may have knowledge of key business methods in his local market and variable permitting and licensing regulations. Certain markets even require resident local representatives to certify the business' compliance with these regulations before issuing a permit.

The letter of the law

Corresponding with the solar industry's rapid expansion, developers and contractors' operating across jurisdictions has become common. New offices and

additional personnel are key to a company's growth, but they bring new risks that must be purposefully controlled. To maintain uniformity across offices and personnel, companies should implement strict internal compliance and corporate training programmes for new hires and inform local representatives of company policies and expectations.

The more geographically diverse a company and its employees become, the larger the risk of a miscommunication that could subject the company to legal liability. As one example, an increasing number of countries have passed anti-corruption legislation that regulates companies based in that country or operating within that country. In the United States, companies must comply with the US Foreign Corrupt Practices Act in every jurisdiction within which they operate. The same applies to companies in the United Kingdom through the UK Anti-Bribery Act of 2010, which establishes strict standards against offering or accepting bribes. Many anti-corruption laws require more than mere compliance but instead require companies to implement adequate procedures in an effort to prevent bribery. Violation of these laws will result in significant harm to the company, including both civil and criminal penalties.

A successful multi-jurisdictional company will combine training of its employees in company culture and policies with strategic use of the employees' local knowledge and business contacts. This integration is key to projecting the company's image in new jurisdictions, and also to

'In the long term a company who demonstrates high level commitment to a new market will become a market leader'

maximising its competitiveness and profitability in these jurisdictions. Third parties seeking to engage the company in business who perceive the company as sophisticated and knowledgeable about the local jurisdiction are more likely to offer fair terms of business (and are less likely to attempt to negotiate pricing and conditions out of line with the local market).

To ensure the company projects a sophisticated image, the company may engage local counsel in that market to ensure the company's documents comply with local laws and account for cultural standards. From the legal perspective, when a foreign company presents a proposed form of agreement to a local third party that contains provisions void and unenforceable under local law, the foreign company has communicated to the third party that it has not performed sufficient due diligence in that jurisdiction to account for its laws. This oversight may be a result of schedule pressures from the new opportunity, or apathy to local culture – but it will inform the third party that the foreign company is also ignorant of pricing and terms in that market, and will increase the chances of less competitive pricing while reducing the company's negotiating leverage.

In addition, failure to conform company policies and



**With us
it's possible.**

Solutions for the Photovoltaic Industry

Modules

- Turnkey Production Lines -

- Key Equipment -

- Cell tester
- Tabber & Stringer
- Automatic bussing
- Sun simulator and EL
- Framing



**MONDRAGON
ASSEMBLY**

www.mondragon-assembly.com

Utility-scale PV development in new markets presents a range of challenges.



documents to local laws poses further risk to the company that its agreements may not be enforced. Some jurisdictions, for example, will void venue selection provisions or will dishonour alternative dispute resolution provisions in favour of local courts or processes. (Even within one jurisdiction, if the proposed project is located on regulated or protected land, additional or alternative laws may apply.)

Consistent with the company's goal to project sophistication in a new market, a local representative and local counsel should be able to assist the company in its efforts to understand and comply with various business regulations, including licensing laws. Most jurisdictions require trade licensing prior to a company's submission of a proposal for a project, and certainly prior to filing for permits. Labour laws and requirements also vary widely by jurisdiction, with some jurisdictions requiring use of local labour. Certain jurisdictions may require the company to contract with labour unions according to the type of work to be performed.

Operating on the ground

Once a company establishes a foundation in the new market by hiring a local representative, obtaining regulatory approvals and offering documents appropriately representing the company, the company is ready to engage in business. The company will need to adapt to the dynamic opportunities of a new market as they unfold. For utility-scale solar plants, this involves review and analysis of each potential project site and purpose, as well as an understanding of geographically specific risk.

Risk in new markets may be legal or regulatory, as detailed above, but it may also involve the challenges of altered terrain. Desert terrain will pose very different construction challenges than tropical terrain - from engineering of posts and tracker systems, if required, to construction scheduling around typical weather patterns (a dust storm

requires different construction accommodations than a flood event). Partnership with local subcontractors or suppliers may assist in planning for projects in new jurisdictions. Many local companies may be willing to assume more risk specific to known territory, helping the foreign company better manage its project.

Developers who finance utility-scale solar projects may find separate financial risks of operating in new jurisdictions. Lenders wary of political instability or of the developer's inexperience in the foreign market may be more reluctant to provide competitive financing models. Many lenders (such as the World Bank, for example) require companies to demonstrate compliance with their regulations and publish debarment lists as a way to better control their investment. These may require a developer or contractor to commit to investigate its business partners, subcontractors, and suppliers in order to avoid entering into agreements with anyone found deficient in business practices by the lenders' standards. Common standards include human rights commitments, anti-corruption policies, diversity commitment programmes and environmental policies.

Although most lender requirements are indicative of strong internal business practices, companies who commit to meeting these requirements for utility-scale solar plants in new jurisdictions should ensure robust internal documentation and compliance policies in order to protect the company in the event of a problem or investigation during the course of the project. In addition, companies must ensure daily monitoring of project construction, and must act immediately to investigate complaints or evidence of failure to follow these policies. To uphold these high standards of business practices, the company must foster an open internal environment that allows for the discussion and resolution of issues that arise during the course of a project.

For example, should a company representative on-site suspect a subcontractor has failed to comply with its contractual obligations regarding hazardous materials, that representative must be aware of his internal reporting requirements (and must be comfortable that doing so is an act to protect the company and his career). The company should investigate and resolve the issue according not only to legal requirements but also with lender regulations and the company's policy promoting social responsibility.

With risk comes opportunity

In the short term, a company may see such compliance as a significant risk to project profitability (albeit a risk that may be priced and controlled), but in the long term (and especially in a jurisdiction without significant investment in utility-scale solar), the company who demonstrates this type of high-level commitment will become a market leader. Likewise the contractor who develops this reputation in the community will be the contractor with whom lenders and developers desire to establish a partnership. Especially as the utility-scale solar market continues to expand, the reputation of projects as producing clean energy but also contributing to a socially responsible world is important for long-term commercial success in the industry.

New challenges and opportunities across jurisdictions bring excitement to the expanding utility-scale solar business model. A company committed to multi-jurisdictional operations must first, however, release any expectation that its domestic business model can be exactly translated and created in a foreign jurisdiction.

When a company enters a new jurisdiction, the investment to become knowledgeable and skilled in the local culture and laws within that jurisdiction may be significant - but correspondingly significant is the potential for continued ongoing success and partnerships in the new region when the company demonstrates its respect and compliance with the region's unique culture. ■

Author

Monica L. Wilson is an attorney with Bradley Arant Boult Cummings LLP who advises utility-scale energy developers and contractors on EPC projects throughout the United States and internationally, focusing on risk management and claim avoidance.

