

save the date

Future *Asian Briefings* deadlines:
November 2010 – Drafts due 14 August 2010

a special supplement to *ACC Docket*

asian briefings

march 2010
in this issue:

- 1** Five Characteristics of a Successful Asia-Pacific Regional Practitioner: What Every Company Needs in Order to Succeed in the Region

By Michael Chang and James Wong

- 6** A Toolkit for In-house Counsel on Mitigating IP Loss Exposure in an Emerging Market: China

By Sean Major and Amy Sommers

Five Characteristics of a Successful Asia-Pacific Regional Practitioner: What Every Company Needs in Order to Succeed in the Region

By Michael Chang (michael.chang@warnerbros.com)¹ and James Wong (james@chinneycapital.com)²

Your company has decided to significantly expand its presence in key Asia-Pacific markets. How do you go about developing in-house talent, or hiring competent outside lawyers, who can help your company succeed in diverse markets such as China, Japan, South Korea and other developing countries in the Association of Southeast Nations (ASEAN)?

There are tremendous business opportunities in Asia for American companies. According to the International Monetary Fund, the Asia-Pacific region will account for 45 percent of the world's gross domestic product in 2015, compared with 20 percent for the United States, and 17 percent for Western Europe. *Fortune* 100 American companies like Coca-Cola, IBM and even General Motors already derive a significant portion of their profits from their Asian operations.



While large, multinational companies have the ability to draw on years of experience and on the resources to hire lawyers who specialize in regional legal matters, this type of unique experience may not be available in-house at smaller companies looking to establish, expand or solidify their businesses to Asia for the first time. Smaller companies often launch with their best available US personnel and then hire outside experts as consultants, or they recruit local talent as their business grows.

But whether companies prefer to grow in-house talent or to retain outside expert practitioners, there are certain characteristics that companies should look for in their Asia counsel. These characteristics tend to be shared by all successful Asia-Pacific practitioners.

1. Excellent Lawyering Skills Honed in One or More Asia-Pacific Jurisdictions

Asia counsel should have the fundamental legal skills to meet the company's requirements for doing business in Asia. Ideally, those skills have been at least partly developed from practice in Asia. Apart from such core legal skills as research and writing, the skills that distinguish a high-performing Asia-Pacific practitioner from her peers are the ability to communicate, negotiate and translate; and the capacity to educate and manage. In other words, an ideal lawyer is someone who can convert nonbelievers like Martin Luther King, Jr., negotiate deals like Donald Trump, interpret nuances like Henry Kissinger and translate ideas across cultures like Ziad Fazah.

Companies tend to face similar challenges whether they do business in the East or in the West: The company needs to make money and keep it; it needs to comply with regulatory requirements; and it needs to protect its intellectual property. Counsel will be expected to negotiate and memorialize enforceable contracts — even in jurisdictions that do not require the contract to be in writing. And then counsel will be expected to resolve conflicts and enforce agreements.

To acquire the skills to meet those requirements, young lawyers typically hone their legal skills at a law firm, an in-house law department or in government service. Larger firms and companies tend to commit more resources to formal training programs. These programs tend to expose trainees to a wider range of issues and provide a better range of solutions. While smaller firms may provide practitioners with more immediate experience, large firms will also give counsel the “name-brand” credentials that are so important in Asia. Therefore, companies looking for counsel may wish to recruit first among lawyers with experience at large law firms or large companies. Working at a top consumer electronics firm, for example, gives a young attorney instant credibility as a technology lawyer.

Also, one of counsels' most valuable skills is the ability to predict what the courts will do and what judges will say, and then to advise clients accordingly. The best way to acquire this skill is in working with a judge or within the administrative bureaucracy. Although these one-year positions are very competitive, a judicial clerkship (or equivalent bureaucratic internship) is a unique opportunity to gain insight into the officiating process and, as important, to observe how judges make decisions in a particular jurisdiction. Companies involved in heavy litigation, frequent enforce-

ment actions or complex regulatory environments may wish to consider counsel with inside-officialdom experience.

2. Listening: Sensitivity to Cultures and Personalities

Counsel working in Asia should have a finely tuned sensitivity to regional cultures and personalities.

As President Barack Obama could attest from his recent visit, China is really a mosaic of several distinct regions, each with its own resources, dynamics and historic character. Despite its reputation as a monolith — 1.3 billion people sharing the same language, history and culture — China, let alone the region, is far from a homogeneous market.

For example, the concept of *guanxi* is ubiquitous to every discussion of doing business in China. *Guanxi* describes the importance of doing business based on personal relationships; it is one of the key social concepts that unite China culturally. However, *guanxi* can be interpreted differently by members of different generations, and can be accorded different levels of importance by those of the same generation. But every business deal in China begins with one party claiming to have *guanxi* with the counterparty. Counsel who are sensitive to the subtle cultural nuances can distinguish between profitable parties and time-wasters.

Understanding that China is not a single culture — there are numerous ethnic minorities and at least as many spoken dialects or sub-dialects — is key. Counsel should also be good at interpreting signals. As in the West, bad news is frequently

“Counsel should also be good at interpreting signals.”

masked by euphemisms. In business dealings, good counsel should correctly distinguish the signals from the noise so as to properly advise companies on how to move forward.

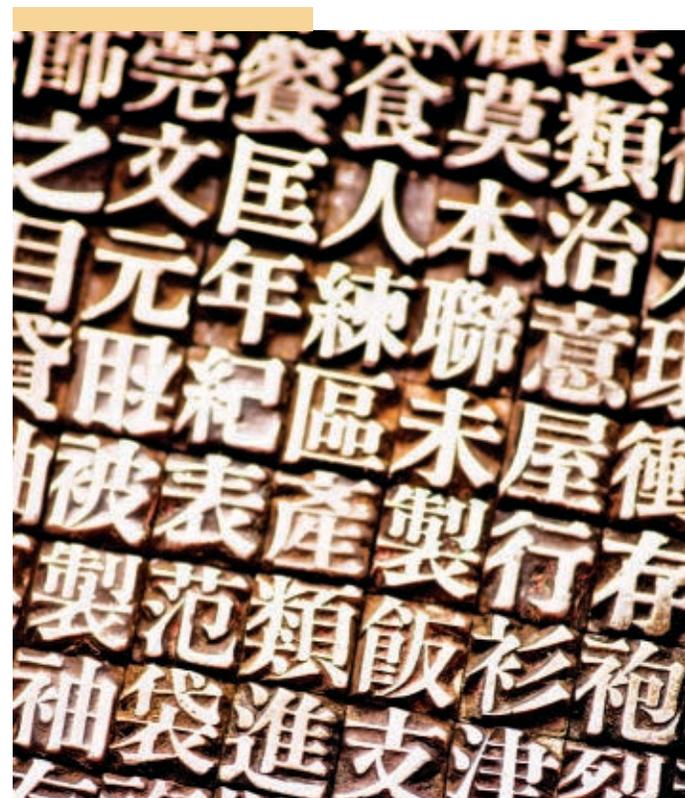
Moreover, as evidenced by the rapid rise of post-war Japan and the speed at which its primarily agrarian society transitioned to an industrial one, societies and cultures are far from static. It helps to be prepared to face legal issues that may arise as a result of changes in the economy, the social system or the political winds. For example, a period

of unemployment may make labor issues more prominent; a shortage of manual labor in large cities such as Tokyo or Osaka may mean a migration of workforce from neighboring countries, necessitating immigration clearances and visa work. In other times, cost pressures faced by companies competing in the global market may couple cost-reduction programs to consumer product safety concerns. The point here is that counsel should also have a “macro” view of the country to help their companies anticipate the next change in what is surely a dynamic environment.

While it is common for Asian counsel to have multicultural personal backgrounds and to spend the majority of their careers in Asia, it is also possible to gain experience and sensitivity to cultures and personalities through work exposure.

3. Communicating: Sensitivity to Regional Differences and Languages

In addition to being a good listener, counsel must communicate at many different levels, in different languages, with sensitivity to cultural nuances.



asian briefings

A single country in the Asia-Pacific region may be composed of a number of sub-regional differences and sub-regional cultures. For example, countries that make up the Greater China sub-region — the People's Republic of China, the Republic of China, Hong Kong and Macau — share a common Chinese heritage.

At the same time, Greater China represents one of the most linguistically and ethnically diverse regions in the world. Mandarin Chinese is spoken on the mainland, Taiwan and Singapore, while the Cantonese dialect is heard in the Canton region of China as well as Hong Kong and South-east Asia, to which a large number of people of Cantonese descent historically migrated. While the written language may be identical, with slight regional variances, a speaker of one dialect may not necessarily understand a speaker of another. The result is a rather colorful picture whereby two Chinese lawyers — one from Hong Kong and the

other Taiwan — are seen scribbling on paper napkins in order to hammer out the terms of a business deal.

Clear and straightforward communication is not as easy as it may be in countries where everyone speaks the same language. As you may have experienced in non-English-speaking countries, communication can break down even in the most mundane situations (such as ordering a bottle of wine, or asking for directions). Sticking with the basics of communication — speaking clearly, avoiding idioms and slang, using gestures if necessary — can be a good way to make sure you're communicating exactly what you need to. Humor often doesn't translate across cultures, so use humor sparingly even when you are communicating in English. Counsel should also have a strong command of local busi-

“While not a requirement, it does give counsel an edge to be able to speak the language of the country where your company is keen to invest.”

ness etiquette so that their behavior does not jeopardize relationships. These skills would be acquired, again, through extended stays in Asia or through extensive cross-cultural training, perhaps at a large firm or corporation. One would wish, for example, to avoid situations such as the one where a deal was torpedoed when the American party used his Japanese counterpart's business card to pick his teeth.

While not a requirement, it does give counsel an edge to be able to speak the language of the country where your company is keen to invest. Language skills are useful, not just in dealing with external parties, but when counsel needs firsthand knowledge of breaking financial news or new trademark law revisions. If you hire local legal specialists, such as paralegals, understanding the local language would enable you directly to source, interview and evaluate potential candidates.

Even if you don't speak the local language, make an effort to visit the countries where your company is do-



ing business at least once a year. Get to know the people, the culture and the laws. Immerse yourself, if possible. These days, Asia is not so far away.

4. Sensitivity to Ethical and Professional Boundaries When Dealing with Cross-border Issues

Counsel needs to have a working moral compass. Ensure that attempting to respect local culture does not trump acting with integrity and observing the rules of professional responsibility.

In the United States and other common law jurisdictions, lawyers are required to follow prescribed rules of professional responsibility. These rules, often formulated at the state level, spell out what you are allowed to do in dealing with clients, opposing counsel and parties, and the judicial system. These standards serve to maintain professionalism and integrity in a profession where vigorous advocacy is encouraged but ethically ambiguous situations often present themselves.

The Association of Corporate Counsel offers excellent resources that enable in-house counsel to quickly familiarize themselves with legal issues unique to the Asia-Pacific Region, such as consumer protection laws (or the lack thereof), arbitration practices and corporate governance. Many of these materials are available online at www.acc.com/infopaks. Similarly, the American Bar Association's Asia Division hosts a series of workshops and seminars on legal ethics with a comparative perspective. In seminars held in conjunction with the Council of Thai Lawyers, for example, speakers have discussed proposed revisions to the code of ethics for Thai lawyers in order to produce concrete suggestions to the Board of Councilors, the governing ethics body of the Council of Thai Lawyers.

These workshops and seminars help to bring visibility to the need for integrity and ethical conduct in jurisdictions that, whether due to lack of interest or lack of resources, don't have comprehensive professional rules of conducts or codes of ethics governing legal professionals. Lawyers who attend these seminars tend to be cognizant of emerging issues and can bring value to multinational corporations that must comply with the Foreign Corrupt Practices Act and other regulations.

5. Specialization in a Key Practice Area in a Key Jurisdiction

Counsel with specialized expertise can bring advantages to their companies. For example, many technology-based

“As long as counsel demonstrates a solid understanding of how the laws apply to a unique market, and works within the social nuances and business environment of that market, counsel will gain the respect of her peers.”

companies look for intellectual property specialists who are former engineers. Companies that have a significant global presence often employ counsel who speak the language of their clients or who are admitted to practice law in the desired jurisdiction. One of the authors employed a paralegal in South Korea who had a music background. That education gave the paralegal a unique practical perspective into such issues as rights clearance and the payment of royalties.

Generalist counsel may be well-versed in a wide range of issues including tax law, IP, trading and real property. Yet specialists immediately can understand the lay of the land and take command of the situation. As long as counsel demonstrates a solid understanding of how the laws apply to a unique market, and works within the social nuances and business environment of that market, counsel will gain the respect of her peers. That respect will help companies close deals and resolve problems. Whether the Asia-Pacific practitioner you are looking to hire is a generalist or a specialist, it's a good idea to consider the advantages of both when filling a particular need. 

The views express herein are the authors' and do not necessarily reflect those of their employers.

NOTES

1. Michael Chang is senior counsel at Warner Bros. Consumer Products Inc., and serves on the board of ACCA SoCal. A native of Shanghai, he is fluent in Mandarin Chinese and Japanese.
2. James Wong is US counsel for Chinney Capital, a Hong Kong-based private equity fund — a role that keeps him commuting across the Pacific. He writes regularly for the China Column in the *Los Angeles Daily Journal*. He also serves on the board of ACCA SoCal.