



30-SECOND SUMMARY Western companies entering Asia for business should consider the following. Always try to privately negotiate a settlement. There is nothing to be gained by following arbitration or litigation through to a decision or judgment with the intention of enforcing that award. The mediation route is the most recommended course of action because it preserves long-term business relationships. Personal relationships are more important to your business success than any written agreement and should not be underestimated. Because relationships can take time to foster, recognize that deals in Asia take longer than in many Western countries. Never force a deadline if things are generally progressing forward.

WHAT YOU NEED TO KNOW ABOUT

Doing Business In Asia

By Iohann Le Frapper and Randall Lewis

Between the two of us, we have over 25 years of legal experience in Asia, specifically China. Over the years, we have both witnessed avoidable and costly mistakes made by very savvy Western business leaders in regard to their businesses throughout Asia. The missteps and errors are continuing to this day, and it seems as though several Western companies are still entering into Asia with their eyes wide shut due to either over-exuberance or simply poor advice. Whatever the cause, we both felt the legal community would benefit from a simple checklist of considerations and concerns (and of course, our pointed and wise advice) that your company (and its operations) will face in any Asian nation. While this listing does contain some generalizations, the benefit of this listing is to save you the trouble of ferreting out the same takeaways gleaned from 20+ lengthy articles.

What you need to know

- Avoid signing any agreement, whenever possible, that provides for local litigation or arbitration (e.g., CIETAC) in mainland China (with some minor exceptions not discussed herein). While we will admit that the implementation of the rule of law and the judiciary in China is improving, the system is still fraught with non-standard behavior that results in arbitral and judicial decisions based upon factors not associated with your written agreement. In our experience, for low-dollar disputes, disputes that do not implicate any State interest and disputes that have very low public interest, fair impartial decisions can be rendered in a Chinese court or through CIETAC arbitration. When entering into a contract, the basic assumption is that you will be a success and your venture will be wildly profitable. Therefore, there is no reason to contractually subject yourself to a dispute resolution mechanism that could destroy the basis of your bargain. Arbitrating in Singapore (SIAC) or in Hong Kong (HKIAC) is always our preferred dispute resolution mechanism and the enforceability of such arbitral awards in China is well established.
- Don't assume that the agreement you have signed will be interpreted or enforced as written. In many Asian countries (China in particular), contracts are interpreted based upon course of dealing, taking into account the evolution of various external factors. Remember that your contract is only your understanding on the day of signing, and not on the day you sit down to resolve a dispute. Any informal waiver or deviation in practice from the initial terms of the agreement, which is not rare, is likely to have very significant weight on the future interpretation

of the deal terms. Betting that you are better off not to memorialize such variation may cost your company greatly the day you opt to revert back to the initial terms of the agreement.

- Always try to privately negotiate a settlement. There is nothing to be gained (in most cases) by following arbitration or litigation through to a decision or judgment with the intention of enforcing that award. The mediation route is the most recommended course of action, particularly for preserving a long-term business relationship and everyone's corporate reputation, although outside counsel may have a different position (often driven by self-interest). In other words, the litigation route implies that the company (and not a manager for a matter of principle) has come to the conclusion that there will be no further business dealings with that partner, vendor or customer.
- If you negotiate contracts and agreements as you would back home (i.e., creating lengthy documents that cover any and all contingencies), you may unintentionally alienate your new business partner and start your commercial relationship off on the path to failure. Further, a few months after a strategic deal has been signed off, taking the stance that your Asian partner can only blame itself for having accepted unfavorable terms and conditions

(e.g., arguing that they should have read carefully all exhibits to the main body of the agreements prior to signing off on the deal) can be tempting but may not pave the way to a successful and sustainable relationship. This might sound odd, but it is true: You cannot assume that people in Asia (China in particular) have read and understood all the terms and conditions contained within a contract. It is possible, even today, that key people sign contracts in China based upon mutual trust rather than a careful reading of an agreement.

- In most developing nations, personal relationships are more important to your business success than any written agreement. That having been said, great agreements are always doomed to fail if you do not take the time to build real and long-term relationships with your local partners. For example, if you believe that it does not matter that a deal is mutually beneficial to both parties as long as you manage to impose your terms and conditions even to the detriment of your Asian counterpart's interests (e.g., "We won and they lost"), your company may encounter some serious difficulties at a later stage. Your short-term business win or your one-off successful M&A deal may not compliment the strategic goals of your company in a specific market, especially if it



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turns out you have alienated your business partner from the outset. The collateral damages of your partner's resentment may have long-standing effects.

- It is usually a good long-term strategy to make concessions in the interest of preserving a commercial or business relationship, even if such an accommodation would not be proper in your home country. Aggressiveness and strict adherence to contractual compliance in Asia can sometimes alienate your business partners and result in bad publicity that harms your ability to secure future relationships. However, each side should make concessions to reach a win/win trade-off outcome. But keep in mind that making any unilateral concessions may not lead to gaining any respect or future return from your business partner who might believe that you are just a fool.
- Deals in Asia often take much longer than you will expect. Never allow your internal financial or strategic goals to drive artificial deadlines to secure agreements or close deals. Cool down the expectations from senior management about the realistic timeline of deals in Asia. Long-term costs may greatly outweigh short-term gains. In our experience, quite a few Western companies have paid a high price in making hasty, last-round concessions that significantly reduced the profitability of the business or the protection of their technology crown jewels, simply because the time pressure was too high to close negotiations in line with senior management's expectations. For in-house counsel, the challenge will be to manage commercial expectations and offer clear explanations of risks should a transaction be accelerated.

- Companies in Asia who face less short-term pressure from their shareholders, and often focus more on their long-term strategic plans, can be extremely skillful in their negotiations. This is very pronounced when those same Asian companies are negotiating with listed entities in the United States or Europe that must deal with financial disclosure and market expectations every three months, and may be under pressure to close deals or agreements on set timelines.
- In a nutshell, everything in Asia takes longer than at home. Use caution when setting deadlines and expect unforeseeable delays. Never force a deadline if things are generally progressing forward.
- If your business becomes profitable, use caution to ensure that your local partner is not privately manufacturing ways to rebalance the financial landscape in a manner that fits their idea of fairness (i.e., look at your suppliers, raw material purchases and competitors to ensure they are not connected to your partner or his family/friends). In short, do not assume that because you are profitable that your local partner is necessarily satisfied with his revenue stream.
- Business success in Asia is measured by your public image, and not only by your gross revenue or sales.
- Financial projections in China and some other Asian geographies (excluding possibly Hong Kong or Singapore) are just projections. Take them with a grain of salt. If you want profitability, create a good market-entry strategy that focuses on gaining brand recognition and good support from your strategic partners. Instead of focusing on a financial target, set market and soft factors as measures of success. If you are entering into any new foreign market, you need to think long term, rather than only two or three years out.

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- Train, monitor and guide local agents closely, and do not assume that their motivations are aligned with your obligations in your home country and your internal policies. Sometimes, people who promise success due to their local connections will expose you to US Foreign Corrupt Practices Act and UK Bribery Act violations, and possibly violations of local laws as well. Use caution when dealing with local agents and employees.
- Training of local employees with regard to your preferred business practices is important. Local employees who are aware of your internal policies may not always understand how to implement them or understand why they exist. This is especially true in China (for example only), where it is possible that some of your employees may never have been exposed to foreign management or foreign companies. They may continue to do business on the basis of gentlemen's agreements and in a non-standard manner that exposes you to risk.
- Do not assume that local employees understand your employment manuals or other policies, which should also be available in key languages where your company operates. Always conduct training

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programs for all levels of staff, including local general managers, business partners and senior executives. Deliver your trainings (face-to-face or online) using the audience language as much as possible. For example, a training in English for the benefit of your Chinese staff will not be as effective as a training in Mandarin (the same is true for back-up slides).

- When creating important policies — the violation of which can have a huge financial pain (FCPA, UK Bribery Act, competition law, antitrust issues) — circulating these policies and conducting training programs is not enough to ensure people really understand. Create mini quizzes that are sent to all staff, along with a confirmation upon completion. This is the only way to really ensure that people have not only read the policy but have also been forced to actively think about and consider real-life

scenarios in practice. Last but not least, face-to-face trainings are by far more effective than online trainings, as they enable people to speak up and share their experiences and specific dilemmas.

- Don't assume that because local government officials, officers or people are friendly that they will support you or your business. Being friendly is far from being supportive. Local protectionism is also alive and well in Asia (but, of course, not specific to Asia). Do not be lulled into thinking your business or staff is somehow immune from this reality.
- Always ensure you have in-house regional counsel with experience in dispute resolution. This does not mean litigation experience. The keyword here is “resolution” and not litigation.
- Always have a good corporate social policy and programs to help disadvantaged people in your key countries of operations. In many Asian nations, the concept of charity or social activities by local companies may be lacking (although one could list quite a few companies in each country that are well-known for their CSR activities). If you are seen by the local public to genuinely care about your host

nation and its people, you will be rewarded with increased sales and a good public image.

- Corruption is widespread throughout Asia. However, there are gray areas that you need to understand with regard to each location. For example, while it is widely thought that corruption is rampant in China, this is not your sole concern. Your larger concern is with the “guanxi” system. Guanxi is a direct personal relationship with a person or a friend of that person. Guanxi, both historically and today, does play a part in influencing governmental officials, judges and most of society to either act or refrain from acting (as the case may be) based upon that personal relationship. The label “corruption” is not entirely accurate in this context. For the sake of clarity, guanxi may have positive or negative bearings depending on the circumstances in which one person is leveraging his network, what is the goal (legitimate or not), which favours are sought, etc. Please see the article in ACC's March 2013 *Asian Briefings* titled, “Clarity on Guanxi, Cultural and Media Issues in China.”
- Creative structuring of a business or acquisition may look great on paper. However, no matter how beautifully structured your deal is, it is doomed to fail if you do not have trusted employees and management in your business with the right to influence and control decisions on the ground. We would rather have an inefficient corporate structure but great board and management control of operations.
- Competition is fierce in Asia. Do not underestimate the power of existing players to take unexpected action in order to force you out of the market or to make your business more challenging (e.g., artificial manipulation of the media and online discussion forums,

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customs inspections, regulatory inspections, visits from tax officials, compromising your employees, industrial espionage, etc.). Also, don't assume that your competition is legitimate. It is also possible that some of your employees or their friends/relatives may be invested in, control or manage your competition.

- Always have in place a good government relationship team that is regularly reaching out to key government players in your industry. However, do not assume that government lobbying alone will result in the alleviation of any of your legal troubles in any Asian country.
- Always have in place a good media management team that is well versed and prepared to assist in the event your company finds itself

in the press or the subject of local social media criticism.

- When in China, if a local government offers your business tax or other incentives, never assume that these are ironclad. Frequently, in second-, third- and fourth-tier cities, local officials will grant promises and incentives that are not supported by PRC laws or regulations at central level. If the local officials are shuffled or certain inspections take place, you will not be able to rely upon concessions granted which were not supported by national policies at the time granted.

While our listing of advice and considerations may appear daunting, do not fret. Asia is an amazingly exciting place to do business, and even though

fraught with hidden risks, those risks are relatively containable with a little forethought, planning and management. Please do not hesitate to contact either of us if you have any further thoughts on this article. **ACC**



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