

"Legal Ramifications and Implications of Doing Business in China" *Opportunities Niches for Hawaii China Business?*

Presented to

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Honolulu HI 96813, USA



Overview of China

- Ups and downs of 2008
- World financial crisis
- GDP could be further down to 8%
- Economic Stimulus Plan
- Tops on SMEs

US Company w/o any Presence in China

- Trading, Licensing, Distribution
- May need licenses/approvals
 - E.g. AQSIQ for scrap metals: supplier license and pre-shipment inspection
 - E.g. Technology transfer
- May trigger individual income tax and withholding tax

US Company with Presence in China

- Setting up a representative office or a branch in China
 - Register with SAIC without MOC approval
 - Approval from authority in charge may require under certain sectors, e.g.
 - Foreign law firm
 - Banking
 - Insurance
 - Airlines
 - Restrictive business activities, no direct local hire
 - Business tax, corporate income tax and individual income tax

US Company with Chinese Legal Person Status

- Foreign Investment Enterprises (FIEs)
 - Joint Ventures:
 - Equity Joint Venture vs. Cooperative Joint Venture
 - Wholly foreign-owned enterprises (WFOE)

Establishment of an FIE in China

- Investment guidelines (Latest Edition 2007)
 - Encouragement category
 - Permitted category
 - Restrictive category
 - Prohibited category
- Confusing categorized sector
 - E.g. Biodiesel

Establishment of an FIE in China – Cont'd

- Feasibility Study (Environment Impact Assessment, EIA)
- JV Shareholders Contract and Articles of Association (approved by MOC, approval authority)
- State-owned Assets
- Land-use Rights
- Register with SAIC for a business license
- Annual Check to renew the business license

Issues and Challenges in the Establishment

- Certificate of Approval vs. Business License
- Equity Contribution (cash and IP)
- Scope of Business
- Economic Development Zone and Tax Incentives
- Employee Contract
 - Non-compete clause and enforcement of non-compete clause
 - Be written contract

Issues and Challenges in the M & A

- Merger with a FIE vs merger with a Domestic Company
- Approval for Equity Transfer
- State Security and Market Monopoly Check
- Due Diligence Check

Issues and Challenges in Purchase of Assets

- No Approval is Required
- License and Permit, Tax Incentive are not Transferable

PRC Law and Foreign Law Firm

- PRC Law
 - PRC Law generally does not cover Hong Kong, Macao and Taiwan
- Foreign Law Firm
 - Permitted to provide consultancy on PRC law and on international conventions and practices; not permitted to conduct legal affairs, including rendering legal opinions upon PRC law
 - A PRC lawyer must suspend his/her PRC license before working with a foreign law firm

Legal Issues

- **Governing Law**
 - Must subject to PRC Law
 - WFOE AOA, JV contract and AOA, equity related transactions and asset purchase of a domestic company
 - Between two Chinese legal persons
 - Can subject to foreign law
 - Foreign-related contract
 - One foreign party involved
- **Validity of Contract**
 - Approval is required for WFOE AOA, JV contract and AOA and equity related transaction

Contract Enforcement in China

- Court vs. Arbitration
- Arbitration: final and binding
 - Foreign arbitration and foreign judgment
 - Foreign arbitration award is enforceable under the New York Convention
 - Foreign judgment is not automatically enforceable in China

A Good Vehicle for Doing Business in China

- Foreign Investment Commercial Enterprise (FICE)
 - Suitable for SMEs
 - Small amount of equity contribution (US\$100 K)
 - Whole sale and retailing in China
 - International trading
 - Outsourcing
 - On-line business (on-line payment needs additional approval)
 - Only local approval

Latest Concerns

- IP Enforcement
- Market Monopoly Check (Anti-Monopoly Law)
 - MOC for anti-monopoly and state security
 - SAIC for anti-competition
 - NDRC for pricing
- Tax incentive on export and tax system reform

Conclusion

- Reduced GDP growth and social stability
- More budget in economic stimulus
- Pay attention to SMEs

Any Questions?

Thank you!

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