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PERSPECTIVE

Chinese companies face hurdles in US

By Evie Jeang

Bowing during introductions, exchanging gifts, a few karaoke songs, a handshake and then a subpoena to appear in court?! Sadly, this may be the unfortunate road taken by Chinese companies who use a traditional Asian style of contract negotiations when dealing with their U.S. counterparts. Thousands of Chinese companies enter the U.S. market every year hoping to grow their business internationally. However, the complex intricacies of the U.S. legal system and cultural barriers have resulted in a plethora of lawsuits against Chinese-owned companies. Since U.S. business law is infinitely more developed than Chinese business law, being unprepared for the differences may have catastrophic monetary and even criminal consequences. A Chinese business must, most of all, obtain adequate legal advice from a reputable U.S. law firm.

Before investing in U.S. companies or opening one's own company in America with American workers, Chinese executives need to implement strategies to navigate the murky legal waters in the U.S.; know what to do in the event contract negotiations are handled improperly; predict how specific U.S. laws will affect relations with American workers; and be aware of which industries may be exposed to the highest risk of lawsuits.

Although it seems obvious that entering the U.S. market would pose challenges differing from entering other local Asian markets, Chinese executives may quickly realize contract negotiations need to be handled in a much more formal and written manner. Although there are some exceptions, U.S. courts require all documentation of agreements and communications to be in writing. In addition, although some U.S. companies are willing to draft contracts in Chinese (which might seem to be beneficial for the Chinese company), this could backfire if litigation occurs

in the U.S., where courts only deal with contracts written in English. Hiring local legal counsel with specific experience in international contracts who can assist with negotiations with U.S. companies or American workers must be done. Legal counsel should be familiar with the area in which the business will be based, especially in the event litigation arises. Frustratingly, U.S. federal law may often defer to state law concerning certain matters, and so any hired counsel must be intimately familiar with the quirks in their own region.

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To avoid situations in which a company may be sued for lack of a written contract or formal agreement, it is imperative to know when written contracts must be used. Contracts that are required to be written include, but are not limited to: (a) an agreement that is not to be performed within one year or cannot be performed within one year; (b) an agreement to answer another's debt; (c) an agreement to transfer real property; and (d) an agreement of sale of personal property, such as commercial goods, valuing more than \$5,000. There has to be at least some written note or memorandum, subscribed by the party to be charged with performance, in order for such an agreement to be enforceable. This covers the majority of U.S. contracts, so the safest bet is to always draft written contracts in English.

However, if a contract was negotiated in good faith (e.g., via handshake) and is subsequently contested, then the best way to argue on your behalf is to possess solid witness testimony, establish course of conduct, and ensure you have good credibility of the parties. The main issue is primarily whether an oral contract was

actually entered, which can be validated by witnesses. "Course of conduct" refers to the proven and accepted history that has transpired between two parties, who allegedly made a verbal agreement. For instance, if a Chinese merchant agrees verbally to sell an American buyer some goods and the buyer signs to receive it, refusing to pay after the merchandise is sent does not invalidate the verbal agreement that was already brokered. Credibility is not the same as character credibility, but rather more a matter of proving that an individual action or statement was credible or incredible.

Another strategic consideration is whether to form a business entity locally. It is important to consult an attorney regarding the most ideal form of business entity for a particular business. Partnerships, corporations and limited liability companies are some of the different types of business entities recognized in California, and each is subject to different laws and regulations.

A third important strategy is to protect intellectual property. It is important to know that, even if you possess patents or trademarks in China, you must separately register them in the U.S. to be protected in the U.S. market. If you fail to register, other companies may register and you may be barred from using your own trademarks or patents, which would be devastating.

Laws vary enormously when comparing the U.S. to China. For instance, U.S. labor law provides significantly more protective provisions concerning work hours and work conditions than in China, where harsher labor practices have historically been the norm. Dealing with entities such as unions would be a totally foreign concept to a Chinese company, and ignoring worker's compensation claims could result in potentially criminal penalties. For instance, failure to purchase Worker's Compensation insurance in California could result in fines of up to \$10,000 and up to one year of imprisonment in the

county jail.

Another example deals with regulation of exports from China. The Chamber of Commerce, a branch of the Chinese government, requires that certain metals cannot be exported at a price lower than a minimum price decided by their entity. Yet in the U.S., antitrust laws strictly prohibit business entities from manipulating/fixing prices of goods. Recently, the U.S. government prosecuted 12 Chinese exporters for violating antitrust laws by manipulating/fixing prices. Although the Chinese companies argued that the price was fixed by the Chamber of Commerce of China under Chinese law, the 12 Chinese companies are facing possibly severe civil and criminal charges in the federal court in New Jersey.

Finally, certain industries may be primary targets for lawsuits. In general, import/export of goods contains a large amount of legal exposure from worker's compensation issues, labor law, copyright law, and most commonly, breach of contract. Breach of contract laws span all types of business, but are most often associated with failure to deliver goods or services.

The most important thing to keep in mind is that local counsel must be utilized to assist with the intricacies of U.S. law. Chinese companies should seek out law firms who have transnational experience, are fully versed in the local laws (city, state and country) and preferably employ Asian Americans, who can be sensitive to both cultures and can act as a bridge between East and West.

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