



This article is an excerpt of the book “**Financial, Administrative and Trade Management in China: A crash course for executives for a successful and compliant business operation**”, available e.g. on [Amazon Kindle](#), [Google Play](#) and [Apple Books](#).

3.4. Commonly Forgotten contract elements

While not being a lawyer, the author of this document learned a lot from cooperating with internal and external lawyers that might be helpful for drafting good contracts and/or by checking the regulatory environment.

At the same time, it is highly recommended to get the support of a lawyer to double-check at least your strategically important contracts.

Assuming perfect conditions, formulating a contract can be quite straightforward. For a first internal check, it might be helpful to analyze potential pitfalls by asking a lot of “what if” questions describing possible deviations between the ideal execution of a contract and potential events.

There seem to be common elements of a contract that frequently get forgotten or ignored during a first draft which are often being suggested by contract lawyers familiar with business in China. They often target at increasing the enforceability in China:

Consider the leading language

Many people strongly recommend contracts in Chinese language. After checking with several lawyers, they all gave the same feedback: Chinese language should be considered, can be mandatory in some cases but still in some constellations an English contract might be favorable. The main goal is to make it for both parties as well as an arbitration or litigation court as easy as possible to understand the contract. If you still write your contracts bilingual, make sure that you define in the end of the contract which language is to be seen as the leading one, e.g. by adding the sentence “the English language is for information and the Chinese version is binding.”. Better also check, if in both languages the binding language is defined the same.

Jurisdiction

Especially for lawyers from other countries, the Chinese contract law might be hard to get a grasp on and a seemingly simple solution might be to set a possible place of trial outside of China, including a definition of which country’s civil law should be applied. Practically contracts and the legal “opinion” of courts in other countries have a very slim to non-existing chance of enforcement, especially if both parties reside in China. A place of jurisdiction in China should be defined in this case.

For international contracts, better listen to your lawyer.

Arbitration court and nationality of the chairman

There seems to be a strong tendency that arbitration courts have a better ruling compared to public courts, especially if you have reason otherwise to rely on local courts outside of Tier 1 cities. Whenever feasible, try to declare a qualified and well-known arbitration court as the responsible one.

The lawyers I know often choose CIETAC in Beijing or SHIAC in Shanghai for local contracts while choosing Hong Kong, Singapore or even Switzerland for international contracts.

If you are worried about lacking fairness due to the nationality of your company in these courts, you can also define in your contract that the chairman of the commission must neither be of your nor of Chinese nationality.

Protect your intellectual property

Protection of intellectual property, not only about technical intellectual property but also about brands, should be handled with a high priority. Actions to consider are e.g. signing non-disclosure agreements during contract negotiations and reserving all intellectual property related rights, e.g. by applying for the registration of patents and brands beforehand.

Delivery and payment terms

Make sure that the contract specifies the delivery and payment terms clearly in a way that makes sense for the transaction. For goods transfer, it might be a good idea to refresh your knowledge about INCOTERMS.

Breach of contract including sanctions like liquidated damages as deterrent

While a contract should be negotiated and signed in good faith, there can always arise the situation that it is being breached.

It is highly recommended to stipulate what should happen if a contract is being breached, including sanctions that might make a potentially fraudulent contract partner reconsider and the process for dispute resolution.

Define maximum liability

It can make sense to limit liability either by cause, e.g. make one contract partner liable only if a damage happens due to gross negligence or by intent, or by total value, e.g. by limiting the maximum liability to the total contract value, to direct damage and to exclude consequential damages or lost profit.



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Define when the contract ends and what happens then

Ordinary termination rights are not common in China and the termination of a contract while the ending date has not arrived yet can rely on your negotiation skills. Even in extreme cases like insolvency you might be bound by contract longer than you intended. A common practice is to define a contract time of one year and an automatic renewal afterwards with special contract provisions in which cases a contract can be terminated before the ending date. A contract should clearly specify how company property, including goods and services, can be transferred back to the owner at termination of the business relationship in an orderly manner and which rights and obligations continue to remain, e.g. confidentiality and competition clauses.

Representations and warranty

For delivered goods—no matter if physical or digital—be sure to define guarantee, warranty and maintenance times. If you omit them, the standard provisions of the Chinese contract law might be used. Also be sure that your contract partner indeed has the rights to the underlying good or service he claims he is having.

Get multiple copies

This should be a basic but it definitely makes sense to make at least two copies of a contract so that both sides can have a legally valid version with chopped copies for their files.

Negotiation tactics

When negotiating a contract with a Chinese counterpart, some of them gained lots of experience in manipulating the process especially by using artificial deadlines or other tactics that might enable them to gain the edge in negotiations.

When you have a bad feeling about a contract or contract partner, do not sign it until the situation has been clarified. You should not be afraid to at least temporarily walk away from a deal just because you feel time is pressing.

Additional resources

One wonderful resource for possible shortcomings of contracts, which also is a great source to research, pitfalls in very common constellations is this website: <http://www.chinalawblog.com>