



PRACTITIONERS' TIPS

Q&A with **Brian Beglin**, Partner with Bingham McCutchen LLP and Principal in Bingham Consulting

What are the stand-out issues particular to the practice of corporate law in China?

Two issues stand out.

(1) Anti-Trust. Under the PRC Anti-Monopoly Law, mergers and acquisitions are supervised by the Ministry of Commerce (MOFCOM). With certain exceptions, enterprises must seek pre-acquisition approvals from MOFCOM (which are in addition to any other required MOFCOM foreign investment approvals) if the turnover of the parties to the anticipated transaction exceeds specified thresholds. Under the PRC Anti-Monopoly Law, an acquisition outside China may also be subject to anti-monopoly review by MOFCOM if the transaction is deemed to have the effect of eliminating or restricting competition in the domestic market of China.

Overseas clients are experiencing long delays in receiving approvals. Although technically the review periods are similar to other overseas anti-trust authorities, they are being extended by MOFCOM in two ways. First, the mandatory periods within which MOFCOM must complete various review steps will not commence until MOFCOM deems all documentation finalised. The result is that there is now an unofficial "Pre-Acceptance Period." Second, all applications are being pushed into the Phase 2 Review (with almost no Phase 1 Review approvals being issued).

Companies should be aware that the MOFCOM process is currently taking at least six months and that there is very little chance of the process being concluded more quickly.

(2) Anti-Bribery. China is intensifying its efforts to combat bribery. While both offering and receiving bribes is prohibited by PRC law, China's enforcement regime has mostly focused on the receipt of bribes by officials. That may well be about to change.

The Supreme People's Court and the Supreme People's Procuratorate have jointly issued an interpretation effective as of 1st January, 2013. The interpretation provides: (i) a detailed guideline on how to determine whether the offering of a bribe involves or results in "serious circumstances," "causing heavy losses to the interests of the State", or "especially serious circumstances," each of which will subject the offeror of a bribe to sanctions under the PRC criminal law; (ii) an expanded definition of what constitutes "seeking inappropriate benefits," which now includes "seeking competitive advantages in economic, organisational and human resources management and other activities in violation of the principle of fairness and justice;" and

(iii) that a voluntary confession and the resultant sanction of probation or exemption from criminal punishment can apply to a corporate bribe offeror in certain situations (this leniency being previously applied only to individual bribe offerors).

While offering bribes to corporate officials is already a violation of the US Foreign Corrupt Practices Act and the UK Bribery Act, the interpretation suggests there may well be a new "cop on the beat."

Are there any key recent or imminent regulatory changes in China in-house counsel should be aware of?

Many enterprises in China (including some foreign invested enterprises) have been utilising secondment arrangements to avoid the complexities and restrictions of PRC employment laws. Under a secondment arrangement, a local labour employment agency engages workers and then seconds them to the enterprise.

The amended PRC Employment Contract Law effective as of 1st July, 2013 specifically addresses the abuse of secondment arrangements by clarifying that secondment arrangements can only apply to: (i) temporary jobs with a labour term of no-longer than six months, (ii) auxiliary jobs in non-core business operations, and (iii) back-up jobs where the workers cannot work full time for reasons such as full-time study, maternity leave, etc. In addition, the amended PRC Employment Contract Law has substantially increased the required qualifications for local labour employment agencies.

Enterprises utilising secondments in China should carefully review their current arrangements to ensure they will be in line with the amended PRC Employment Contract Law.

What are the most common types of billing arrangement in China? How negotiable are fees?

It is fair to say that all types of billing arrangements are common in China, with domestic firms typically charging less than international firms. While the legal market in China is competitive, the quality of legal services delivered varies greatly. Ordinary and commoditised work can be had at discounted or capped rates. More complex and cutting edge work, especially cross border work, will demand hourly rates at or much closer to full freight. Companies typically will maintain a panel of 'go to' counsel with whom fee arrangements will already have been agreed, either specifically or conceptually, depending on the matter.