Legal Aspects of Doing Business in China

China Risk, Regulations & Rewards
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Asian Cultural Center, Oakland, California

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Topics of Discussion

• China RoHS
• Intellectual Property Rights
• Technology Licensing
• Using Your Own Contracts
• Getting Money Out of China
• Sales and Distribution
China RoHS – Legal Ramifications
China RoHS

- Administration Regulations on the Control of Pollution Caused by Electronic Information Products
  - Promulgated on Feb. 28, 2006
  - Enter into effect on March 1, 2007
  - RoHS -- “Restriction of Hazardous Substances”
China RoHS (cont’d)

- Timeline for implementation
  - 1st Phase – Marking and disclosure (from March 1, 2007)
  - 2nd Phase – Restriction of hazardous materials
China RoHS (cont’d)

• Marking & disclosure obligations
  – Environmentally friendly-use period
  – Maximum Concentration Value (MCV) of Hazardous Substances
    • Lead (Pb) <0.1%
    • Mercury (Hg) <0.1%
    • Hexavalent Chromium (CrVI) <0.1%
    • Polybrominated Biphenyls (PBBs) <0.1%
    • Polybrominated Diphenyl Ethers (PBDEs) <0.1%
    • Cadmium (Cd) <0.01%
  – Packaging materials
China RoHS (cont’d)

- Questions
  - Where to place the logo
  - How to disclose what you don’t know?
Green Logo

- Applies directly to the product
- Does not contain any Hazardous Substances
- Recommended color is green, but if not aesthetically pleasing other colors are acceptable
- Product with surface area smaller than $5 \times 10^3 \text{ mm}^2$ are not required to have logo printed on the product, but the logo should be printed clearly in the documentation
Please refer to Table 1 for the names and contents of the toxic or hazardous substances or elements contained in electronic information products.

**Table 1 Marking Styles for Names and Contents of Toxic or Hazardous Substances or Elements**

<table>
<thead>
<tr>
<th>Part Name</th>
<th>Toxic or hazardous Substances and Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Lead (Pb)</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

O: Indicates that this toxic or hazardous substance contained in all of the homogeneous materials for this part is below the limit requirement in SJ/T11363-2006.

X: Indicates that this toxic or hazardous substance contained in at least one of the homogeneous materials used for this part is above the limit requirement in SJ/T11363-2006.

(Enterprises may further provide in this box technical explanation for marking “X” based on their actual conditions.)
Environmentally Friendly-Use Period Logo

- Applies directly to the product
- Contain Hazardous Substance(s)
- The number in the middle represents the “Environmentally Friendly-Use Period”
- Declaration of present Hazardous Substance in table format
- Orange is the recommended color
- Product with surface area smaller than 5 x 103 mm² are not required to have logo printed on the product, but the logo should be printed clearly in the documentation
Marking Requirements on Packaging Materials

- **GB 18455-2001**

<table>
<thead>
<tr>
<th>Mark Number</th>
<th>Mark Name</th>
<th>Mark Graphic</th>
<th>Scope of Application of Mark</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Reusable</td>
<td><img src="image" alt="Mark Graphic" /></td>
<td>Applies to all types of packaging</td>
</tr>
<tr>
<td>2</td>
<td>Recyclable/renewable</td>
<td><img src="image" alt="Mark Graphic" /></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Contains renewable materials</td>
<td><img src="image" alt="Mark Graphic" /></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Green point mark</td>
<td><img src="image" alt="Mark Graphic" /></td>
<td>Applies to all types of packaging</td>
</tr>
</tbody>
</table>
China Compulsory Certification (CCC)

- Products in the “Key Catalog” are banned from containing Hazardous Substances
- Pre-market testing and compliance certification associated with the RoHS Substances
- Key Catalog is expected to be published in Sep. 2007 ~ Mar. 2008
Enforcement of China RoHS

- Warning
- Seizure of non-compliant products (e.g., marking, substances)
- Fines
- Repatriation orders
- Suspension or cancellation of business license
## Chart: China RoHS v. Europe RoHS

<table>
<thead>
<tr>
<th></th>
<th>China RoHS</th>
<th>EU RoHS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Implement</strong></td>
<td>Directly implement</td>
<td>Via the state law of each members</td>
</tr>
<tr>
<td><strong>Scope</strong></td>
<td>EU RoHS Scope <strong>PLUS</strong> Radar, Component, Appliances, Toys …</td>
<td>10 Categories</td>
</tr>
<tr>
<td><strong>-- Exemptions</strong></td>
<td>N/A</td>
<td>Material Application Exemptions</td>
</tr>
<tr>
<td><strong>-- Packaging M</strong></td>
<td>Non-Hazardous/ Recyclable</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>-- Production M</strong></td>
<td>Restricted per material restrictions</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Marking Requirements</strong></td>
<td>Hazardous Materials</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>Env-Friendly Use Period Packaging Materials</td>
<td></td>
</tr>
<tr>
<td><strong>Certification Requirements</strong></td>
<td>Prerequisite</td>
<td>Not a prerequisite</td>
</tr>
</tbody>
</table>
Intellectual Property Rights (IPRs)
Scope of IPR Protection

• IP rights cover product:
  – Form:
    • Patents (design)
    • Copyright
  – Contents:
    • Patents (invention/utility models)
  – Identifiers:
    • Trademarks, trade names, enterprise names
  – Information / entertainment / software:
    • Copyright
Scope of IPR protection (cont’d)

• Other protection:
  – Unfair competition
    • Trade secrets

• Regulation of IP
  – Technology licensing rules (mainly cross-border)

• Nature of protection – trademarks and patents
  – Geographical
  – First-to-file
Legal Aspects of Doing Business in China

Legislation

- Criminal enforcement:
  - Criminal Code
- Civil enforcement:
  - Trademark Law
  - Copyright Law
  - Patent Law
  - Anti-Unfair Competition Law
- Administrative enforcement
Administrative Enforcement

- Administration for Industry and Commerce, etc.
- Limited deterrence
  - Seizures / fines only
- Fines
  - Low or avoided entirely
- Akin to misdemeanor
  - But without stigma of criminal record
Civil Enforcement

• Preliminary injunctions
  – Available in theory for trademark / copyright only
  – Courts in many cities very conservative

• Asset preservation
  – Guaranteeing access to compensation
  – Ex-parte seizure of infringer funds

• Fairly fast / efficient in major cities

• Evidence collection can be difficult
Criminal Enforcement

- Handled by procurate, but private suit possible
- Mainly targets counterfeiting and piracy
- Effective remedy when available
Customs Recordal

• Any protected patent, trademark or copyright
• Recordal not required, but for recorded rights:
  – Customs will take ex officio action
  – Reduced security bond
  – May not need to obtain preliminary injunction from People’s Court
• Confiscate infringing goods and fines
IPR Developments

• WTO accession 2001
  – Trademark, patent and copyright laws amended
    • Statutory damages up to RMB500,000 possible
  – Almost full compliance with TRIPS Agreement
  – Technology licensing rules liberalized
• Since then…
  – Law developed organically through cases
  – Counterfeiting / piracy are serious problems
  – Companies and foreign governments unhappy
Trademark Infringement Trends

• 2005 Quality Brands Protection Committee survey:
  – 60% of companies say fakes occupy 5-10% of market
  – 40% say fakes take 10-99% of market
  – 77% suffer “serious” or “very serious” export problem

• 81% of goods seized by US Customs in 2006 by value came from China
Expanding locally

And globally
Not to mention the internet…
Recent Progress

• “Action Plan” announced March 8, 2006
• National Working Group on IP Protection
• Comprehensive blueprint
• Legislation
  – New rules on administrative transfers to police
  – New rules on general customs bonds
  – New rules on IP enforcement at trade fairs
  – Consultation with industry on TM / copyright law revision
• New national police unit dedicated to IP crimes
What can you realistically achieve through enforcement in China?
Realistic Strategies

- **Civil actions:**
  - Compensation starting to be viable: statutory damages up to RMB500K
  - Asset preservation available – subject to payment of bond of 100%
  - Evidence preservation / preliminary injunctions: worth a try, but unreliable

- **Criminal enforcement:**
  - Increasingly viable and cost-effective
  - But still require significant budget (US$20-100K)

- **Administrative raids:**
  - Always there and generally cheap (US$3-10K)
  - But limited deterrence

- **Combining measures:**
  - AIC raid, then seek damages through negotiations or civil action

- **Retailers and underground factories**
  - Target the landlord
Case Study – Landlord Liability
Case Study: Landlord Liability

• “Silk Market” litigation (2004-2005)
  – April 2006 decision by Beijing appeal court for five luxury brands
  – Confirmed liability for landlords where:
    • Actual notice given of infringing outlets
    • Infringements continue

• June 2006 MOU with three landlords
  – Two landlords cooperating
  – Support from EU, MOFCOM, Mayor

• Silk Market being difficult
  – They sued lawyer, claiming he lacked POAs
  – Required s to obtain legalized POAs
Trade Secrets

• Assume the worst
  – You may lose what you introduce to China
• But companies not enforcing their rights
• Industry not lobbying for legal reforms
Trade Secret Protection – Best Practices

• Show reasonable steps taken to protect confidentiality
  – Documents stamped “confidential”
  – Tight restrictions in employment contracts
  – Physical access to secrets restricted
  – Training
• Cultivate local police
• Be prepared to prove direct losses
• Be prepared to disclose technology to authorities
Technology Licensing
Cross-Border Technology Licensing

• Regulations for the Administration of the Import/Export of Technology
  – Broad scope:
    • Know-how, patents, trademarks, copyrights, etc.
    • Licenses, assignments, co-development, technical services, etc.
  – Prohibited, restricted and freely tradable technology
  – Mandatory, prohibited and negotiable clauses
“Restricted” Technology

**Steps required to import:**
1. Apply to MOFCOM for technical review
2. MOFCOM reviews (30 days)
3. If approved, sign contract
4. MOFCOM reviews contract (10 days)
5. If approved, MOFCOM issues technology import license ("effective date")
6. Register contract online (http://info.ec.com.cn)
“Freely Tradable” Technology

- Steps required to import:
  1. Sign contract ("effective date")
  2. Register contract online
  3. Submit hard copy to MOFCOM
  4. MOFCOM issues technology import registration certificate

- In either case, imports of commercial technology with the “core function” to protect encryption prohibited except for self-use upon approval
Legal Aspects of Doing Business in China

Mandatory and Prohibited Clauses

• Mandatory:
  – Ownership or right to license
  – Complete, accurate, effective and capable of achieving objectives

• Prohibited:
  – Unnecessary ancillary conditions
  – Unreasonable restrictions on sourcing, production or exports
  – Barring competitive technology
  – Prohibiting improvements
Negotiable Clauses

• Negotiable:
  – Confidentiality
  – Governing law
  – Dispute resolution

• Now “liberalized”:
  – Royalties
  – Term
  – Post-termination restrictions

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Using Your Own Contracts
Using Your Own Contract -- Adaptation, Localization, Translation

- To meet mandatory requirements under Chinese laws and regulations
- To secure your rights and limit your liabilities
- Choice of law (local choice of law v. mandatory laws)
- Dispute resolution
Changes to Contract Clauses

• Regulatory
  – Form and/or content drivers
    • Approval/registration requirements
    • Foreign exchange
    • Tax
  – Intellectual property laws
  – Product quality and consumer protection laws
  – Restrictions on competition
Changes to Contract Clauses (cont’d)

• Confidentiality
  – Protection of proprietary trade and business information
  – Adopt measures to maintain confidentiality
  – Non-disclosure agreement
Changes to Contract Clauses (cont’d)

• Other Provisions
  – US law-driven provisions
  – Software licenses v. sales
  – Level of payment and technical detail in contract
  – License grant wording
  – Liquidated damages
  – Termination
Governing Law

• Contracts governed by foreign v. PRC law
• For a “contract with a foreign element”, unless otherwise provided by law (limited exceptions), parties are free to choose governing law
• UN Sale of Goods Convention
• Laws of the place where the chosen forum located (i.e. Hong Kong law)
Dispute Resolution – Litigation v. Arbitration

<table>
<thead>
<tr>
<th>Court Judgments</th>
<th>Bilateral Treaties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arbitration Awards</td>
<td>New York Convention (1987)</td>
</tr>
<tr>
<td>Service of Judicial Documents</td>
<td>Hague Convention (1965)</td>
</tr>
</tbody>
</table>

- IP carve-out – preliminary injunction
- Non-exclusive jurisdiction
- No discovery
Dispute Resolution - Arbitration

• Key elements for a valid arbitration clause
  – Writing
  – Agreement of Arbitration (exclusive jurisdiction)
  – Place of arbitration
  – Name of the arbitration commission
  – Arbitration rules

• Domestic arbitration (CIETAC, CMAC)
• Foreign arbitration (ICC, LCIA, AAA ……)
• Hong Kong arbitration (HKIAC)
## Dispute Resolution – Hong Kong, Macao and Taiwan (different legal regions (法域))

<table>
<thead>
<tr>
<th></th>
<th>Hong Kong</th>
<th>Macao</th>
<th>Taiwan</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Court Judgments</strong></td>
<td>Bilateral Arrangement</td>
<td>Bilateral Arrangement</td>
<td>SPC Regulations / TW Regulations</td>
</tr>
<tr>
<td><strong>Arbitration Awards</strong></td>
<td>Bilateral Arrangement</td>
<td>No Agreement</td>
<td>Same as above</td>
</tr>
<tr>
<td><strong>Service of Judicial Documents</strong></td>
<td>Bilateral Arrangement</td>
<td>Bilateral Arrangement</td>
<td>No Agreement / Arrangement</td>
</tr>
</tbody>
</table>
Dispute Resolution – Bilateral Treaties between Mainland and Hong Kong/Macau SARs

- Recognition of monetary judgments
- Circumstances of non-recognition
  - Exclusive jurisdiction
  - Earlier proceedings on the same matter
  - Judgments or arbitration awards concerning the same matter already recognized or enforced
  - Improper procedures
  - Judgments not effective yet or whose enforcement is suspended
  - Public interest
Dispute Resolution – Bilateral Treaties between Mainland and Hong Kong/Macau SARs (cont’d)

• Time limit: according to the rules of the court of application (Article 20)
  – In Mainland: 1 year if one or both of the parties are natural persons and 6 months if both parties are legal persons or other organizations (Article 219)
  – In Macao: no time limit
• Court cost and enforcement cost: applicant to pay according to rules of court of application (Article 19)
Getting Money Out of China
Getting Money Out of China

• China’s Foreign Exchange Regime
  – Inflow and outflow of foreign exchange (forex)
  – Conversion of forex to and from local currency (Renminbi or RMB)
  – Currency used for pricing and settlement of transactions in China
Getting Money Out of China (cont’d)

• Administering forex - players
  – People’s Bank of China (PBOC) announces RMB exchange rates; buyer/seller of last resort
  – State Administration of Foreign Exchange (SAFE) drafts laws on trading, settlement, etc., monitors forex bank accounts, and approves individual forex transactions
  – Designated foreign exchange banks (DFXBs) serve as the gateway for forex to flow in and out of China
Getting Money Out of China (cont’d)

• Four types of transactions subject to control
  – Inward remittance (汇入境内): a party outside China remits forex into China
  – Settlement (结汇): a party in China sells forex in exchange for RMB
  – Sale (售汇): a party in China pays RMB to buy forex
  – Payment (付汇): a party in China remits forex out of China
Getting Money Out of China (cont’d)

• Forex payment for imports
  – No need for transaction-by-transaction approval, but there are recordal and ex-post verification requirements
  – To remit funds abroad, must submit documentary proof that the transaction is valid
    • E.g. import contract, invoice, etc.
  – Once goods clear customs, must submit customs documentation within 30 days for “verification”
• Forex Payment for Imports

Six-step Process

1. Submit recordal docs
2. Forex remittance
3. Goods
4. Customs docs
5. Customs docs
6. Conducts verification

Importer

Exporter

Forex Bank

Customs

SAFE
Legal Aspects of Doing Business in China

- Forex Payment for Imports Involving Chinese Distributors

1. Distributor
2. Forex remittance
3. Goods
4. Customs docs
5. Customs
6. SAFE
7. Forex Bank
8. Chinese Purchaser
9. Goods
10. RMB remittance
11. Customs docs
12. Submit recordal docs
13. Recordal of amount remitted
14. Conducts verification

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Getting Money Out of China (cont’d)

• Forex payment for technology transfer fees
  – Scope of technology import contracts
    • Patent transfers, application right transfer, or license
    • Proprietary technology license or transfer
    • Computer software license
    • Trademark license or transfer embedded within a patent or proprietary technology license
    • Technology service or consultancy
    • Cooperative design, research, development or production
Getting Money Out of China (cont’d)

• Forex payment for technology transfer fees (cont’d)
  – Documents required
    • Written application
    • Transactional documents
    • Invoice or request of payment
  – Registration or approval documents
    • With other authorities in charge as applicable
      – Patent: recordal certificate issued by the State Patent Administration
      – Trademark: recordal certificate issued by the State Trademark Administration
      – Computer software: recordal certificate issued by provincial copyright bureau

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Getting Money Out of China (cont’d)

• Forex payment for technology transfer fees (cont’d)
  – Registration or approval documents
    • With foreign trade authority (MOFCOM)
      – Technology import license (for restricted technology) or technology import contract registration certificate (for freely tradable technology)
      – Data Form for Technology Import Contract
      – Recordal Form of Data Change for Technology Import Contract
Getting Money Out of China (cont’d)

• Forex payment for technology transfer fees (cont’d)
  – Registration or approval documents
    • With other authorities in charge as applicable
      – Patent: recordal certificate issued by the State Patent Administration
      – Trademark: recordal certificate issued by the State Trademark Administration
      – Computer software: recordal certificate issued by provincial copyright bureau
Getting Money Out of China (cont’d)

• Forex payment for royalties (other than technology transfer fees)
  – Process substantially the same as technology transfer fees, except:
    • No registration or approval from foreign trade authority is required
    • Recordal certificates from copyright, cultural, film, or trademark authorities are the only required registration or approval documents
  – BUT, tax is higher -- no business tax exemption
Getting Money Out of China (cont’d)

• Forex payment for service fees
  – Depending on the nature of the services, approval or registration may be required
  – No approval or registration required for
    • Advertising fees
    • Consulting fees (excluding technology consulting)
    • Fees for attending exhibits
Sales and Distribution
“Doing Business in China”...

“One Billion Customers”
Sales and Distribution – Cross-Border

• No presence in China
  – Sales to agent or distributor in China; or
  – Direct sales to customer

• Advantages
  – Agent or customer responsible for Customs and value-added tax (VAT)
  – Agent or customer responsible for complying with local regulatory requirements
  – Receive payment directly in US dollars
  – Can use US law and arbitration
Sales and Distribution – Cross-Border (cont’d)

• Challenges
  – Forex payments require detailed documentation
  – Contract registration or approval?
  – Tax clearance certificate
  – Characterization of sale
  – Goods, services or software
  – Stationing employees in China without a registered presence
    • Limitations on foreign employees traveling to China
    • Requirement to establish a representative office
  – Individual income tax obligation
  – Local independent agent or deemed employee?
  – Permanent establishment
Sales and Distribution – Presence in China

• All foreign establishments in China -- registration or approval/registration required
  – Legalized documents
  – Office space with signed lease; no shelf companies or virtual offices
  – Identified representatives/directors/supervisors
  – Subsidiaries require a formal business plan and articles of association
  – Post-registration procedures required to open bank accounts and begin operations
  – Summary: budget time to complete tasks
Legal Aspects of Doing Business in China

Sales and Distribution – Representative Office

• Advantages:
  – A sales liaison office with broad promotional scope
  – Defined tax liability
  – Station and hire employees in China

• Challenges:
  – No collecting of payments, issuing invoices or signing contracts with customers
  – Stationing service personnel in representative office is problematic
  – Risks of operating outside scope
    • Fine, reprimands, revocation of the license and reputation risks
    • Tax exposure
Sales and Distribution – Foreign-Invested Commercial Enterprise (FICE)

• Engage in “trading”: wholesale or retail sales, sales agency and ancillary services

• Advantages:
  – Buy in foreign currency and sell to Chinese customers in local currency
  – Customer receives VAT or business tax invoice
  – Customer has no foreign exchange, Customs or import-stage VAT obligations
  – Ancillary services include advertising, warehousing and broad range of support services for products
Sales and Distribution – FICE (cont’d)

• Challenges
  – May require higher level of approval – more time to establish
  – Qualify as a general VAT tax-payer (or input VAT cannot be deducted)
  – Not eligible for tax incentives
  – Combining sales with production or R&D – may lose incentives
Sales and Distribution – Online Sales and Services

• Servers outside China
  – Sales and services from outside China are generally not regulated
• But how does the customer pay?
  – Credit card may be possible for online consumer purchases
  – Otherwise customer must apply for foreign exchange remittance
• Business tax and enterprise income tax may be withheld on services - 60% rule
• Is it a license? - business tax and withholding tax
Sales and Distribution – Online Sales and Services (cont’d)

• Servers inside China
  – Sales and services from a server inside China are regulated
  – Also, if invoicing and collecting in local currency (RMB), usually treated as if server located inside China

• Basic and value-added telecoms (VAS) services
  – Foreign investment restricted to 49% or 50% respectively
    • Joint venture with local partner
    • Nominee arrangement
  – Basic: E.g., fixed network and mobile cellular communications
  – VAS: E.g., online data processing and transaction services; call centers
Sales and Distribution – Online Sales and Services (cont’d)

• Examples of other services requiring licenses or prohibited to foreign investment
  – Encryption technology
  – Internet security
  – Payment services
Sales and Distribution – Online Sales and Services (cont’d)

• Commercial internet information services (CIIS) v. non-CIIS
  – CIIS -- compensated provision to online subscribers through the internet of information services -- requires permit
  – Non-CIIS – requires recordal only

• Effect
  – Companies established in China can market and sell products and services within their business scope over the internet and provide related telephone support
  – But must have permit to market and sell other products or provide telephone call-center support services
Sales and Distribution – Sales of Online Services and Software

- Scenario – Subsidiary in China sells software or services provided from offshore affiliate
- Challenge – How to compensate affiliate?
- Solutions
  - FICE can import software through Customs and resell subject to VAT in China
  - Master license from affiliate will add business tax and withholding to cost
  - Provider in China of services located on offshore server can pay offshore affiliate provider service fee under subcontract
    - But onshore provider must have license to sell services (VAS, etc.) in China
  - Master license from affiliate will add business tax and withholding to cost

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Total Staff: 557

Shenzhen
Total Staff: 3

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China Client Choice Award – International Law Office 2006, 2005


China Practice of the Year – ALB Hong Kong Law Awards 2004, 2005
PLC Which Lawyer? Directory 2006, 2005
ALB China Law Awards 2004

China IP Firm of the Year – Managing Intellectual Property Awards 2006
Hong Kong IP Firm of the Year – AsiaLaw IP Awards 2006, 2005, 2004

China Practice of the Year – ALB Hong Kong Law Awards 2004, 2005


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Questions?

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