



Précis Paper

Tips for Australian Lawyers on working with Chinese Law Firms

A discussion about Australian lawyers working with Chinese law firms, including a discussion about Australian lawyers providing services in China, building rapport with Chinese partners and the future of China-Australia legal collaboration.

Discussion Includes

- How Australian Lawyers can provide Legal Services in China
- Current Practices and Emerging Trends
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- Dispute Resolution and Recognition of Foreign Judgments in China
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- Legal Practice in Hong Kong
- ChAFTA and Future China-Australia Legal Collaboration

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Tips for Australian Lawyers on working with Chinese Law Firms

In this edition of BenchTV, Professor Michael Adams and Dr Ying Chen discuss and provide tips for Australian lawyers on working with Chinese law firms.

How Australian Lawyers can provide Legal Services in China

1. Firstly, one must be qualified to practice law in China. According to Article 5 of the *Lawyers Law of the People's Republic of China* (PRC), to be entitled to practice law in China, one must meet four conditions. The first is upholding the constitution of the PRC. Secondly, one must have passed the Chinese bar exam. Thirdly, one must complete a one year internship at a Chinese law firm. Lastly, one must be a person of good character and conduct.
2. For non-Chinese citizens, the Chinese bar exam is the main obstacle to get licensed to practice law in China because only Chinese citizens are allowed to take the Chinese bar exam. This means that non-Chinese people cannot be licensed as Chinese lawyers to practice Chinese law in China.
3. Non-Chinese law firms and other non-Chinese organisations or individuals could provide legal services in China, but only very limited services. Non-Chinese law firms can set up a representative office in China and send representatives to China. However, they are often required to obtain approval from the Ministry of Justice in China. A representative office and its representatives are not allowed to engage in legal practice in China but may entrust a Chinese law firm to do so. This means that only licensed Chinese lawyers in approved domestic firms (that is, Chinese law firms), can practice law.
4. Non-Chinese law firms and non-Chinese lawyers are excluded from litigation services. They are prohibited from representing clients in relation to Chinese law issues, but they can provide advice on foreign law as long as they have the right qualifications to do so. In practice, most international law firms in China help Chinese and international clients with matters such as international murders, technology transfers, intellectual property, and sometimes *Foreign Corrupt Practices Act of 1977* 15 USC compliance.
5. If lawyers licensed to practice in China are hired by non-Chinese law firms, they must also suspend their license to practice Chinese law during their employment with a non-Chinese law firm. In some cases, non-Chinese lawyers are hired by Chinese law firms. However, they cannot practice Chinese law as they are not allowed to provide a full service in China. Most of the time, such lawyers work as foreign consultants and provide advice on non-Chinese law. Research conducted by Harvard Law School indicates that more than 170 international law firms have offices in mainland China, but China's regulations and restrictions continue to prevent international law firms from providing full legal services.

Current Practices and Emerging Trends

6. There is an emerging trend among law firms towards better navigating the Chinese legal service industry and providing international clients with quality services they receive in their home countries. Some international law firms choose to partner with their Chinese counterparts through mergers and acquisitions. For example, in 2013, an Australian law firm, a UK law firm and China's King and Wood merged. Also, in 2015, global law firm, Dentons, merged with Chinese law firm, Dacheng. Dr Chen's view on this merger is that it created an increased market share and helped the merged law firms become more competitive.
7. However, there are several concerns in relation to the mergers. First, as compared to the partner law firm, other law firms (or other lawyers from other law firms) may have better resources and performance, especially in some very specialised areas of law. Secondly, the merger of Chinese and non-Chinese law firms means the merging of two very different business models, thereby leading to many practical issues.
8. It is possible for Australian law firms and Australian lawyers to provide legal services in China, but only very limited services. When dealing with legal matters that are China-related, it is unavoidable to work with Chinese law firms or Chinese lawyers, either simply looking for a Chinese partner to work with or having a long-term plan of setting up a representative in China.
9. Hong Kong has some different standards and rules. From a legal practice point of view, these differences will apply differently depending on a variety of circumstances relevant to the matter in question. Examples of relevant circumstances include whether the matter is related to mainland China, whether it is an arbitration and whether it is a matter going forward via litigation.

Identifying the Appropriate Chinese Partner

10. It is generally easier to find law firms that can provide services to international clients in big cities (e.g. Beijing, Shanghai), but the quality of legal services and professionalism can still vary greatly between law firms and even lawyers within the same law firm. In addition, not every lawyer in big law firms is experienced in doing the work for international clients.
11. However, many Chinese law firms have made significant achievements in restructuring to provide for international law practice. Many of them now have great facilities and resources for document processing and other administrative work. Many Chinese lawyers have been educated and worked in the US, UK, Australia and other common law jurisdictions. They have knowledge of both the common law and civil law systems. Their level of professionalism and experience in international transactions is rapidly growing. The best way to find a quality law firm to work with is through introductions via a mutually known third party who can provide certainty and achieve mutually beneficial outcomes.

12. In addition, it must be kept in mind that there is great regional diversity in China so one should not expect that a lawyer's services in one city can be wholly replicated in another. This is because the Chinese law firm's professional network might not be as strong, or the administrative framework or local regulations for matters might be different.
13. Generally, the location of a firm may sometimes indicate the type of work they do on a regular basis, which means they are likely to have more experience in specific legal matters. For example, it is easier to find a law firm that provides legal services to non-Chinese clients in Beijing and Shanghai. This is because foreign activities are usually undertaken in Beijing, Shanghai and their surrounding areas.
14. Many international law firms choose to work with Chinese law firms in Beijing so that they can be closer to the central government and regulatory authorities, especially if they will work on projects that will require approval from the Chinese government. Unlike Beijing, Shanghai is China's financial and industry center. There are many direct investment and joint venture activities occurring in Shanghai and surrounding areas. Generally speaking, law firms in Shanghai are more experienced in these legal matters.

Building Rapport with Chinese Partners

15. It is beneficial to choose a law firm (or a lawyer) with important contacts because the deals can be closed rather quickly if the Chinese lawyers know the system well and can access it. This can help with avoiding administrative delays. In China, these relationships are important at various levels of government. The Chinese term 'Guānxi' is very important in this context. The literal translation of this term is 'relationship, network or connections'. It is a word that is used to describe the system of social networks, specifically professional networks in business, and important relationships that facilitate business and other dealings.
16. Sometimes, Guānxi is misinterpreted in Western business as bordering on unethical behaviour associated with corruption. While there may be some unethical behaviour, just like there is in any jurisdiction, generally Guānxi is not about unethical behaviours. It is about having strong personal trust and relationships with others in the business world. This is a core part of doing business with someone in China. Personal relationships are so important in China that there is a plethora of academic research on the topic.
17. Building Guānxi is about building trust. Language skills (i.e. being able to speak Mandarin) are highly desired if a non-Chinese lawyer is looking to relocate to China for work. However, knowing how to speak Mandarin is not essential if a non-Chinese lawyer is only looking to do some business with these Chinese lawyers or law firms. Most of the Chinese lawyers speak English or are generally able to understand English.
18. If the goal is to look for a long-term partnership with a Chinese law firm, it will require a long-term approach. In achieving this goal, it is important to respect the people and culture. Sometimes, because of cultural differences, one might unknowingly offend other people

from a different culture. However, if the Chinese partner is aware that your intention was not to offend them, it may be forgiven.

19. It is important to have some general knowledge of China because it helps in understanding what can be spoken about and what should be avoided. Try to avoid topics that are controversial. This will largely depend on the individual, as some may not want to speak about the topic whereas others may not mind. Thus, it is good to take a cautious approach, especially at the beginning of the relationship. Also, having some general knowledge of China helps establish an immediate connection to any Chinese contact.
20. A formal introduction is also beneficial. Chinese people hope to do business with people who they already have a personal connection with. Thus, it can help if you are introduced to prospective business partners through someone you both know. Usually, the higher the social status that the connection has, the more successful you are likely to be introduced to the right person and perhaps the key decision-makers. After being introduced, the next step is to develop the relationship from there.
21. Relationships in China are more trust-oriented and personal than relationships elsewhere. It takes a lot of time and effort to build trust. Once the trust has been developed, you may be able to reap the benefits, such as the Chinese partners doing a better job for you and at a better rate. Continued effort is required to develop and maintain personal trust. Frequent visits are important. It is always good to maintain regular contact with Chinese partners. If frequent visits are not possible, you can at least send the Chinese partners some greetings through text messages and emails for important holidays. Giving gifts is also part of Chinese culture, especially when visiting the Chinese partners in person.
22. It is important to have someone in your Australian law firm that knows the Chinese culture and knows how to do business with Chinese partners. Chinese partners who are not exposed to Western culture may avoid disagreeing and try to 'save face'. Not saying "no" is a way for many Chinese people to avoid embarrassment and humiliation. Australian law firms need someone who can accurately interpret Chinese partners' intentions and goals.
23. Some international law firms, especially those with international offices around the world, have sent their lawyers to their Beijing or Shanghai offices for a period of time to build relationships and do deals. These are some effective ways to build personal trust.
24. In addition, food plays a very important role in Chinese culture. Once the relationship with Chinese partners is established, and sometimes in the process of developing relationships, Australian lawyers are likely to be invited to dinners and other forms of entertainment (e.g. golf). These activities are all part of relationship-building in Chinese business. These social activities are very important to build personal trust. Also, many Chinese people believe that one can truly see if a person can be trusted or not, based on how they behave at a dinner table, especially after a few drinks. Thus, it is wise to have some table manners and knowledge of the drinking culture in China. Sometimes, business ideas can be generated and deals can be closed at dinner tables. These tips can often be more helpful than simply swapping business cards in a business setting.

Dispute Resolution and Recognition of Foreign Judgments in China

25. The main dispute resolution methods used in China are negotiation, mediation, arbitration and litigation, which is similar to the Australian system. In China, many commercial disputes are resolved through negotiation and mediation, but some proceed to arbitration and litigation. It is quite common for Chinese lawyers to advise foreign clients against litigation in China because it is expensive, inflexible (because the courts have the power to control and manage litigation) and it is often difficult to enforce judgments for various reasons. Examples are where there is no treaty between the foreign country and China or if it is difficult to enforce foreign judgments in China. To avoid litigation, it is important for parties to agreements involving Chinese entities to include an arbitration clause.
26. For a commercial dispute involving parties from mainland China, it is quite common to choose the Hong Kong International Arbitration Centre to resolve the dispute. Hong Kong has a very strong pool of arbitrators. It also has an independent judiciary and enjoys the reputation of being an impartial venue for dispute resolution. Compared to other arbitration institutions, it also has a very unique status as a bilingual common law jurisdiction.
27. The recognition of foreign judgments in Chinese courts depends on whether the two countries have a treaty. If the two countries have a treaty, then it is easier to implement the judgment in China. Otherwise, implementing the judgment can be problematic.

Legal Professional Privilege

28. Although the *Lawyers Law of the PRC* requires a lawyer to keep certain information confidential, including commercial secrets, state secrets and personal information of clients, it also prohibits the use of audio surveillance when a lawyer interviews a criminal suspect. The concept of legal professional privilege is not expressly recognised by Chinese law. China has made several attempts to strengthen the protection of lawyer-client confidential communications over the last few years, especially in criminal cases. However, it is still quite different from the concept of legal professional privilege in common law jurisdictions.
29. Thus, it is important to treat communications between a lawyer and a client as information that may under certain circumstances need to be produced as evidence if requested by a court or other bodies that have power to demand such information. This is especially so for communications in relation to anti-trust or competition investigations. Being in common law jurisdictions, Australian clients may be used to having unrestricted conversations with their own in-house lawyers, so this difference in China must be kept in mind.

Billing Methods in China

30. Billing methods are quite different in China compared to Australia. It largely depends on the law firm (or sometimes, the individual lawyer) one works with. Some of the Chinese lawyers adopt an hourly billing rate model (similar to Australia) when they represent non-Chinese clients. This is quite common in mergers and acquisitions. Some law firms have capped fees, which is commonly used in capital markets transactions. Some lawyers charge success fees, which is an agreement between the lawyer and the client. For example, if the outcome of a deal is not successful, the client may negotiate a discount. On the other hand, the lawyer can negotiate a premium if the outcome is successful. Another billing method is the combined fee arrangement.
31. It is also possible to negotiate a better rate, but it often depends on the specific legal matter, the individual Chinese lawyers and many other factors. For example, you may be able to receive a better rate because you have been introduced to a lawyer by a mutual friend, or you have worked with the same lawyer on many cases. On the other hand, there are some very experienced lawyers who charge the equivalent of \$AU200,000 just to agree to open the files that were sent to them.
32. The hourly rate charged by Australian lawyers/law firms and Chinese lawyers/law firms cannot be fairly compared. The rates vary greatly and depend on the legal matters, the individual lawyers one works with and the lawyer's experience.

Legal Practice in Hong Kong

33. Hong Kong can be an attractive destination for many Australian lawyers and judges due to its proximity to Australia and its common law system. Using a law firm in Hong Kong is not the same as using a law firm in China. The Hong Kong-based lawyers may have obtained the license to practice Chinese law in China, but they may not be fully functional in mainland except in their specialised field. The Hong Kong-based lawyers may not have the connections or local knowledge in mainland China. In contrast, Chinese lawyers in mainland China have better local knowledge. For example, some were judges or legislators before they entered private practice. Thus, they have a clear understanding of the application of the law. Many Chinese lawyers in mainland China are much better at interacting with and managing relationships with the relevant government agencies. It may be more effective to develop a strong relationship with Chinese law firms or lawyers based in mainland China.

ChAFTA and Future China-Australia Legal Collaboration

34. The China-Australia bilateral relationship is predominantly based on strong economic and trade activities. This relationship has created many opportunities for the legal services industry. The implementation of the China-Australia Free Trade Agreement (ChAFTA) in

December 2015 helped Australia secure China's best ever FTA commitments on legal services. It provided Australian law firms with greater access to the Chinese market. Under ChAFTA, Australian law firms are allowed to establish commercial associations with Chinese law firms in the Shanghai Free-Trade Zone. However, Australian-qualified lawyers are only allowed to practice Australian law and international law. Chinese-qualified lawyers will not be able to practice Chinese and international law without suspension of their Chinese practicing certificates.

35. Over the past 2-3 years, the China-Australia relationship has deteriorated rapidly due to many reasons. Trade and economic activities between the two countries have been practically suspended. At this stage, the suspension appears to be indefinite. In late 2020, the two countries were supposed to meet and discuss the upgrade of ChAFTA. However, that did not happen. No negotiations on further opening up the Chinese legal services market to Australian law firms happened because there have not been many trade and economic activities occurring between the two countries lately. That being said, it is important to maintain the relationships between Australian law firms and Chinese law firms so that whenever the market is ready, Australian law firms can enter the market quickly.
36. In China, when international travel becomes very difficult, it is almost impossible to travel overseas to study. In the meantime, Chinese law firms and many Chinese lawyers still want to expand their knowledge on common law (e.g. by studying Australian law). This created an opportunity for the University of New England to develop some online courses for them so that they can continue their professional study while they are in China.

BIOGRAPHY

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Professor Michael Adams is an internationally recognised specialist in corporate law, governance, securities markets regulation and legal regulation (particularly e-learning). Michael has been writing, teaching and regularly presenting on all these topics for over 20 years. He is a Fellow of the Australian College of Educators (FACE), as well as the Australian Academy of Law (FAAL), and is also a Fellow of the Governance Institute of Australia (FGIA & UK FCIS). He is the author of 10 books and 30 chapters, 50 articles and over 250 conference/seminar presentations. In 2000 he was the recipient of the Australian University Teacher of the Year, for Law and Legal Studies, as well as 2005 CSA President's Award

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Dr Ying Chen is an academic at the University of New England School of Law. Her research primarily focuses on global food governance. She is particularly interested in questions relating to how agricultural trade affects global food security and safety, and what the world can do to improve food governance for better protection of human rights and the environment. She has taught in the United States, Mexico, China and Australia.

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