

4.4. Commonly forgotten issues with contracts and cooperation with lawyers (RC)

Introduction

While not being a lawyer, the author of this document had some learnings 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 doublecheck 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.

Commonly forgotten or suboptimal contract elements

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.

Enforcement of contracts

China might not enforce your contracts very well or at all based on international arbitration or court decisions. To make a contract enforceable, it should be enforceable in front of a Chinese court or arbitration council.

Chinese should be the leading language

Even while you and your contract partner might speak great English, the judge in a court might not. To ensure that a contract is also enforceable in court, please use the Chinese language as leading language.

A best practice is to use English and Chinese with the added information in the end that "the English language is for information and the Chinese version is binding".

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 which country's civil law should be applied.

Practically contracts and the legal "opinion" of courts in other countries have a very slim chance of enforcement.

As place of Jurisdiction China should be defined.

Arbitration Court

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

Protect your IP

Protection of intellectual property, not only about technical intellectual property but also about brands, should be handled with a high priority.

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

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.

Define what happens when the contract ends

When entering a contract which renews automatically or with a long run-time, a company might fully rely on the services of the partner and/or might hand over company

property for handling.

A contract should clearly specify how company property, including goods and services, can orderly be transferred.

Guarantee 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.

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 chops for their files.

Negotiation tactics

When negotiating a contract with a Chinese counterparty, some of them gained lots of experience in manipulating the process especially by using deadlines and/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 time is pressing.

What to consider when you involve a lawyer

Do you know what you want?

While lawyers can be helpful to create formally correct contracts, from my personal experience they will not be very helpful in defining the exact contents: They obviously cannot help you defining what YOU want to reach.

Lawyers in general do not negotiate or execute

In basically every case I was working with lawyers considering contract law, the lawyers did not help in any way with negotiation. They can help with comparing situations and/or documents with the law, find possible risks and pitfalls but the negotiation with your

counterpart or the execution of the findings is usually in the hand of the client.

Type of Lawyer

If you just need someone to support you in writing a good contract, any qualified lawyer will do. As soon as the potential level of enforcement of a contract is being entered, it is a different story: International Law consultancy companies might be really helpful in drafting a great contract but they are often lacking the formal requirements to enforce these contracts in front of a Chinese court. If you expect that a contract might enter litigation in front of a court, it is recommended to search for a lawyer who is certified to do so.

If you do not ask specifically, you get generic answers

From the personal experience when working together with lawyers, it is highly recommended to ask very specific questions to the lawyer otherwise you will get very generic answers. While there is a tendency of especially inexperienced personnel to get the opinion of a lawyer so that you can show internally in the case of problems that you “involved a lawyer”, this seldom leads to a considerable impact on the formulation of the contract. The responsible manager for signing this contract might be tempted to outsource the responsibility and liability for a poorly formulated contract but it is seldom worth the effort or the fee of the lawyer if you are not clear about the objective to seek their counsel.

Make your expectations clear

Lawyers often tend to get very deeply in analysis mode, increasing the bill that has to be paid. By either making clear what kind of result you expect or if you are purchasing a training or audit package, you can try to limit the cost by explaining very detailed either how the result should look like or by asking for a tailor-made solution according to the budget. It is noteworthy, that you have to find

the right balance between limiting the analysis work and the thereby increasing risk.

Let lawyers help you to navigate the biggest stumbling blocks

Even if you are using a lawyer, especially in China where enforcement of laws often is lacking, you will often not be able to gain absolute security while lawyers often continue to ask a lot of “What if”-questions. While this is their job, in many cases it can be already enough if the lawyer can provide you help to avoid the biggest pitfalls beforehand. If you just let the lawyer continue his analysis, you might have a very high bill in the end and a lot of information without any actual practical use case.

Create lasting documentation

If you ask the lawyer for support in cases that are not related to lawsuits but about business decisions and possible contracts, do not underestimate the long-term benefits this can bring to you and your company. Make sure that you create long-lasting documentation, either for yourself if you require to doublecheck a while later what the lawyer said or even some documentation that you can use in lawsuits and legal cases with the government as supporting document, showing that you “tried to avoid legal problems”.

Be honest

You are paying the lawyer to help you – for this he needs the full information about the case. Deliver all the relevant information upfront and answer all of the questions he might have openly and directly. Often lawyers will require information upfront before discussing the matters more deeply and you should provide it as required.

Additional sources

One wonderful source 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/>

Additional information can be found with the following Keywords in the search engine of your choice:

- General provisions of the civil law
- Chinese Contract Law

5. Administrative Management

The legal framework in China might be pretty different to the one in your own country, therefore to get a general understanding about some crucial topics will bring you a long way to ensure smooth operations.

This chapter will give you information about:

- Corporate Governance and important documents and organs in companies
- The importance of Chops and Chop management within China
- The Challenges of IT Infrastructure, especially caused by the “great firewall of China”, for international companies
- Data Protection Guidelines
- Environment, Health and Safety
- How to cooperate with lawyers.

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