



203 China Business Update

Andrew Halper

Partner, Head of China Business Group
Eversheds

Susan M. Ponce

Vice President & Chief Counsel, HES International
Halliburton Law Department

Thomas L. Shillinglaw

Vice President & Assistant General Counsel
Corning Incorporated

John C. Tecklenburg II

General Counsel-Asia Pacific
Alcoa (China) Investment Company Ltd.

Faculty Biographies

Andrew Halper

Andrew Halper leads the Eversheds China Business Group and is a partner in the firm's corporate group. He advises British, European, and U.S. companies pursuing matters in China across a broad range of sectors, and also advises Chinese corporations on transactions outside of China. He divides his time between the UK and China.

Previously, Mr. Halper qualified as a lawyer in Canada and practiced as a barrister in Vancouver, when he joined Canada's diplomatic service. After a posting to Hong Kong, he was deputy head of the Canadian Embassy's Political Section. After, he returned to private practice as resident partner of a Canadian law firm's Beijing office. He acted for a wide range of corporate clients and also served as counsel to the Dutch Embassy in Beijing, advising on commercial and political matters. Later he moved to London and qualified as an English solicitor.

In addition to full-time practice, Mr. Halper remains active in academic matters. He was visiting lecturer in Chinese law at the University of London-SOAS. He was appointed affiliated lecturer in Chinese law at the University of Cambridge. He has also lectured on Chinese law at the University of Oxford.

Mr. Halper was educated at the University of British Columbia, earning a B.A. and an L.L.B. in law, and at the Université de Paris-I (Sorbonne), where he earned a D.E.A. in comparative law.

Susan M. Ponce

Susan M. Ponce is currently vice president and chief counsel, ESG international for Halliburton Company, a Fortune 500 oilfield services and engineering/construction company. She is in charge of the ESG's international legal function, leading 20 lawyers in 14 offices worldwide. Ms. Ponce's current practice includes counseling on a wide variety of complex commercial and corporate matters and overseeing the delivery of legal services to operations in over 100 countries. Her practice includes commercial contract negotiation, training, policy development, interpretation and implementation, and corporate governance and regulatory compliance, particularly relating to Sarbanes-Oxley issues.

Prior to taking on her current role Ms. Ponce spent 10 years developing and leading the company's environmental law practice group, where she directed the delivery of environmental legal services to the company, including transactional, legislative, and regulatory counseling on a wide variety of environmental, health, and safety issues, including the company's global HSE audit program.

Ms. Ponce is past chair of the ABA section of energy, environment and resources' ethics committee. Past ABA activities include chairing the Tort Insurance Practice Section's (TIPS) energy resources law committee and serving on the 'TIPS' women and minority involvement and corporate counsel committees. She also recently joined ACC.

Ms. Ponce received an undergraduate degree from the University of Texas at Arlington and is a honors graduate of University of Texas School of Law. She received her LL.M. with merit from the University of London.

Thomas L. Shillinglaw

Thomas L. Shillinglaw is vice president and assistant general counsel of Corning Incorporated in Corning, New York. He joined Corning as division counsel and was later appointed to division vice president and assistant general counsel.

Before coming to Corning he was an attorney with Allis-Chalmers Corporation, as well as Allis-Chalmers' accredited USSR representative in Moscow for two years. Prior to that, he was an attorney with the Office of Legislative Counsel, U.S. House of Representatives.

He is on the American Arbitration Association roster of arbitrators and is on the list of arbitrators for both the Ethics Commission of the Russian Union of Industrialists and Entrepreneurs (Moscow) and the China International Economic and Trade Commission (Beijing). Mr. Shillinglaw is a former member of the boards of directors of the Fulbright Association, the Russian-American Chamber of Commerce, and the Rockwell Museum.

A graduate of Cornell College (Iowa), he studied for two years (on Fulbright and Ford Scholarships) at the Faculty of Law of the University of Belgrade and at the Yugoslav Constitutional Court. He received his master's degree in Russian and East European Studies at Stanford and is a graduate of Stanford Law School.

John C. Tecklenburg II

John C. Tecklenburg II is currently general counsel-alcoa asia-pacific, in the Alcoa (China) Investment Company Ltd., in Beijing, has been responsible for a wide range of legal services for Alcoa Inc.'s worldwide business units. His legal practice has centered on joint ventures and mergers and acquisitions, and international corporate and commercial matters, with a focus on China and Asia for the past 20 years. He serves on the board of more than a dozen companies in the China. In addition to Beijing, he has lived in Lausanne, Switzerland where he served as chief regional counsel in Alcoa's European headquarters. He also has extensive experience in legal matters in Brazil and Russia.

Mr. Tecklenburg became active in the ACC when it was first established in Western, Pennsylvania, and is currently active in ACC activities in China.

Mr. Tecklenburg holds a J.D. in law from the University of Pittsburgh, School of Law, where he was book review editor of the school's law review and order of the coif. He has also attended the program on civil law of the Parker School of foreign and comparative law, Columbia University.



203: China Business Update

Monday October 17, 2:30-4:00 p.m.

Panelists:

Michael H. Chang, AGM, Business & Legal Affairs, Matsushita / Vivendi Universal Office
Andrew Halper, Partner, Head of China Business Group, Eversheds
Susan M. Ponce, Vice President & Chief Counsel, Halliburton Company
Thomas L. Shillinglaw, VP & Assistant General Counsel, Corning Incorporated
John C. Tecklenburg II, General Counsel-Asia Pacific, Alcoa Investment Co. Ltd.

ACC's 2005 Annual Meeting: Legal Underdog to Corporate
Superhero—Using Compliance for a Competitive Advantage

October 17-19, Marriott
Wardman Park Hotel



203: China Update

IPR Enforcement - Combatting Counterfeit and Piracy: A Case Study

Michael Chang
Matsushita Electric Industrial Co. Ltd.
The NBC-Universal Building
10 Universal City Plaza, T-100
Universal City, CA 91068

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Summary of Presentation

- About Matsushita Electric Industrial Co. Ltd.
- About my background
- Combatting Counterfeit and Piracy – A Case Study
- Targeted activities:
 - A/V Content Replication
 - A/V Content Transportation
 - A/V Content Distribution
- The Legal Framework
- Lessons



- Matsushita Electronic Industrial Co. Ltd. (NYSE Symbol: MC)
 - Owner of Panasonic, National, Technics, Japan Victor Company (JVC) and other worldwide consumer electronics brands;
 - Shares listed on the Tokyo, Osaka, Nagoya, New York, Euronext Amsterdam, and Frankfurt stock exchanges;
 - Consolidated group sales for the first quarter ending June 30, 2005: 2,048.2 billion yen (U.S.\$18.62 billion);
 - 334,752 employees worldwide as of March 2005;
 - Multiple manufacturing facilities in China;
 - Minority shareholder of select Universal Studios entertainment-related assets.
- Panasonic Corporation of China awarded top twenty of "The Most Influential Multinationals in China 2004" in 2005, based on a combination of strong products, corporate image, crisis management and marketing competitiveness.



Personal Background

- Native of Shanghai; raised in Greater China
- Lived and worked in Asia during last 8 years
- Mother tongue is Mandarin Chinese; learned English as a second language and Japanese as a third (speak, read and write)
- In Greater China region, bought and sold multiple internet-related assets; did deals, most recently as...
- Managing Director/Corporate Counsel for North Pacific Region at **FedEx**



The Challenge

"If you do business in China, you should assume that your designs and products can and will be copied."

-Patrick Powers, US-China Business Council.



Combatting Counterfeit and Piracy: A Case Study

- Piracy is a profitable business; more profitable than narcotics.
- Despite recent progress, piracy of audio/video works is a major problem in China. Piracy rate of movies in China remained at around 95% at the end of 2004, with losses to Motion Picture Association (MPA) member companies estimated at \$280 million.
- Pirated versions of foreign and Chinese films are nearly always widely available in China on DVD or VCD even before their theatrical release dates there.



Three Types of Targeted Activities

- The Duplication of AV Content
- The Transportation of AV Content through physical channels
- The Distribution of AV Content through online channels

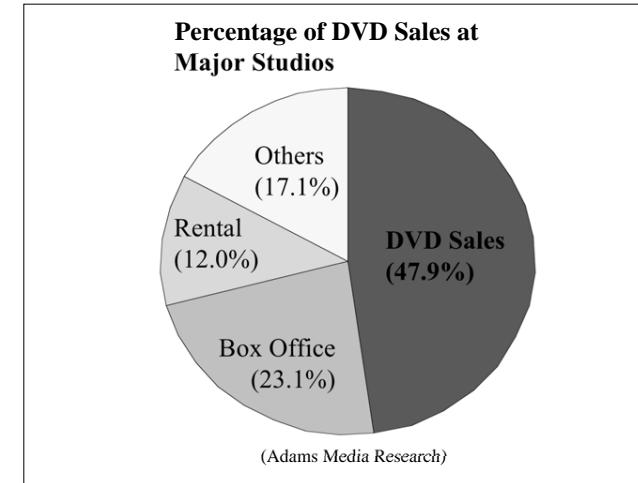


Content Duplication

From 1994 to 2004, nine CD duplicating enterprises had their duplication business licenses revoked, and 200 illegal CD production lines were discovered.



DVD is Big Business





Content Transportation

- In September 1994, China began to carry out border protection of IPR.
- From 1996 to 2004, the Chinese customs ferreted out 4,361 cases of right infringement in import and export, which involved 630 million yuan.
- Since 2000, the number of cases discovered by the customs has increased by 30 percent annually.



Content Transportation

- Through the cooperation of multinational carriers such as FedEx, Chinese customs houses have established a complete system of IPR-related law enforcement measures, which includes:
 - Examination of customs declaration bills and certificates,
 - Inspection of imported and exported goods,
 - Detention and investigation of right-infringing goods,
 - Punishment of illegal importers and exporters, and
 - Disposal of right-infringing goods.

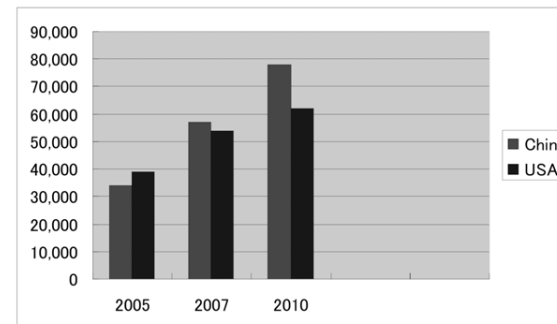


Content Distribution Thru Internet Downloading

- Piracy by internet is compelling (and growing). More than 10 million people live in Shanghai alone, and more than 7 million in Beijing. The U.S. population is a little more than 300 million. Over 100 million Internet users (broadband + lowband) in China, according to a recent survey by local authorities.
- Close to 80 percent of all internet users have downloaded songs from the Web. Market watchers estimate there are around 7,200 music download portals in the country, but only a fraction of them are legitimate sites with the necessary copyright licenses.



Comparison of Broadband Users



| | China | USA |
|------|--------|--------|
| 2005 | 34,000 | 39,000 |
| 2007 | 57,000 | 54,000 |
| 2010 | 78,000 | 62,000 |



Content Distribution Thru Internet Downloading

- In 2005, the USTR elevated China onto the Priority Watch List.
- This marks the first time that China has been elevated to the Priority Watch List on the basis of WTO TRIPS or JCCT-related concerns.
- The U.S. will also maintain Section 306 monitoring of China's implementation of its 1992 and 1995 bilateral agreements with the United States (including additional commitments made in 1996).

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The Legal Framework

- In 2001, around the time when China was admitted into the World Trade Organization (WTO), the country made comprehensive revisions to the laws and regulations regarding IPR protection and their legal interpretation.
- The revisions brought the laws and regulations into conformity with the WTO's "Agreement on Trade-related Aspects of Intellectual Property Rights" and other international rules on IPR protection.
- In recent years, China has made revisions to the "Copyright Law." It has promulgated a number of regulations with legal effect, such as "Regulations on the Protection of Computer Software" and "Regulations on the Administration of Audio and Video Products," which was promulgated in 1994 and amended in 2001.
- The promulgation and implementation of these legal documents have laid a solid legal basis for the protection of audio/video works.

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The Legal Framework

- In recent years, China has gradually established a whole set of systems for the management of audio and video products, each met with mixed success:
 - An IPR protection system,
 - Audio and video business license system,
 - Exclusive publication right system,
 - Duplication authorization system,
 - Awards for informants,
 - Registration and filing of audio and video products in storehouses,
 - Inspection of, report on and keeping the public informed of illegal audio and video products.



The Legal Framework

- Effective May 30, 2005, new regulations on online copyright protection have been issued by the National Copyright Administration and the Ministry for the Information Industry.
- Prior to these regulations, online copyright received protection through the Copyright Law and its implementing regulations.
- However, these dedicated regulations serve to enhance considerably online copyright protection by
 - Placing the onus of protection on ISPs, requiring them to monitor and appraise the content of website material posted by their ICP customers, and
 - Introducing strict penalties for ISPs that fail to satisfy this monitoring standard.



Difficulties with Implementation

- As the level of IPR awareness and enforcement varies considerably throughout China, ISPs will find that over-zealousness in observing the new regulations could see content providers fleeing to regions that are less inclined to take action.
- A vicious circle could be created where ISPs that derive sizeable revenue from copyright infringing websites, may be reluctant to take tough action that would result in the loss of such revenue.



Lessons

What lessons or best practices can be extracted from the recent experiences of audio/video works and manufacturers of audio/video equipment??



Lesson #1: Gov't Cooperation

- China's Ministry of Culture (MOC) and State Administration of Radio, Film and TV (SARFT) and the Motion Picture Association signed an agreement in July 05 implementing measures protecting movies from piracy before, during and immediately after theatrical release.
- On the eve of the Joint Committee on Commerce and Trade (JCCT) talks in Beijing this week, the MOC put forward the agreement based on an earlier proposal by the MPA, and posted on its website a statement that MOC enforcement agencies around China should make a priority of seizing specified pirated titles.
- The website notice was backed up by a decree distributed to the MOC's offices throughout the country to various govt. and commercial bodies.



Lesson #1: Gov't Cooperation

- Under the MPA agreement, every 3 months the MPA will submit to the MOC and SARFT a list of movies scheduled to be screened in China by its member companies.
- Remedies:
 - All home video products in the market before the official home video release date in China will be illegal and subject to seizure by authorities.
 - Criminal copyright infringements will be prosecuted.
 - Quarterly consultations conducted between MPA and the Chinese agencies on the agreement's effectiveness; additional consultations held on protection of titles not covered by the agreement.



Lesson #2: Technology-Based Content Protection Mechanisms

- Under an agreement signed in April 05, Universal Music will use Chinese firm R2G to track digital music sales in the mainland, as well as crack down on unauthorized Web sites that are offering its songs for downloads.
- Beijing-based R2G specializes in software tools that comb through major portals and search engines in China to uncover instances of copyright violations. The company also provides billing and accounting applications for licensed online music distributors to monitor download statistics and determine royalties payable to music labels.
 - R2G's antipiracy measures receives backing from government bodies like the Copyright Society of China and the Copyright Protection Center of China.
- As part of the deal, Universal will register a catalog of songs with R2G. These tracks will be monitored for piracy and infringing sites can be referred to Universal for possible legal action.

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Lesson #3: Public Awareness

- In 2004, China launched a national public awareness campaign as part of its JCCT commitment to educate the Chinese public on IPR protection. For example, the State Intellectual Property Office (SIPO) introduced a television program, "Intellectual Fortune," which is broadcast in 20 provinces nationwide.
- In April 2004, SIPO began publishing an English language insert in the China Daily English-language newspaper on intellectual property. China IPR trade journals also routinely report on specific efforts targeting students and industries.
- In February 2005, the National Copyright Administration hosted a nationally broadcast anti-piracy concert at Beijing Capital Stadium, with a television audience that was estimated by its sponsors at 500 million. It is too early to tell what the long-term implications of this campaign will be.

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7/05

In Summary

Unlike other more developed countries, enforcement and litigation are not the only, or the best, solution. Yet, consensus exists among audio/video rights holders that China's current IPR system relies too heavily on enforcement by administrative authorities and is non-deterrent.

Legal Issues Often Faced by Western Companies in China

- I've been working as a lawyer on Corning's China transactions since 1984 – but...
 - I do not speak Chinese; and
 - I most certainly don't consider myself an expert in the country or its laws

However, I do have some observations:

- Probably most important issue for succeeding in China is to insist on clarity of contracts
 - a contract is a contract; whether in China or in Topeka, Kansas
 - there is nothing special about China which should allow you to assume the preceding point is not required
 - contracts may take more time to negotiate in China
 - arbitration in Stockholm; make formal dispute resolution a little difficult/expensive (thus encourage direct resolution of disputes)
- China (with Russia) one of few countries where translation required. Very important to have Chinese translation done by a Chinese lawyer

Legal Issues Often Faced by Western Companies in China

- Unlike in 1980s, there are now many highly qualified Chinese business lawyers. In China (as elsewhere) I use the best local national lawyer I can locate (after a lot of due diligence). In this regard, I have worked with Hogan & Hartson in Beijing for over 10 years
- As is the case with Russia, a key in China for establishing a partially owned equity company is to find a local equity investor (and a general director of the company) -- both as part of the new entrepreneurial China...not an investor or general director tied to a state run apparatus. Ask yourself what the local investor can realistically do to help your equity company succeed
- Look for talent in your Chinese equity company that you can use worldwide
- Read the Economist's March 20, 2004 survey "Behind the Mask: A Survey of Business in China"

Legal Issues Often Faced by Western Companies in China

- Intellectual Property
 - We began to get Chinese patents in relevant products about 10 years ago, and the process is still moving forward – although slowly
 - We have not yet licensed a third party under any Chinese patents
 - Regarding know-how licenses, an ongoing concern of maintaining the confidentiality of the licensed know-how (both tangible and intangible) within the licensee Chinese company
 - you can get non-competes (if appropriately limited in time and geography)
 - Royalty rates acceptable in China have been typical for our license agreements worldwide
 - Trademarks
 - Need to register
 - Need to develop clear policy of how to address infringers in a cost effective manner

Legal Issues Often Faced by Western Companies in China

- U.S. Export Control
 - For telecommunications (and other high tech) products this continues to be an issue with exports to China
 - need to protect against prohibited re-exports (Iran, North Korea, Cuba, Sudan, Libya, Iraq and Syria)
 - need to protect against diversion to military/nuclear uses within China
 - Deemed export control (in controlled technology related work areas)
 - hiring Chinese nationals outside of China
 - employing Chinese nationals within China
 - China Export Control
 - Primarily relating to military items

Legal Issues Often Faced by Western Companies in China

- U.S. Foreign Corrupt Practices Act
 - Ongoing oversight required both at the bribery level and at the accounting level
 - This (with export control and, in the near future, antitrust) are probably the three most important areas of ongoing legal oversight in China
- Chinese law
 - Official bribery: bribed party has a regulatory capacity
 - Commercial bribery: all parties are commercial entities
 - Quasi bribery: party with regulatory capacity is also acting in a commercial capacity

Legal Issues Often Faced by Western Companies in China

- Legal/Financial Oversight
 - Have local counsel/accountant perform periodic legal and accounting audits/due diligence investigations both for partially-owned entities and WFOEs (for example, annually for WFOEs and two times a year for partially-owned companies)
 - appropriate follow-up from audits
 - above process not only enhances compliance with parent company procedures within China, but helps with the company's compliance with those U.S. regulations which include a U.S. company's controlled offshore subsidiaries

Legal Issues Often Faced by Western Companies in China

- A. Antidumping
 - (i) Petition by Chinese Companies in China
 - China in WTO (lower duties and as a result possibly more antidumping claims)
 - Increased usage by Chinese companies (many of which are controlled state-owned enterprises, which raises separate WTO compliance issues)
 - (ii) Petition by U.S. Companies in U.S.
- B. Antitrust – New Chinese Proposed Statute
 - Similar in structure to U.S. and EU law....U.S. Sherman 1 and 2; EU Articles 81 and 82; i.e. agreement in constraint of trade; abuse of dominant position
 - Other, loosely drafted sections could be cause of concern

Legal Issues Often Faced by Western Companies in China

- Importing into China
 - Sales to Hong Kong, special economic zones for subsequent resale into China, make sure that initial sale is at full tariff duty for China, so that subsequent sale from HK/SEZ cannot be construed as an attempt to avoid full Chinese customs duty for export sale to end user
 - Equity joint ventures can only sell what they make, they cannot be used as sales conduits

Legal Issues Often Faced by Western Companies in China

- Foreign Exchange Regulation
 - SAFE

CCA 2005 #610
 Before the Ink is Dry
 Summary of "The Deal" for Client

Technology Transaction Summary
[Client] / [Vendor]

Prepared by _____

- History:** [Product name(s) /internal user(s) / license type / justification / purpose, etc.]
- Legal Entities:** [Exact corporate names, not market group or other informal moniker]
- Contract Title:** Master Hardware, Software and Maintenance Agreement
- Contract Term:** September 1, 2005 – August 31, 2008 (3 year term). Automatic renewal for consecutive one-year terms unless terminated with or without cause.
- Discounts:** **30%** off of list for ___[product(s)]___
20% off of [then current, other methodology] for Maintenance
20% discount off of list for Professional Services (**Discount Expires 8/31/06**)

Terms and Conditions:

All [Client] affiliates may purchase products from [Vendor] under the terms and conditions of this Agreement, including negotiated price discounts.

Delivery and installation are included.

[Client] is entitled to relocate hardware products from one site to another site. [Client] is entitled to transfer a software license from one server to another identical server at no charge, provided notice is given to [Vendor].

Payment term is Net 40 from the date of an undisputed invoice.

Warranties: Period is 90 days from date of installation. Coverage includes, Performs according to Specifications, Software Data Capabilities, Software Free of Disabling Codes, Software Updates and Enhancements, Services, and ISO 9002. Infringement is covered by [Client's] standard indemnification terms.

Maintenance includes software updates and enhancements, break-fix support, and for an additional fee, "SAM+" support. Support is facilitated via telephone, email, the Web and on-site personnel.

[Client] and [Vendor] are mutually protected by confidentiality, indemnification, and limitation of liability terms and conditions.

External Contact:

[Vendor]
 Account Executive
 [Name]
 000-000-0000
name@vendor.com

Internal Contact:

[Client]
 [Name]
 [Department]
 111-111-1111
name@client.com

PERSONAL COMMITMENT REGARDING CONFIDENTIALITY
 and
 COMMITMENT TO AVOID COMPETITIVE ACTIVITIES

This Agreement is made by and between **First MI Last**, an individual whose present home address is **Street, City, State, ZIP** ("Individual") and [My Company], a Minnesota corporation having its principal place of business at [Street/City/State/Zip] ("MyCo"). MyCo and [Professional Services Company] ("PSS") are parties to the Technology Consulting Services Agreement dated [Month, dd, yyyy] (the "Contract"), the relevant portions of which appear as Attachment 1. Certain of the Services and Deliverables (each as defined in the Contract) will be provided by Individual. In recognition of MyCo's right and need to protect Confidential Information (as defined below), and in consideration of MyCo's contract with PSS and PSS's relationship with Individual, and for other good and valuable consideration, Individual, intending to be legally bound, hereby agrees as follows:

NO EMPLOYER-EMPLOYEE RELATIONSHIP

1. Individual is an employee or subcontractor of PSS. Individual is not an agent of MyCo and has no authority to bind MyCo. **INDIVIDUAL IS NOT AN EMPLOYEE OF MYCO AND IS NOT ELIGIBLE TO PARTICIPATE IN ANY EMPLOYEE BENEFIT PLAN SPONSORED BY MYCO AS A RESULT OF SERVICES PROVIDED TO MYCO.**

NO CONFLICT

2. Individual hereby represents and warrants to MyCo that no other party has or will have exclusive rights to Individual's personal services and that by fulfilling the terms of this Agreement, Individual is not and will not be (i) compromising any obligation, right or trust relationship between any other party and Individual or (ii) creating a conflict of interest, or any possibility thereof, for Individual or for MyCo.

INTELLECTUAL PROPERTY

3. Individual consents to be personally bound by the provisions of Section 3 (Ownership of the Deliverables) of the Contract and Individual promises to take, or assist others in taking, all steps necessary to satisfy the requirements thereof.

PROTECTION OF CONFIDENTIAL INFORMATION

4. "Confidential Information," means trade secrets and proprietary information about MyCo's business that Individual learns or develops during the course of providing services to MyCo or in connection with Individual's relationship with PSS, including, but not limited to, (i) matters of a technical nature such as processes, devices, techniques, data, formulae, inventions (whether or not patentable), specifications and characteristics of current products or products being developed, and research subjects, methods and results; (ii) matters of a business nature such as policies, procedures, standards, manuals, reports and information about production, costs, margins, pricing policies, markets, sales, suppliers, customers, product plans and marketing plans or strategies; (iii) computer programs, software, databases and documentation; (iv) information of third parties for which MyCo is under an obligation of secrecy and (v) any other information that MyCo does not generally disclose to the public. Confidential Information may be disclosed visually, orally, in writing or electronically. No special stamping, marking or notation designating the proprietary nature of Confidential Information shall be required.

Individual shall not be liable for disclosure or use of any Confidential Information:

- (a) If it was in the public domain at the time it was disclosed or falls within the public domain, except through a breach of this Agreement or a breach of the Contract; or
- (b) If it was known to Individual and its value appreciated at the time of disclosure; or
- (c) If it was disclosed with the written approval of MyCo; or

- (d) If it has been disclosed to Individual free of any obligation of confidentiality by a third party who has a right to disclose such Confidential Information; or
- (e) If it was independently developed by Individual without the benefit of Confidential Information; or
- (f) If it is required to be disclosed by judicial order notwithstanding the good faith efforts of the parties to prevent such disclosure, but only to the extent required by such order;

provided, however, that if only a portion of any Confidential Information falls within any of these exceptions, the remainder shall continue to be subject to this Agreement.

5. Except as required in its duties to MyCo, Individual will never, either during or after the term of this Agreement, use MyCo's Confidential Information to benefit her/himself or any other person. All rights to Confidential Information disclosed pursuant to this Agreement are reserved by MyCo. No license or conveyance of any rights is granted or implied by the disclosure of Confidential Information except as provided herein.

6. Individual shall use not less than reasonable means to prevent the disclosure and protect the confidentiality of Confidential Information. Individual shall limit dissemination of Confidential Information on a strict "need to know" basis in furtherance of PSS' s obligations to MyCo under the Contract. Individual will immediately notify MyCo upon discovery of any unauthorized use or disclosure of Confidential Information and will cooperate in any reasonable way to help regain possession and prevent further unauthorized use.

7. Individual agrees to return, promptly upon MyCo's request, all Confidential Information and destroy any electronic files containing same. In the event Individual has included Confidential Information in any of its own internally prepared documents or electronic files, Individual shall not be obligated to deliver those documents to MyCo or destroy those files, but Individual shall collect and segregate (or destroy) all such files from its other files and shall certify in writing that such internal documents: (i) have been collected and segregated or destroyed; (ii) will not be duplicated; and (iii) will be maintained confidential in accordance with this Agreement.

COMPETITIVE ACTIVITIES

8. Individual agrees that during Individual's assignment with MyCo and for a period of 24 full months thereafter Individual will not alone, or in any capacity with any other person or entity:

- (i) directly or indirectly engage in (1) the design, manufacture, sale and/or distribution of [Describe MyCo's, business lines] or (2) any future business under development at MyCo during Individual's assignment;
- (ii) in any way interfere with any of MyCo's relationships with any of its current or potential suppliers, customers or channels of distribution, or;
- (iii) solicit or assist others in soliciting the employment of any of MyCo's then employees on (iii) behalf of any other entity.

GENERAL PROVISIONS

9. This Agreement is made in and shall be governed by the laws of the state of Minnesota.

10. If, during the term of the Contract or at any time thereafter, MyCo becomes involved in any actual or anticipated litigation, arbitration/mediation, or in any administrative proceeding that requires the assistance of Individual, Individual shall support MyCo in such matter and, at MyCo's cost, lend whatever assistance MyCo requests. If Individual is no longer working on MyCo's behalf, MyCo shall compensate Individual according to Individual's then-current rates.

11. This Agreement shall be to the benefit of and be binding upon MyCo and its respective successors and assigns, and upon Individual, and upon any other entity which engages Individual during the period described in Section 8 above.

12. Individual understands that if it fails to fulfill its obligations under this Agreement, the damage to MyCo would be very difficult to determine and therefore consents to the specific enforcement of this Agreement by MyCo

through an injunction or restraining order issued by an appropriate court, in addition to any other available rights or remedies.

13. This Agreement (i) constitutes the entire understanding between Individual and MyCo with respect to the subject matter hereof and (ii) can be amended only by a written document executed by both of them.

IN WITNESS WHEREOF, the parties hereto have signed this Agreement at _____, Minnesota, intending it to be effective as of [Month, dd, yyyy].

MYCO CORPORATION

INDIVIDUAL

By: _____
 [Type Name]
 [Title]

NAME
 An Individual

Attachment 1: - Technology Consulting Services Agreement dated [Month, dd, yyyy]

CCA Members: Questions? Comments? Please let me know j.thomas@thomson.com 651-687-3773

CCA 2005 #610
Before the Ink is Dry
Escrow, SOWs & Acceptance

CCA 2005 #610
Before the Ink is Dry
Escrow, SOWs & Acceptance

THE POST-SIGNING PHASE

Note to Counsel. Typically, you will now have several separate contracts (be sure the signed originals are delivered to you for safekeeping in the vault):

- Software License Agreement
- Consulting Services / Software Development Agreement
- Software (Hardware) Maintenance and Support Agreement
- Source Code Escrow Agreement

Unless the product is truly off-the-shelf, with no need for configuration or customization services, each of these documents will require some level of follow-up. The following is a "starting-point" draft you can customize to get the message to the project team.

A. Source Code Escrow. Confirm that the Escrow Agreement itself protects you in the manner agreed to by Licensor in the License. See that the deposit is made ASAP. Establish a procedure for catching subsequent releases and new versions.

1. Although the escrow requirements must always be spelled out in the License Agreement, the Escrow Agreement itself is often not signed at the same time. In this case, quickly obtain a copy of the proposed Escrow Agreement and have legal counsel review it to make certain that it meets each of the requirements listed in the License. Any discrepancies need to be resolved on an ASAP basis.
2. Once the Escrow Agreement meets all the requirements stated in the License, it must be signed by each party (generally 3 -Licensor, Escrow Agent and Licensee). Our signed original must be filed with the other signed agreements in the vault.
3. Immediately after signing, the source code and full documentation sufficient for operating, maintaining and enhancing the source code must be deposited with the Escrow Agent.
4. Be certain that the initial deposit is verified as required and the results documented. A signed authentication of the results will be kept with the other original documents in the vault.
5. Be sure that any significant "Work Product," together with related Documentation, is periodically added to the escrow. The frequency of such interim deposits will depend on the circumstances. It is not always wise to wait until the "final" version is completed.
6. Responsibility must also be assigned for monitoring release of new versions, upgrades, enhancements and so forth. This responsibility will include following through to be sure the deposited materials including all documentation are kept up to date.
7. Other Escrow issues that should be clearly addressed in the License include permissible use and waiver of the no-hire commitment following release of the source code.

B. Statements of Work. At the time the License Agreement and Consulting / Software Development contracts are signed, it is often simply not possible to define the actual "Deliverables" in sufficient detail to be meaningful. In such cases, a "Statement of Work" is usually the vehicle used to identify the specific Services and related Deliverables. Statements of Work are contracts so give them the attention they deserve.

Each SOW must be in place before the work starts. Do not try to get too much into one SOW. Group the tasks and deliverables intuitively. Statements of Work should, at a minimum, cover:

- The specific "Services" being provided by the vendor
- Identify the project manager(s) and who will be doing the work by name and/or skill level
- Performance requirements, functionality, and other "specifications" which the product must meet in order to qualify as a "Deliverable"
- The completion schedule, including any action required on Client's part in order for vendor to meet the schedule
- The cost and method of determining total cost
- Any other details appropriate under the circumstances.

Remember, each Statement of Work must be reviewed by the Legal Department to be certain it is consistent with the License Agreement. We often find terms in the SOW which would have had the effect of "giving back" important rights that we fought for in the License.

C. Acceptance. The step-by-step acceptance process, the testing protocol, required results, correction procedures, right to retest, and remedies need to be defined in the Software License. The payment schedule is often tied to acceptance events.

- Where substantial programming services are being provided, it is often helpful to approach the acceptance process as a number of stages or phases so that problems can be identified and addressed at the appropriate time.
- Failure to insist on strict compliance with the Acceptance Test section of the License will probably result in ending up with less than we bargained (and paid) for.
- Do not let "Acceptance by Default" happen to you.

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ACCEPTANCE TESTING

Sample for RFP/RFQ:

Following successful installation of the Software at the location requested by ABC, ABC shall have an agreed number of days to test the Software to determine whether it operates in all material respects according to all applicable Specifications

X.1 ABC will promptly notify Licensor of any failure of the Software to perform according to the Specifications discovered by ABC during the testing period. If ABC does not notify Licensor within the agreed period of any such failure, ABC will be considered to have accepted the Software, whereupon the warranty period shall start.

X.2 If ABC does notify Licensor during the testing period of any failure of the Software to perform according to the Specifications, Licensor shall, as soon as practicable, modify, repair, adjust or replace the Software to correct the failure or deficiency and will resubmit the Software to ABC for such further testing as ABC, in its sole judgment, deems necessary. If the Software fails to perform according to the Specifications on any retesting, ABC may, at its sole option, terminate the license and receive a full refund of all amounts paid with respect to the Software, including any consulting or prepaid maintenance fees.

Sample for License:

X.1 Acceptance Test. Upon successful Software installation in Licensee's production environment and at Licensee's option, Licensee shall commence an acceptance test for the purpose of determining whether the Software performs in conformance with Licensee's requirements [alternative: performs as warranted in Section Y] ("Acceptance Test"). The Acceptance Test will last for 30 consecutive days unless otherwise agreed. During the Acceptance Test period, Licensee is entitled to Use the Software as it deems appropriate, including Use of the Software for commercial purposes; Licensee's Use of the Software for commercial purposes during the Acceptance Test will not constitute acceptance of the Software.

X.2 Acceptance. If the Software performs in conformance with Licensee's requirements [alternative: performs as warranted in Section Y] during the Acceptance Test, Licensee shall accept the Software by providing Licensor with a written certificate of acceptance, similar in form and substance to Exhibit A. Licensee's determination as to whether or not the Software meets Licensee's requirements will be made in Licensee's sole discretion.

X.3 Acceptance Test Failure. If the Software fails to meet Licensee's requirements [alternative] during the Acceptance Test, Licensee is entitled to:

- (a) agree with Licensor to extend the Acceptance Test for a specified period of time in order to enable Licensor to correct the nonconformity;

- (b) permit Licensor to replace the Software with substitute software that, in Licensee's judgment, is functionally equivalent or superior to the replaced Software;

- (c) cancel the applicable Order; or

- (d) elect to retain the Software in its non-conforming condition, subject to the parties' agreement on a price that fairly reflects the Software condition.

If Licensee elects option (a), and if, upon retesting, the Software continues to fail to perform in conformance with Licensee's requirements [/as warranted], Licensee is entitled to exercise any of the above four options.

If Licensee elects option (b), the Acceptance Test process will start anew.

If Licensee elects option (c), Licensee may also cancel, without incurring any liability to Licensor, any outstanding Orders for similar software and, in addition, may return to Licensor previously accepted software that cannot be utilized as intended because of the absence of the canceled Software. Upon cancellation, Licensor shall promptly refund to Licensee all amounts paid by Licensee related to the Software, including, not by way of limitation, fees and costs for licenses, implementation, professional services, maintenance and training.

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EXHIBIT A
To the
Master Hardware, Software and Maintenance Agreement
Dated Month, day, year, by and between
[Licensor]
and
[Licensee] (“Agreement”)

CERTIFICATE OF PRODUCT ACCEPTANCE

[Capitalized terms not defined herein have the meanings ascribed to them in the Agreement]

Schedule/Order No. _____

Acceptance Date: _____

LICENSEE certifies that the Product(s) provided by Licensor and identified below has/have passed the Acceptance Test performed as provided in the Agreement. LICENSEE therefore accepts the Product(s).

[Identify Product or portion thereof which is accepted]

LICENSEE

By: _____
[Type Name]
[Official Capacity]

Date: _____

SAMPLE WARRANTY PROVISIONS

7. Performance Warranties and Remedies

7.1 Software Performance and Media Warranties. Licensor warrants that, for a period of one (1) year after the Software is first used in ABC’s operating environment, the Software will meet or exceed each Specification which ABC, in its sole discretion, deems to be material to its operations. Licensor also warrants that the media on which the Software is recorded will be free from defects in materials and workmanship under normal use and service so long as ABC is receiving support from Licensor.

7.2 Remedies. In the event that ABC notifies Licensor of any failure of the Software to perform according to the foregoing Software performance warranty within the warranty period, Licensor will use its best commercially-reasonable efforts, at its expense, to correct the deficiency. In the event Licensor is unable to correct the deficiency within thirty (30) days, ABC may, at its option, terminate the license and receive from Licensor a full refund of all amounts paid with respect to the Software.

8. Documentation Warranty. Licensor warrants that all Documentation will conform in all respects to generally-accepted industry “best practices.” Licensor is obligated to assure that at all times, ABC has the current version of the Documentation.

9. Licensor’s Warranties.

9.1 Authority Warranty. Licensor warrants it is a validly organized business entity with authority to enter into this Agreement. Licensor warrants it has the right to perform all its obligations and grant all the rights contained in this Agreement.

9.2 Third Party Rights Warranty. Licensor warrants the Work Product is free of all liens, claims, encumbrances, and other restrictions and does not violate any rights of any non-contracting party, including any patent, copyright, trade secret, trademark, or other proprietary rights.

9.3 Open Source Warranty. Licensor warrants that no Work Product will contain any Open Source. Open Source means any software code that contains or is derived in any manner (in whole or in part) from, any software that is distributed as free software, open source software, shareware (e.g. Linux), or similar licensing or distribution models. Open Source includes, but is not limited to, software licensed or distributed under any of the following licenses or distribution models, or licenses or distribution models similar to any of the following: (i) GNU’s General Public License (GPL) or Lesser/Library GPL (LGPL), (ii) the Artistic License (e.g. PERL), (iii) the Mozilla Public License(s), (iv) the Netscape Public License, (v) the Berkeley software design (BSD) license including Free BSD or BSD-style license, (vi) the Sun Community Source License (SCSL), (vii) an Open Source Foundation License (e.g., CDE and Motif Unix user interfaces), and (viii) the Apache Server license.

CCA 2005 #610
Getting it Done -- Warranties

9.4 Work Product and Services Created Warranty. Licensor warrants the Work Product and Services delivered or rendered hereunder, are of the kind and quality designated by Licensor and are performed by qualified personnel in a professional, good, and workmanlike manner, consistent with the highest industry standards.

9.5 Other Express Warranty. Licensor warrants to Licensee (i) the Work Product operates in conformity with the Work Product specifications and documentation, (ii) the media upon which the Work Product are embodied is free from material defects for a period of 90 days from the delivery date of the Work Product to Licensee; and (iii) the Work Product contains no computer virus or other contaminant, including any codes, instructions, or devices capable of impairing operations or erasing or altering data or programs.

MASTER SERVICES AGREEMENT

This Agreement, dated as of October XX, 2005 ("Effective Date"), is between [exact business entity name], a [State in which organized and type of entity] with an office located at [Complete Address {STREET, not just PO Box}] ("Vendor"), and [Same information as for Vendor], on behalf of itself and its Affiliates (together, "Buyer"). "Affiliate" means any business entity that, from time to time, directly or indirectly controls, is controlled by, or is under common control with Buyer, or that is a successor (whether by change of name, dissolution, merger, consolidation, reorganization, sale or other disposition) to Buyer or its business and assets. The term "Vendor" includes, but is not limited to, all employees, agents, and contractors of Vendor.

In consideration of the foregoing and the mutual promises contained herein (together with any outstanding Statement of Work, the "Agreement") the parties agree as follows:

1. Scope of Work. Vendor will provide, for the exclusive use of Buyer and its Affiliates, and Buyer will purchase and pay for, consulting services and advice (the "Services") and materials (the "Deliverables") requested by Buyer from time to time. All such work shall be governed by the terms of this Agreement and delivered in accordance with agreed specifications to be set forth in a completed "Statement of Work" or "SOW," the agreed form of which is attached as Exhibit A.

1.1 **Agreed Changes.** Buyer may, from time to time, propose changes to the scope of an assignment. If Vendor agrees, the relevant Statement of Work must be amended to (i) specify the revised Services and/or Deliverables and (ii) document any resulting changes to the cost, timing, and/or resources required from Buyer.

1.2 **Personnel.** All Services shall be performed and Deliverables provided consistent with generally accepted "best practices" in the state of the art involved by appropriately qualified persons.

1.3 **Supremacy.** The terms appearing in the body of this Agreement shall control in the case of a conflict with any term appearing in a Statement of Work unless expressly stated to the contrary in the SOW (by reference to this Section 1.3 and to the specific Section(s) intended to be superseded). Any preprinted terms and conditions on a purchase order, quotation, acknowledgement, invoice, or similar document which conflict with the terms of this Agreement are deemed superseded by this Agreement.

1.4 **Services for an Affiliate.** Any Affiliate is entitled to purchase Services hereunder by entering into a Statement of Work with Vendor and for the purposes thereof is to be considered "Buyer" as that term is used in the body of this Agreement. In such event, the Affiliate agrees to be bound by the terms of this Agreement and is solely liable for all obligations relating to such SOW. Vendor agrees that Affiliates may not change the Agreement terms except as they specifically apply to the particular SOW.

2. Costs and Payment.

2.1 **Fees.** Buyer agrees to compensate Vendor for Services and Deliverables on a fixed fee, time and expenses, or other basis as specified in the relevant Statement of Work. If compensation is based on time spent, Vendor will be compensated only for the actual hours spent on work done directly for or on behalf of Buyer and at Buyer's request. Time spent traveling to or from a place of consultation is not billable.

2.2 **Expenses.** Subject to prior written approval, Buyer will reimburse Vendor for reasonable travel expenses (lowest available air fare, economy lodging, basic meals and mileage at the current IRS rate). Unless specifically so stated in the applicable Statement of Work, there is no separate charge for Deliverables.

2.3 **Invoicing and Payment.** Unless otherwise specified in a Statement of Work, Vendor will invoice Buyer monthly for Services performed during the immediately preceding month; Buyer's payment terms on undisputed invoices are 45 days, as measured from Buyer's receipt of invoice.

CCA 2005 #610
Getting it Done -- Services

CCA 2005 #610
Getting it Done -- Services

3. **Relationship of the Parties.**

3.1 **Independent Contractor.** Vendor is a nonexclusive independent contractor to Buyer. The employees and/or agents of Vendor are not employees of Buyer and are not eligible to participate in any benefits or privileges given or extended by Buyer, or by operation of law, to its employees. Vendor has no authority to assume or to create any obligation or responsibility, express or implied, on behalf of or in the name of Buyer, except as expressly so stated in a Statement of Work.

3.2 **Taxes.** Buyer will not withhold or pay any federal, state, or local income tax, or payroll/employment taxes of any kind, on behalf of Vendor or the staff of Vendor. Vendor is solely responsible for the payment of such taxes.

4. **Intellectual Property.**

4.1 **Ownership.** Buyer acknowledges that Vendor owns, holds, or may independently develop in the future, proprietary information and technology including licenses to pre-existing materials such as development tools, compilers, algorithms, files, specifications and documentation ("Vendor IP"). Buyer agrees that all Vendor IP is proprietary to Vendor and shall remain Vendor's exclusive property. To the extent that any Vendor IP is contained in a Deliverable, Vendor hereby grants Buyer a perpetual, irrevocable, royalty-free, non-exclusive, license to perform, display, use, reproduce, modify, and adapt such Vendor IP. To the extent that any Vendor IP is included in any Deliverable intended to be used in any Buyer products, Vendor grants Buyer a perpetual, irrevocable, royalty-free, non-exclusive, non-transferable license to use, display, reproduce, modify, sublicense, sell, and distribute the Vendor IP within such Buyer product without the express written consent of Vendor. Except for the rights granted to Buyer in this Agreement, Vendor reserves all right, title, and interest to the Vendor IP.

4.2 **Work Product.** Vendor shall promptly and fully disclose to Buyer all inventions and works of authorship, including improvements, discoveries, ideas, technologies, know-how, work product, concepts, material, disclosures, software programs, computer language, programming aids, documentation, or any other intellectual property, conceived, developed, originated, fixed or reduced to practice by Vendor in connection with any Services performed by it for Buyer ("Work Product"). Vendor agrees to assign to Buyer, its successors and assigns, and hereby does so assign, without further consideration, the entire right, title, and interest to all Work Product whether or not patentable or copyrightable. The parties intend that (i) Vendor shall perform all Services hereunder as a contractor, (ii) any Work Product arising from such Services shall be deemed to be a "work made for hire" pursuant to 17 U.S.C., Section 201(b) (the Copyright Act), and (iii) such Work Product shall be deemed to be a specially commissioned work. Whether the Work Product is considered to be a "work made for hire," the result of an employment to invent, or otherwise, all Work Product is the sole property of Buyer. Vendor agrees that Buyer owns all copyright, trademark, trade secret, patent and other intellectual property rights associated with any Work Product. Vendor shall execute and shall cause its staff to execute, all applications for patents and copyrights, domestic and foreign, assignments, and other papers necessary to secure and enforce all rights related to any Work Product. If Vendor or its staff are needed at any time to give testimony for Buyer in any proceeding affecting such proprietary rights, Vendor shall do so and shall cause its staff to do so and Buyer will pay Vendor at the rate set forth in the applicable Statement of Work (if this Agreement is in force) or at a rate to be mutually agreed (if this Agreement has been terminated or does not contain an hourly rate), plus reasonable expenses.

4.3 **Use.** Buyer may make copies of the Deliverables without Vendor's consent, provided that the Deliverables may be used by Buyer only in furtherance of its business purposes and not sold to an unrelated 3rd party.

5. **Confidentiality and Non-Competition.**

5.1 **Confidentiality.** Except as otherwise specified in this Section 5, the Mutual Proprietary Information Agreement entered into between the parties as of February 1, 2005 ("MPIA") governs this Agreement. Even though the MPIA may terminate between the parties, the MPIA terms will continue to govern the information disclosed to a party by the other party in connection with this Agreement. Vendor shall keep all Work Product confidential as if it were Buyer's Proprietary Information under the MPIA. Except as allowed by the licenses granted in this Agreement, Buyer shall keep all Vendor IP confidential as if it were Vendor's Proprietary Information under the MPIA. If the provisions of the MPIA conflict with this Agreement, the terms herein shall govern.

5.2 **Non-Competition.** At no time during the term of this Agreement and for a period of three years thereafter, shall Vendor develop, reproduce, promote, distribute, market, license or sell any product or service that competes, directly or indirectly, with the Services or Work Product provided to Buyer, nor shall Vendor enable any third party to compete directly or indirectly with Buyer.

6. **Warranties.** Vendor hereby represents and warrants to Buyer that:

- (a) no other party has or will have exclusive rights to its services and Vendor is not compromising and will not compromise any rights or trust relationships between any other party and Vendor, or create a conflict of interest, or any possibility thereof; for Vendor or for Buyer.
- (b) all Services and Deliverables will be provided in accordance with all applicable federal, state or local laws and executive orders;
- (c) each Deliverable will constitute original development by Vendor and/or Buyer's possession thereof and use as intended will not infringe any patent, copyright, trademark, trade secret or other intellectual property rights of any third party;
- (d) each Deliverable will conform to the requirements set forth in the body of this Agreement and, in addition to each specification appearing in the relevant Statement of Work and
- (e) unless specifically stated to the contrary in the relevant SOW, no Work Product will contain any "Open Source" software code that contains or is derived in any manner (in whole or in part) from, any software that is distributed as free software, open source software, shareware (e.g. Linux), or similar licensing or distribution models. Open Source includes, but is not limited to, software licensed or distributed under any of the following licenses or distribution models, or licenses or distribution models similar to any of the following: (i) GNU's General Public License (GPL) or Lesser/Library GPL (LGPL), (ii) the Artistic License (e.g. PERL), (iii) the Mozilla Public License(s), (iv) the Netscape Public License, (v) the Berkeley software design (BSD) license including Free BSD or BSD-style license, (vi) the Sun Community Source License (SCSL), (vii) an Open Source Foundation License (e.g., CDE and Motif Unix user interfaces), and (viii) the Apache Server license.

EXCEPT AS OTHERWISE SPECIFICALLY SET FORTH HEREIN, VENDOR MAKES NO OTHER WARRANTY, WHETHER EXPRESS, IMPLIED, ORAL OR WRITTEN AND, TO THE EXTENT APPLICABLE, SPECIFICALLY DISCLAIMS THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

7. **Indemnification and Insurance.**

7.1 **Indemnification.**

- (a) Except as otherwise provided herein, each party shall indemnify, defend and hold harmless the other from and against third party claims for (i) all injuries and damages to person or property, and (ii) all actions, claims, demands and damages, in each case caused or purported to have been caused by the negligent act or omission or willful misconduct of the indemnifying party.
- (b) Vendor shall indemnify and hold Buyer harmless against (i) all injuries and damages to person or property, and (ii) all actions, claims, demands and damages arising out of Vendor's violation or alleged violation of any patent, copyright or other proprietary rights of another as a result of Vendor's performance of this Agreement and not as a result of Buyer's use of the Deliverables in an unintended manner.
- (c) Vendor shall indemnify and hold Buyer harmless against all damages arising (i) from a breach by Vendor relating to any of its obligations set forth herein and (ii) from any claim relating to the subject matter of Section 3 (Relationship of the Parties).

7.2 **Insurance.** Unless otherwise agreed by Buyer in writing, Vendor shall, at all times and at its expense, procure and maintain, at a minimum, the types and amounts of insurance coverage described below, in each instance naming Buyer as an additional insured. Upon request, Vendor shall provide Buyer with evidence of such coverage and a statement from the carrier(s) certifying that the coverage is primary and will not participate with nor be excess over any valid and collectable insurance carried by, or program of

self-insurance maintained by, Buyer. Vendor shall notify Buyer of any material change in such insurance 30 days prior to such change.

| | |
|--|---|
| Workers Compensation | Statutory limits |
| Employers Liability | \$1,000,000 |
| Comprehensive General Liability including Products/Completed Operations coverage, and Broad Form Contractual | \$2,000,000 General aggregate \$1,000,000 Personal Injury \$1,000,000 Per event |
| Automobile Liability | \$1,000,000 per occurrence, bodily injury and property damage |
| Umbrella Excess Liability | \$5,000,000 per occurrence |
| Professional Liability | \$1,000,000 per claim |

9.3 Excusable Delay. Except for payment obligations, neither party shall be liable to the other for any delay or failure to perform if the delay or failure to perform is without the fault or negligence of the party claiming excusable delay and is due to causes beyond the control of the delaying party, including, but not limited to: acts of God, war, acts of government, fires, floods, epidemics, or quarantine restrictions. The party claiming excusable delay shall immediately inform the other party in writing. If the party claiming excusable delay is Vendor, and the delay is reasonably expected to prevent Vendor from providing Services to Buyer, then Buyer is entitled to terminate the applicable Statement of Work without liability to Vendor.

9.4 Non-Waiver. No course of dealing, course of performance, or failure of either party to strictly enforce any provision in the body of this Agreement or in a Statement of Work is to be construed as a waiver thereof.

9.5 Governing Law and Venue. This Agreement is governed by the laws of the State of Minnesota without application of principles of conflicts of law. The parties are subject to, and agree to submit to, the jurisdiction of any Minnesota court for the purposes of resolving any dispute or action relating to this Agreement. Except as otherwise limited herein, a party's rights and remedies are cumulative and in addition to any other remedies available at law or in equity.

9.6 Severability. Provisions of this Agreement shall be interpreted to be valid and enforceable under applicable law; provided, however, that if any provision is held invalid or unenforceable, such provision will be deemed deleted from the Agreement and replaced by a valid and enforceable provision which so far as possible achieves the parties' intent in agreeing to the original provision. The Agreement's remaining provisions will stay in effect.

9.7 Entire Agreement. This Agreement, each Statement of Work and the MPIA constitute the entire agreement between the parties and supersede all previous agreements, written or oral, between the parties with respect to the subject matter hereof. No modification, amendment, supplement to, or waiver of this Agreement is binding upon the parties unless made in writing and signed by authorized representatives of both parties.

NEITHER THE EXISTENCE OF NOR THE ASSENT BY VENDOR TO THE TYPES OR LIMITS OF INSURANCE CARRIED BY VENDOR SHALL BE DEEMED A WAIVER OR RELEASE OF VENDOR'S LIABILITY OR RESPONSIBILITIES UNDER THIS AGREEMENT.

8. Term and Termination.

8.1 Term. Unless earlier terminated according to its terms, this Agreement shall continue in effect through and including December 31, 2009.

8.2 Termination for Convenience. Buyer is not obligated to engage Vendor for any minimum hours and Vendor is not obligated to provide any Services or create any Deliverables in the absence of a signed Statement of Work. Accordingly, unless a SOW is then outstanding, either party may terminate this Agreement upon thirty days notice. In addition to the foregoing, and not by way of limitation, Buyer may terminate any outstanding SOW upon ten days notice, provided that Buyer will compensate Vendor for all work performed through the effective date of such notice.

8.3 Termination for Cause. In the event that either party breaches a material term of this Agreement or of a Statement of Work, and said breach is not cured within ten business days following receipt of written notice, the non-breaching party may, but is not required to, terminate this Agreement (which shall terminate all outstanding Statements of Work) or terminate one or more outstanding SOWs, upon written notice given at any time after the end of said ten-day period.

8.4 Effect. Expiration, or termination for any reason whatsoever, shall not affect any right or obligation arising prior thereto.

9. General.

9.1 Assignments. Except as provided otherwise in this Section 9.1, neither party shall subcontract, assign, or otherwise transfer any rights or delegate any obligation under this Agreement without the prior written consent of the other party, which will not be unreasonably withheld or delayed. Any purported assignment made without such consent is void. Notwithstanding the foregoing, Buyer may, upon notice, assign its rights and obligations under this Agreement, either in whole or in part, to an Affiliate. Upon acceptance of the assignment and the assumption of the duties and liabilities by the assignee, the assignor is released and discharged, to the extent of the assignment, from all further duties and liability under this Agreement except for assignor's obligations of confidentiality and any obligations or liabilities that arose prior to the assignment that are retained by the assignor. This Agreement is binding upon the parties' respective successors and permitted assigns.

9.2 Notice. All notices, designations, consents or other formal communications shall be given in writing and delivered in person, by courier or by mail to that party's address first set forth above (if to Buyer, ATTN: Technology Contracts), or to such other address as the party shall have previously provided. Notices will be effective on the date personally delivered or on the date on the receipt for such article, as the case may be.

By signing below, each party represents it has read this Agreement, understands it, and agrees to be bound by it as of the Effective Date.

[BUYER], for itself and on
Behalf of its Affiliates

[VENDOR]

By: _____
[Type Name]
[Title]

By: _____
[Type Name]
[Title]

Its: _____

Exhibit A: Agreed Form of Statement of Work

CCA Members: Questions? Comments? Please let me know i.thomas@thomson.com 651-687-3773

CCA 2005 #610
Getting it Done – Services

Vendor / Buyer Master Services Agreement
Exhibit A
Agreed form of SOW

CCA 2005 #610
Source Code Escrow

STATEMENT OF WORK No. X
Pursuant to the
Master Services Agreement
Dated August XX, 2005 (“Agreement”)

**N.B. The term “Source Code” must be defined broadly
and
The license grant must expressly include “Source Code”.**

[Capitalized terms not defined herein have the meanings ascribed to them in the Agreement.]

1. Services

[Describe the nature of the Services and subject matter in general terms.
If any of the Services are somewhat “unique,” get specific.]

2. Deliverables

[Describe in as much detail as is necessary to avoid future disagreement over whether or not the end product is what the Buyer expects to get for the price paid. Include as many qualitative or quantitative descriptors as possible.]

3. Materials/Information/Resources Required of the Buyer

[Detail *what* the Buyer must provide and *when*. These are any and all specific “conditions precedent” Buyer must satisfy in order for Vendor to fulfill its obligations.]

4. Work/Completion Schedule

[Document the agreed schedule/timeline in as much detail as is necessary to avoid misunderstanding. Include the Vendor-supplied items from Section 3 above. Use a “milestone” format where there is a series of Deliverables]

5. Fees: The fixed amount for this SOW is \$_____.

[If not fixed price, state the assumptions on which the cost estimate is based and the methodology (including any minimums/maximums) by which the final cost will be determined.]

6. Payment

[Where different than provided in Section 2.3, describe payment terms with precision (e.g., monthly as services are incurred vs. X% upon signing, Y% upon reaching a stated milestone and balance upon completion vs. any other agreed approach).]

IN WITNESS WHEREOF, this Statement of Work shall be effective as of the last date indicated below and thereupon become a part of the Agreement.

[BUYER]

[VENDOR]

By: _____
[Name]
[Title]

By: _____
[Name]
[Title]

Date: _____

Date: _____

CCA Members: Questions? Comments? Please let me know i.thomas@thomson.com 651-687-3773

Direct Release (in Lieu of Escrow)

X.1 Delivery of Source Code. In addition to any rights Licensee may have under this Agreement, upon the occurrence of any of the events set forth in Section X.2, Licensor shall, within three (3) days after written notice from Licensee, provide to Licensee, at no additional cost, one (1) complete copy of the Source Code including all Documentation and tools necessary for the use thereof used in the preparation of any Software licensed or otherwise acquired by Licensee under this Agreement on machine readable media in a format usable by Licensee. If delivery is required by Section X.2 (a), (d), or (f), Licensor shall only be entitled to delivery of the specific software to which such delivery event applies. Licensee shall then be permitted to use the Source Code under the conditions set forth in this Agreement. Licensor agrees to pay to Licensee any reasonable fees, costs or expenses (including reasonable attorneys’ fees) incurred by Licensee to enforce its rights under this Section X.

X.2 Delivery Events. The irrevocable right of Licensee to the Source Code shall arise upon the occurrence of any of the following events: (a) all or any material part of such Source Code is made generally available by Licensor to any other customer; (b) Licensor ceases, for any reason, to carry on business in the usual manner including, but not limited to, continuing to invest in development of new features and products; (c) Licensor has failed to cure a material default; (d) sale or other disposition of all or substantially all of the assets which relate to the Software; (e) institution of bankruptcy, receivership, insolvency, reorganization, dissolution, liquidation, or similar proceedings by or against Licensor or all or any substantial part of its property under any Federal or State law or (f) Licensor ceases to or fails to provide Support Services for any Software.

Escrow Pointers

- Any 2-party escrow arrangement the Licensor already has in place will be, without exception, of no practical value. Quite to the contrary, by creating a false sense of security, it does more harm than good.
- Assess the risk: (i) operational dependence, (ii) cost to replace, (iii) time needed to replace, etc.
- If the Software is mission critical to the company’s operations, a customized 3-party agreement is essential. The key provisions are the release process and the level of verification required.
- Counsel must have the opportunity to review in detail the escrow company’s “standard documents.” Use them ONLY as a starting point. That said, try to avoid wholesale changes to the escrow company’s processes – how it administers deposit, reporting and release events. Focus instead on the substantive issues: (i) identification and format of deposited materials, (ii) extent to which the content of each deposit will be verified and how the costs will be allocated, (iii) definition of release conditions and (iv) use rights following release.

CCA Members: Questions? Comments? Please let me know i.thomas@thomson.com 651-687-3773

CCA 2005 #610
Getting it Done – Support & Maintenance

Sample for RFP/RFQ

10. Maintenance and Support.

10.1 Commencement. Support may commence upon either (i) the expiration of the performance warranty period or (ii) upon Acceptance. Either way, the first "support year" will end 12 months following expiration of the warranty period.

10.2 Required Services. Licensor will promptly provide either a modification or addition that, when made or added to the Software, re-establishes conformity of the Software to the performance specifications (in all respects ABC deems to be material).

10.3 Scope. All future updates, upgrades, releases, enhancements, modifications and versions will be provided to ABC at no additional cost. Support will continue to be provided for the current version's "parent" and "grandparent" and for earlier versions as negotiated.

10.4 Term. Licensor will be required to make support services available for a minimum of five (5) full support years. Renewal shall be automatic, subject only to ABC's payment of the appropriate fees. Renewal fees are capped at 103% of the amount paid by ABC in the prior year, adjusted to reflect additional purchases.

10.5 Termination. Only ABC may elect to not renew. Licensor may not cease to provide support services unless the Support Agreement and/or the License Agreement have been terminated according to their terms.

New Opportunities in Distribution

Due Diligence

Secrets of Chinese negotiating tactics –revealed!

Andrew Halper – Eversheds LLP

October 2005



CCA Members: Questions? Comments? Please let me know j.thomas@thomson.com 651-687-3773

The Bad Old days

Chinese Protectionism

- Foreign investment has been welcome in China for some 25 years, first in the form of JVs and eventually in the form of WFOEs – wholly foreign owned enterprises
- Yet, PRC long maintained severe restrictions on retail and wholesale, by:
 - sector
 - scope of business
 - high registered capital thresholds
 - Equity proportion limits
 - Geographical ambit
 - burdensome approvals process requiring central government approval

The door starts to open...

- Some liberalisation occurred before WTO accession on 11 December 2001:
 - “trial basis” approvals began in 1992
 - 1999 Pilot Procedures expanded the opportunities but retained high qualification requirements for investors
- Foreign investors tried to circumvent by establishing companies with local approvals only, these structures were risky and infrequently were shut down

And now much wider...

- True liberalised access occurred due to WTO accession negotiations and pressure primarily from the US.
- Over course of three years, PRC allowed minority stakes, then majority stakes.
- Further changes effective on 11 December 2004 with promulgation of Administration of Foreign Investment in the Commercial Sector Procedures ("**Procedures**")
- **Procedures** are meant to bring PRC into compliance with its WTO accession commitments

Major Changes

- From 11 December 2004, WFOEs allowed (subject to certain restrictions)
- High capitalisation requirements have been eliminated
- Geographical restrictions on wholesalers and retailers have ended
- Wider scope of business, now including franchising and commissioned sales for wholesalers
- Simplification of approval processes

Relaxation of Investor Qualifications

- For retail JVs, 1999 Procedures required that foreign parties had:
 - annual sales of US\$2 billion
 - net assets of US\$200 million
- For wholesale JVs, 1999 Procedures required foreign investors to have:
 - annual sales of US\$2.5 billion
 - US\$300 million in net assets

Relaxation of Investor Qualifications cont...

- Chinese party also had high thresholds for annual sales and import and export volumes
- New 2004 **Procedures** eliminate all such requirements, but:
 - foreign parties with “strong economic resources, advanced distribution skills, management experience and overseas marketing networks” are encouraged
- In addition to foreign corporates, the **Procedures** now allow foreign individuals to set up retail and wholesale companies

Registered Capital Requirements have been lowered:

- Previously, retail JVs needed RMB 50 million (RMB30 million in West and Central regions)
- Wholesale JVs needed RMB 80 million (RMB 60 million in West and Central regions)
- Now, only PRC Company Law requirements are imposed (RMB 300,000 for retail, RMB 500,000 for wholesale)
- Term limits (previously 30 years and 40 for West and Central regions) may now be handled flexibly

Equity Ratios have been liberalised

- Previously, Chinese party had to hold at least 51% in wholesale, and in retail with three or more stores (with limited exceptions)
- Generally there is now no requirement for minority stake, but foreign investors are limited to 49% where the investor has opened more than 30 retail outlets involved in distribution of:
 - books, newspapers, magazines, (until 11 December 2006) cars, pharmaceuticals, pesticides, fertilizers, processed and crude oil, cereals, vegetable oil, sugar and cotton; or
 - Products from multiple suppliers or with different brand names

"Scope of business"

- Retail:
 - retail sales
 - import of products for own business
 - purchase and export of domestic products
 - related services, including after-sales
- Wholesale:
 - wholesale sales
 - acting as commissioned agent (except auctions)
 - import and export
 - related services
- On approval, retail and wholesale can be combined
- Commercial FIEs may authorise third parties to operate franchises

Continuing Restrictions and Prohibitions

- Wholesalers may not distribute chemical fertilisers or processed and crude oil before 11 December 2006. Wholesalers may not distribute salt
- Retailers may not distribute chemical fertilisers before 11 December 2006
- Neither may distribute tobacco

Geographical relaxation

- Until 11 December 2004, retailers were limited to provincial capitals, cities under direct control of central government and SEZs.

Simplified Approval Process

- Previously, process was cumbersome: feasibility study submitted to local ETC which then submitted to SETC. SETC consulted with MOFTEC. If positive, matter went back to local ETC which would submit JV contract to MOFTEC.
- Now, for certain defined business scopes, provincial level branch of MOFCOM can carry out examination and approval and merely report back to MOFCOM for filing.
- In other cases, the provincial MOFCOM will review the applications within one month and submit onward to central government MOFCOM, which will decide on approval within three months.

To sum up...

- Liberalisation in distribution sectors and other sectors has been dramatic. PRC promised sweeping reform and has largely delivered.
- As with all investments into the PRC, the situation is complicated by still-incomplete corpus of legislation, weak courts, and inconsistent application of the law by officials.
- Remember that FIE establishment is still subject to significant restrictions on freedom of contract

**Due Diligence: containing
the problem of 同床异梦 ***

*Translation: "same bed, different
dreams"

Common pitfalls and errors:

- Assumptions about vast market
- Reliance on "facts" recited by the Chinese party
- Poorly thought-out due diligence
- Eggs and baskets

- Over-reliance on "guanxi"
- Failure to include detailed initial business plan
- the language trap: the seduction of good English
- Localising too quickly: cowards and cowboys
- Inadequate head office support

Getting on the same page...

- Successive sets of heads of terms
- Rigorous use of conditions precedent
- Assume nothing - ask, verify, confirm, and ask again
- The initial business plan
- Rigorous government relations strategy

Level Playing Field?

- Regulatory officials still play major role, and they are often – but not always -- 'Team China' fans
- Quality of attainable due diligence has improved greatly, but many pitfalls remain
- Formal enforcement of rights remains patchy, but a well-diligenced and well-structured deal reduces the likelihood of needing formal enforcement!

Negotiating with Chinese parties:

Secrets of traditional tactics revealed!

- Preferences for generalities over specifics
- Haggling
- Adversarial atmosphere
- Repetitive questioning
- False citation of authorities

- Illogical demands (“muddy the water to catch the fish”)
- Excessive concentration on price
- Time pressure
- Threat of competitors

- Change of negotiators
- Apparent lack of coordination
- Stalling
- Re-opening previously closed issues

And the all-time favourite

- Re-negotiating the deal after signature (and how to turn this into an advantage.....)

What should you do?

- Send the right people to negotiate
- Do your homework
- Verify and cross-check what you are told
- Don't show your hand

203 CHINA BUSINESS UPDATE

Association of Corporate Counsel

Annual Meeting 2005 – Legal Underdog to Corporate Superhero

October 17-19, 2005

- Know your bottom line
- Ensure good interpretation
- Take your time
- Keep your sense of humour – you'll need it!



Susan M. Ponce

Vice President and Chief Counsel

Halliburton

INTRODUCTION

My learned colleagues on today's panel have far more experience working in China than I do, but my practice is multi-jurisdictional and gives me some insights into both the practical and legal considerations that one should consider when one's client is

considering moving into China, as well as other 'foreign' jurisdictions. I use the word 'foreign' in quotes because as we see the "globalization of appetites" and the attendant globalization of our businesses, we must stop considering everywhere but the United States as 'foreign' and start thinking more broadly of different jurisdictions where we do business. Having said that, far from being able simply to parachute into unknown territory and go about our business the same way everywhere in the world, lawyers must be able to identify and manage both the legal risks and the practical considerations surrounding movement into a new jurisdiction so that we can have a safe landing in those places where our clients choose to do business – in this case China.

Let's start with some of the more basic and practical considerations that will face a U.S. company heading into China. They are easy to identify though perhaps not so easy to overcome. Language, culture and time zones have varying degrees of impact depending on where you operate in the world outside your home country. For example, my company has operations all over Latin America, which are by and large conducted in the local languages except when our English-only speakers come to town. Our company Code of Business Conduct and other key documents are translated and available in Spanish or Portuguese and our offices conduct their business in the native tongues. Russia is a different matter, as are various parts of Africa, the Middle East and even other parts of Asia. China is not so easy. I for one cannot decipher street signs based on bits of foreign language I have picked up other places. And the business functions I have attended in China require interpreters. The nuances of doing business in a foreign language can be critical to the success or failure of your deal. As critical, or even more so, are the cultural sensitivities that one unfamiliar with the culture may face. It is not so much that we must view the Chinese as so different or 'foreign' from us, as much as that we should not assume that they are the same or that they see things the same way we might. Being unaware of cultural differences may be not only a social faux pas but can be a crucial business mistake.

Time zones are another matter altogether. Because we have lawyers in 14 different countries and almost that many time zones, I see part of my job to be accessible 24 hours

a day – certainly in theory. And if your business is 24/7, as lawyers we must support that business the best way we can. A company going into China must give thought to time differences in setting up its legal services model – considerations include internal deadlines, how to manage external (e.g., court) deadlines, timing for obtaining home office approvals, or just fatigue when people have to travel far distances for meetings. Nothing will drive your clients madder than the perception that they do not have timely response or cannot easily access legal services, and that will only be made worse if they perceive they are 'waiting' on the rest of the world to wake up.

This will also raise the question of how you will provide legal support. Will you centralize support in your home office or place lawyers in remote locations? Or will you use outside counsel as your mainstay legal support? No one model works for everyone and most will likely find a combination of styles suits them. Locally licensed attorneys provide knowledge of local business and social culture as well as a more intimate understanding of the legal system. Moreover, in-house counsel are typically cheaper than outside counsel, though if you import your in-house counsel costs can be significantly higher. Significantly, an in-house attorney can also be important for access reasons just discussed as well as for being a part of the business team. Outside counsel also have their advantages, including their detailed local knowledge as well as resources, contacts, and a certain independence that can be key in a remote location. But if you locate your lawyers remotely – that is away from the home office or the core of your legal department, you must make special efforts to educate them in the culture of your client. You must also ensure they have timely information and an understanding of the broader picture of legal and other issues facing the company, both to guide their legal advice but also so they will not feel like the lone ranger. Importantly, their client must also know they are not alone in their legal decisions.

Some slightly different practical considerations include other staffing needs. Employment conditions can hugely impact a start-up operation, whether the question is one of potential unions or use of expatriate workers. Moreover, in true Stephen Covey style, you must 'begin with the end in mind,' understanding what cost and severance implications may attend to the eventual winding down or transfer of a business later on.

Personnel costs can be extremely high, so go in with your eyes open. Everything I read today indicates that China has such an abundance of labor that workers are easily replaced. This is probably less true in the legal context (i.e., the abundance of qualified personnel) at this moment.

A different issue is whether your company will want to use agents to foster its business opportunities in China. Use of agents is fairly common, but like anywhere agent relationships must be managed. This includes the up-front work conducting appropriate due diligence to understand with whom you are entering into a relationship and to meet any anti-bribery obligations your company may have. It also includes managing the relationship once you are in it to avoid mishaps or complacency. The lawyer's role tends to be heavily on the upfront end, so make sure that your processes for due diligence and vetting of a potential agent are solidly in place. It may in fact be a good idea to review those processes anew in anticipation of going into China.

From a more practical business standpoint, your client must address the issue of whether partnering up with an entity in China, in whatever form, will lead ultimately to creating your own competition. Transferring technology and know-how, even to suppliers, presents a high risk of fueling the very competition that will make it harder for you to keep up later. This is a very real issue that must be addressed, though it may not easily be overcome. A company must simply understand what it is getting into whenever it enters into any kind of partnering relationship to further its business goals.

Among the first legal issues that will face a company are those tied to what business it is exactly that the company intends to do in China. That is, will a company only conduct a portion of its business or a certain product line, or will it go in full speed ahead. Then what legal entity will be used to do business? This question must be viewed from a tax standpoint, as well as to ensure that the company can get paid in the currency it wants in the location it desires to be paid. These seminal issues must be resolved before even registering to do business. Legal entity considerations may also impact what business may be conducted. For example, certain legal entities may not be allowed to do business

in certain countries (as in the case of U.S. entities that cannot do business in 'sanctioned' countries). While China is not currently subject to any U.S. government sanctions, the controls on technology in this area can be critical for a high tech company as discussed below. The broader implications of the extra-territorial reach of a company's home country law to its China operations can also not be ignored.

Choice of law and choice of forum provisions in contracts should be considered. It has been my experience that it can be difficult to get a Chinese customer to agree to law other than the law of China. However, for a non-Chinese company, consideration should be given to the level of comfort with the legal system and or the arbitration system. Recent legal periodicals suggest changes in China's arbitration laws that make arbitration more desirable than it has been in the past.

As mentioned, the movement of goods and of people into and out of China may be subject to legal restrictions. For example, U.S. export control laws may impact the ability to move certain goods or technology into China or to sell them to Chinese customers. At worst these laws could kill a deal but more likely the process and timing of applications to the relevant federal agency must be taking into account in planning such a deal.

For a publicly held U.S. company today, one cannot ignore that reporting requirements of various kinds can impact decisions with respect to doing business in China. Timing can be critical and to the extent that U.S. reporting requirements conflict with local requirements of one kind or another, coordination is key. This can be true not only in a purely regulatory context but also just in the practical management of relationships with clients and interested governmental entities.

This brings us to the balance being global policies and the realities of local law and practices. A global company typically seeks to standardize its policies and have a consistent approach to its business worldwide. Think of McDonald's – they say no matter where you go into a McDonald's anywhere in the world, the product and product quality is pretty much the same. They have taken consistency to a new level. But, like any multinational company, they must balance their desire for global consistency with a

deference to local legal requirements and in some instances local customs. Where local law exists on a given topic, a company must be mindful that its policies do not go against local requirements. Where no local law exists, a company must equally balance not imposing excessive requirements on its business where the global standard is higher than others in the area are practicing, lest it risk placing itself at a competitive disadvantage.

In an era of heightened transparency, a company moving into China must also recognize that though China itself is not where some of its western counterparts are, the window shade will not come back down on operations in China. Vigilance in attending to non-governmental interest in a company's activities will remain the same. As the spotlight continues to focus on the growth of China's economy, questions about how a company chooses to enter the China market are assured.

And finally, the need for training must be underscored. Training in all areas, but particularly in topics such as the company's values and code of conduct must be clear and frequent. Language issues will be paramount in developing appropriate training and materials.

After all this you may be saying there's no place like home. But the keys to unlocking a successful cross-border practice, in China or elsewhere in the world, are pretty universal and timeless. Professionalism in how we behave as lawyers and really in all we do will take any negotiation farther; lack of it can hurt far more than lack of detailed knowledge in some arcane area of the law. Providing the client with legal advice that is appropriate to the situation in which it finds itself, as opposed to the advice we want to give or we think will show how much we know will provide far more value to the client. Remembering that the corporation is the client, not any given person and certainly not ourselves, and acting in the client's best interest – even when it leads to a hard answer that your client may not want to hear. These global standards will help us overcome all the practical and legal challenges that we might face as we head into China and beyond.

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203 China Business Update

Susan Ponce

Vice President and Chief Counsel

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ACC's 2005 Annual Meeting: Legal Underdog to Corporate Superhero—Using Compliance for a Competitive Advantage

October 17-19, Marriott
Wardman Park Hotel



Considerations for Doing Business in China

- Practical Issues
- Legal Issues

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Practical Considerations

- Language barriers
- Cultural sensitivities
- Time zones

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Practical Considerations

- Response time/accessibility
- Locally licensed attorneys?
- Support for remote lawyers



Practical Considerations

- Staffing
- Use of agents
- Creating your own competition



Legal Issues

- Tax considerations
- Currency controls
- How/where you can get paid

Legal Issues

- Registration to do business
- Choice of Law
- Choice of Forum
- Extra-territorial reach of home country law



Legal Issues

- Movement of goods
- Movement of people

Legal Issues

- Differing reporting requirements
- Global policies vs. local law
- Transparency
- Training



“Global” or Universal Standards

- Professionalism

- Legal advice appropriate to the situation

- Who is client/client’s best interest

- Client’s best interest