

## Lawyer's advice on legal self-protection in China

On his first visit to China in 2004, Alexander de Nerée liked what he saw. So when he was asked to set up De Nerée Advocates in Hong Kong, it did not take him long to decide. "I am really fascinated by China, but I also feel fortunate to be living in Hong Kong. Hong Kong is really 'China-light'. Not so much fun, but healthier for you. With the fairly Westernized attitude of the Hong Kong people and the relatively high standard of English, the business climate for foreigners is better here than in most parts of China. It's like Switzerland in Asia. Everything is well-organised and clean."

So there is not much work to do for lawyers in Hong Kong then? "Quite the opposite. Many businesses choose Hong Kong as their base to start operations in Asia. An obvious choice: all the leading banks, insurers and accountants are around the corner. Hong Kong also plays an important role because of its favorable tax regulations and the excellent legal infrastructure. It is actually a sort of 'home away from home'. A safe haven to start if you are looking to do business in mainland China. Where of course other legal concepts and basic business rules apply. In that last category, when clients ask about do's and don'ts I generally advise them to bring their patience and their credit card.

Apart from money you will need significantly more patience than in the West. I think this is a pitfall for many entrepreneurs in China. It takes considerably more time to do business here compared to other parts of the world. It's also wise to bear in mind that the Chinese legal system is rather rickety." And that is precisely where De Nerée provides his added value.

### Protect your products

"Companies often ask us how they can protect their products against copycats. The first, most obvious, and safest method is not to disclose all the relevant information. Don't share certain key aspects with a Chinese partner. That may sound like a lot of work, but the point is that if you don't handle this issue well, you might be giving your biggest competitor in the future a leg up. A second preventive measure is to agree with your Chinese partner in advance that any questions of counterfeiting and liability for counterfeiting and damages that occur from counterfeiting, will always be subject to arbitration. Apart from the fact that winning a court case in China is extremely difficult for foreigners, arbitration has the advantage that you can settle the issue of liability and the compensation for damages in one go."

### Contracts

Which factors should Western businessmen take into account if they are about to sign a contract? "In theory, contracts in China are just as binding as in, for instance, the US, but in practice, enforcing them is difficult. If I draw up a contract, I always take into account the fact that parts of the contract will be subject to discussion again some day. You therefore build in some 'small change', so you remain in the game and retain a good position in the negotiations that are to come. People will typically say about contracting with Chinese: 'The negotiations start only after the contract has been signed'. That, however, is not always a disadvantage. This attitude towards agreements will also give you the opportunity to re-

negotiate should you find the terms of the agreement less favourable than expected.”

### **Labour**

Is room for negotiation also important when drawing up employment contracts? “There are substantial differences between the West and China in terms of labour law and employment contracts. Hong Kong is quite Anglo-Saxon. Employment contracts can be terminated quite easily, generally with a month's notice and without substantial compensation. The terms of employment agreements tend to be simple. They state your duties, when to perform them and for what consideration. Employers do not even have to withhold tax for the employee, employees pay their income tax themselves at the end of the year. Things are a little more complicated in China, because in theory at least, it is a socialist state. This means the law provides for all sorts of protection through trade unions and rules for redundancy payments. In practice, however, you will not see many companies comply with all the rules.”

### **Developments**

“Labour law is a hot topic in China at the moment. Every so often an employee falls from scaffolding, or people work in very unhygienic conditions, often with dangerous materials. Regulations, or at least the execution of these regulations, regarding working conditions often leave much to be desired. Political steering on this issue often amounts to campaigns in which foreign companies are shown in a particularly bad light. They try to highlight the ‘Western-capitalist-exploiting-the-Chinese-labourer’ image as much as possible. On the other hand government authorities tend to look the other way when Chinese plants exploit their workers. It doesn't seem likely that the newly drafted labor law will bring much change in the near future. The new law includes a requirement making trade union representation compulsory only for foreign companies. The upside to this development could be that it might make it increasingly attractive for Chinese employees to work for foreign businesses.”

### **Risks**

Taking all this into account, how can you minimize risks? “Apart from trying to have all agreements governed by Hong Kong Law, it makes sense to not take more risks than you would in the West. I can understand why people have a tendency to take risks in China. When you come here for the first time, the energy is quite amazing. Then, I guess, some entrepreneurs are afraid to miss out on the whole China hype. But why accept risks in China that you wouldn't accept anywhere else? Especially when you realize that the risks you take here are generally greater. In a way, you should protect yourself, from yourself. Go home and sleep it over. When, after the dust has settled, you still feel comfortable with investing in China, go ahead and join the rest of us!”

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