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Relations with Outside Counsel in Asia Pacific

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The countries of the Asia Pacific region represent perhaps the most interesting market in the world today for United States exporters and investors. When in house counsel is presented with a legal problem in this area of the world, reference to outside counsel is likely. This article discusses how outside counsel should be selected and handled in the Asia Pacific region. It will describe general factors to consider in selecting such counsel as well as specific country aspects, and it will discuss some examples of interaction with outside counsel in an Asian context. First, however, the article highlights the growing importance of the Asia Pacific region to United States businesses and their attorneys.

I. Asia Pacific

For many, Asia Pacific begins with Pakistan on the western end and ends with Korea and Japan on the east. Australia and New Zealand are often included, but because they are so much more British than Asian, mention of them is only made briefly. The People's Republic of China and India are of course colossal nations. Although they are the two most populous countries in the world, and by that fact have impressive potential, it is fair to say that for many companies, Singapore or Hong Kong—much smaller in population and size—are still a source of more business.

For most U.S. exporters or importers, the key countries of Asia Pacific are likely to be Japan, the third largest market in the non-communist world

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(counting the European Community as the second), the ASEAN countries (Indonesia, Malaysia, the Philippines, Singapore, Thailand and now Brunei), collectively the fourth largest, and the Republic of Korea, Taiwan and Hong Kong. The ASEAN countries alone, with a population of 270 million, are about as large as the European Community and more populous than South America.[1]

II. Choice of Outside Counsel

As Howard J. Aibel so aptly commented, "[i]t makes sense to use outside counsel when geography is a factor."[2] Even if a lawyer has lived and practiced in the foreign country in question, he or she is unlikely to have stayed current on the legal point in issue, especially if it is a government regulation subject to frequent change. Although improvisation is always possible, the result might be embarrassment or, worse yet, malpractice.[3] Thus outside counsel is needed, but who?

The initial choice is usually between a U.S. lawyer or firm, either its U.S. or foreign office,[4] and a foreign lawyer in the country in question. It is relatively rare to find a foreign lawyer in the United States, and even if he or she is qualified abroad and has access to library and research materials, the person is unlikely to have retained current local political and administrative contacts. Thus this latter alternative can be dismissed in most cases.

The choice of a U.S. or foreign lawyer depends primarily on one's level of sophistication and familiarity with the country involved. If foreign experience is limited, a U.S. international lawyer will probably be the choice. Yet the drawbacks should also be mentioned. The use of a U.S. lawyer is likely to be expensive, since fees will usually be cumulated with the fees of a foreign correspondent lawyer. If much rewriting and time-consuming translating of local advice is required, the level of fees may be double or triple the foreign lawyer's fees if dealing directly. This expense may be diminished, however, if the U.S. lawyer is located in the foreign country and in effect practices local law. Another drawback is that the U.S. lawyer may not be particularly knowledgeable about the specific foreign legal issue. But that problem is inherent in the choice of outside counsel. The solution is to call upon experience and consult other lawyers, embassies, and directories.[5]

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1. *See* Melchor, *A Perspective of the Emerging Asia Pacific Region*, 15 INT'L LAW. 132 (1981).
2. Aibel, *Successful Teaming of Inside and Outside Counsel*, 38 BUS. LAW. 1587, 1589 (1983).
3. *See* Janis, *The Lawyer's Responsibility for Foreign Law and Foreign Laywers*, 16 INT'L LAW. 693 (1982).
4. *See* Crabb, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 COLUM. L. REV. 1767 (1983). A table showing 109 offices of U.S. firms in 29 foreign countries in 1982 is set forth at page 1767.
5. Murphy, *An Overview: Special Considerations in Representing Clients Abroad, International Law for General Practitioners*, STATE BAR OF TEXAS INSTITUTE A-1, A-18 (1977).

Expectations of performance and management of the relationship with outside counsel should present few difficulties if a U.S. firm is chosen. If a foreign lawyer is retained directly, however, there are many potential pitfalls in communications. In the choice of a foreign lawyer, therefore, it is wise to look for someone with good English language ability and experience with other international clients. Over the last twenty years, many European, Latin American and Asian attorneys (particularly from Japan, Korea and Taiwan) have studied for at least one year in the United States in L.L.M. and S.J.D. programs.[6] Having spent a year or more in the United States provides a valuable acclimation to American legal vocabulary, thinking and practice for a foreign lawyer educated in a different legal system. Many of the large law firms in New York and other cities have subsequently hired such foreign L.L.M. graduates for year long internships. As the foreign lawyers in each year's cohort tend to know each other well, both they and the large firms who have hired them are good sources of references.

III. Lawyers by Country

The colonial history of Asia Pacific, as well as the historical European role models for countries like Thailand and Japan which were never colonized, provides a convenient framework for comments on foreign lawyers in different countries. The good news about Asia Pacific is that, with the exception of North America and some countries in Africa, it evidences the most extensive common law tradition received from Great Britain. The bad news is that, in the Indian subcontinent in particular, the most bureaucratic and mind-numbing sides of that tradition have flourished.

Those countries where common law and British legal training predominate are Hong Kong, Singapore, Malaysia, Australia, New Zealand, India, Pakistan, Bangladesh, Sri Lanka, Burma and Nepal. Hong Kong and Singapore, and to a significantly lesser extent Malaysia, enjoy burgeoning free market economies with many excellent British educated lawyers. Business negotiations can be rapidly concluded, with no particular difficulty in obtaining good local legal advice. Australia and New Zealand are of course largely populated by British immigrants and are also well served by common law attorneys.

The more problematical common law tradition countries for the business lawyer are those of the Indian subcontinent. In the thirty-six years since independence, British lawyers have long departed, and the practice of law by their local colleagues can be frustrating and disappointing. Governmen-

6. The Taiwanese bar examination is reputed to be extraordinarily difficult and to have a very low passage rate. Some Taiwanese attorneys, therefore, obtain graduate law degrees in the U.S. because with them automatic bar membership is available after three years of legal teaching in Taiwan.

tal bureaucracies are enormous; permits of one sort or another are required for most important aspects of business activity. The task of obtaining the permits often falls to lawyers, however, it can seem that much time passes with little result apart from voluminous files of correspondence.

It can be wise in India to look for a lawyer with a foreign education, usually English. Having seen how society can be organized abroad perhaps galvanizes these persons to do more aggressive battle with the bureaucracy. Once an effective lawyer is located in India, he can also be used in the neighboring countries of Bangladesh, Nepal and Sri Lanka, but not in Pakistan because of political and religious enmity.

Those countries where American influence has predominated—the Philippines for nearly a century, and Korea and Taiwan over the last twenty-five years—present few problems in the selection of local business oriented lawyers. A number of Korean and Taiwanese lawyers have studied in the United States and relate well to American clients. The Philippines has taken as a model much of the form of American government, with the regulator of the securities market, for example, called the Securities and Exchange Commission. English is commonly spoken in the Philippines, and adequate local counsel is not difficult to find.

To complete this brief geographical survey of selection of local counsel, the more problematical countries remaining are Japan, the People's Republic of China, Thailand and Indonesia. Although Japan's reputed antipathy to lawyers has been well described with such admonitions as "(k)eep a low legal profile,"[7] legal advice is indispensable in any complex business venture within Japan. While it is true the Japanese prefer more informal forms of contracts,[8] the civil law system adapted by Japan from the German model and Japan's extensive controls on foreign related business require attention to legal considerations. Many foreign companies turn to the handful of American lawyers who joined the Japanese bar after World War II, but there are an increasing number of younger Japanese lawyers with some American legal education and experience.

The People's Republic of China (PRC) extirpated its pre-existing legal system during the communist revolution. With increasing Western trade and investment, however, the need for a well defined legal structure and lawyers is being recognized. Although a search for a PRC-trained lawyer is still almost a contradiction in terms, there are several well known American legal PRC specialists, and it is also possible to be a pioneer and search out one's own way.[9] In any event, until the Chinese fully renew their legal system, and perhaps until even later, the perceived policy or "line" from

7. Watts, *Briefing the American Negotiator in Japan*, 16 INT'L LAW. 597, 605 (1982).
8. *Id.* at 607.
9. *See, e.g.*, Doing Business in China: Legal, Financial and Negotiating Aspects, *Law & Business, Inc.* (1979).

Beijing will probably count more with PRC negotiators than any lawyerly interpretation of a newly promulgated law or regulation.

Thailand and Indonesia are both civil law countries, the Indonesian civil code being heavily influenced by the Dutch colonial experience. A few American lawyers practice in both countries, and competent local lawyers are also available. In Indonesia in particular, however, prepare to adapt to the "Indonesian way" of approaching legal matters. Nothing is really what it first appears, and local assistance in the negotiating process is usually indispensable, particularly with government entities.

IV. Interaction with Outside Counsel

Techniques in teaming with and supervision of outside counsel have been well described in recent literature.[10] As they are also the frequent subject of conferences and seminars, the following merely emphasizes a few recurring problems in foreign practice. Outside counsel are asked to deal with a number of subject matters. Among these are export sales of products and technology, direct foreign investment, and taxes.

A. Export Sales

The structure of international sales transactions is the daily bread of much of the practice of transnational law. On the one hand, inside counsel must handle the United States side of the transaction, such as the terms and conditions of sale and the domestic legal aspects of the distribution or sales agency agreement. Putting aside U.S. antitrust considerations as a problem infrequently encountered in trade with Asia Pacific, an underlying continual concern is compliance with the Foreign Corrupt Practices Act.[11] A broad management and legal program of compliance is advisable, including careful investigation and selection of local sales agents, and inclusion in the sales agency agreement of FCPA-related representations on the agent's part. On the other hand, outside counsel must advise on applicable foreign legislation, from restrictive provisions governing the relationship with the local dealer to labor laws, trademark matters, compensation, and local competition law.[12] Although the choice of United States law or dispute resolution can mitigate or eliminate the effect of harsh provisions of local law, such choices are not always respected.[13]

10. *See supra* notes 2 and 5.
11. 15 U.S.C. 78 dd-1 (Supp. I 1977) [hereinafter cited as FCPA].
12. *See* Saltoun and Spudis, *International Distribution and Sales Agency Agreements: Practical Guidelines for U.S. Exporters*, 38 Bus. Law. 883 (1983).
13. *Id.* at 894.

Within Asia Pacific, countries such as Korea and Pakistan may limit the use of sales agents, in governmental military sales in particular. Nevertheless, if local marketing expertise is believed necessary, outside counsel can help devise acceptable alternatives such as medium term consultancy agreements where fees are not contingent upon particular sales.

Perhaps the most restrictive important market in Asia in terms of sales transactions is Indonesia. Local distribution of products is restricted to Indonesian individuals and Indonesian-owned companies, and foreign exporters are required by law to grant an exclusive agency to an Indonesian company for the importation and sale of their products.[14] Since the sole agency agreement can be terminated only by mutual consent, and the foreign exporter can appoint a new agent only after having ". . . thoroughly settled all matters . . ."[15] with the prior agent, the foreign exporter's options are indeed limited. Competent outside counsel for Indonesia should have given advance notice of this recent 1982 decree and advice on how to mitigate its effects. Continual monitoring of governmental implementation and interpretation of the decree is required, as well as assistance in negotiations with the Indonesian dealer whenever the effects of the decree are unavoidable.

Unfortunately, this degree of support from outside counsel would be unusual in many countries of Asia Pacific. Thus inside counsel should regularly read the relevant business oriented press, such as *The Asian Wall Street Reporter* and the *East Asian Executive Reports*, for early notice of such developments. Inside counsel should also be prepared to research foreign law from time to time, both to be alert to the details of new legislation and to double check advice from outside counsel that may be superficial or even dead wrong.[16]

B. Direct Foreign Investment

If a product finds acceptance in a foreign market, or if acceptance is likely but is contingent on local manufacture, questions about direct foreign investment can arise. Alternatives include creation or purchase of a local distributor or factory, as well as the search for a local partner or 100% foreign investment. In Asia Pacific, unfettered foreign investment is possible only in Hong Kong, perhaps the last bastion on the earth of *laissez faire* free enterprise. Even in countries like Singapore where foreign tax investment is welcomed, the availability of tax holidays or other incentives and

14. Decree of the Minister of Industry on the Provisions Governing Sole Agency of July 7, 1982.

15. *Id.* Chapter VIII, Article 26 (3).

16. *See generally* Williams, *Undertaking Effective Research in International Law*, 17 Int'l Law. 381 (1983).

permits provide a degree of discretion to government officials. At the other extreme, in the PRC all foreign investments must fit within a narrow pattern and are subject to negotiation with the government on every detail, trivial as well as major.[17]

When contemplating direct foreign investment in Asia Pacific, an initial meeting with outside counsel to allocate responsibilities is indispensable. Inside counsel can often prepare as applicable the shareholders agreement (which may be advisable as a good faith charter of intentions even if unenforceable in the foreign country), technology transfer agreement, distribution agreement, supply agreement, and loan agreement. Outside counsel will normally prepare the articles of incorporation and by-laws and government investment application, as well as translations of all documents required to be submitted to the local authorities. A schedule should be developed for drafting the documents and receiving comments, particularly on foreign legal restrictions. If, for example, applicable law prohibits deferred payment for locally owned shares contingent on the correctness of representations and warranties of the seller, outside counsel can suggest alternatives such as an extra "bonus" payment not part of the original price.

A related question to be carefully delimited is the scope of outside counsel's authority. In order to keep matters moving, it may be advisable to grant outside counsel some independence in settling minor questions of a legal or commercial nature. With a time difference between Asia Pacific and the United States of an average of 12 hours, and given primitive telephone service with some countries, direct communication can be difficult, and obscure or arcane telex traffic may not clarify the situation. If outside counsel is an outstanding business lawyer who has had enough experience with the client company to have a good sense of its desired outcome in each case, then authority can perhaps be given to resolve matters locally within certain limits. In the absence of a good knowledge of the client, outside counsel is likely to take excessively conservative positions as protection against later criticism.

A reciprocal factor is outside counsel's appraisal of the authority and competency of personnel within the client company. Although inside counsel should be the primary point of contact, other executives in marketing, accounting and taxation may also wish to refer questions or give instructions directly to outside counsel. Absent a military-like chain of command within the company, outside counsel may have to adjust to an ambiguous situation and decide whose questions or instructions should receive priority. It is here that frequent communiation with inside counsel is crucial, since inside counsel should at least know which persons within the company should take precedence and whose opinions can safely be ignored.

17. *See supra* note 9; *see* PRC Joint Venture Law of September 20, 1983.

If negotiations with a local joint venture partner or the government are required, the maximum benefit should be gained of outside counsel's sense of local legal, political and commercial nuances. Although it has been advised that negotiations with the government be left to the local partner,[18] the very real danger exists that the government and the partner will combine against the interests of the American client, as for example in reducing the share of permissible foreign ownership or the royalty rate for technology. Negotiations with the government, therefore, should be directed by the American client if possible, and, at a minimum, outside counsel should be present at every meeting between government representatives and the local partner.

When undertaking direct foreign investment in Asia, an occasional phenomenon which to my knowledge is encountered no where else in the world is the absence of legal representation on the other side. In Japan in particular, a small Japanese domestic business can grow to moderate size without any reference at any point to a lawyer.[19] When a U.S. client wishes to acquire such a business, the Japanese seller will probably arrive without a lawyer. It is surprising how uncomfortable one can feel burdened with a lengthy English language standard U.S. form of acquisition agreement facing a seller with poor command of English and no intention or desire for legal representation. Under these circumstances, each person must find the appropriate solution. One possible response is to radically condense the standard form of agreement and to insist it be read out loud to the seller in his or her language.

C. Taxation

Once a local presence is established through foreign direct investment or otherwise, foreign income taxes are usually due unless the office operates in a purely liaison status within an applicable tax treaty. Although preparation of income tax returns can usually be left to the accountants, the initial tax planning is part of counsel's responsibility. At least one country in Asia Pacific, Indonesia, is *sui generis* in taxation matters. Even though a foreign owned liaison office is prohibited by law from carrying on trade in Indonesia and in fact takes no part in specific export sales into the country, the office is considered to be the permanent establishment of its U.S. parent and is subject to imputed income tax on all sales of the parent's and affiliates' products into Indonesia.[20]

18. *See supra* note 7, at 607.
19. *Id.*
20. Letter of Instructions of the Director General of Taxation to Local Tax Offices of July 7, 1971. *See also*, Investment and Taxation Indonesia, Touche Ross International (1981).

In practice, Indonesian tax inspectors will examine the parent company's published annual report and extract the worldwide profit margin. This deemed margin, of perhaps five to seven percent, is then applied to all sales into Indonesia as recorded by Indonesia importers and from records in the liaison office. At corporate rates of now up to thirty-five percent,[21] the claimed "income" tax can be many hundreds of thousands or millions of dollars in a situation where few other countries would levy any income tax at all.

In a day when the FCPA[22] clearly applies to any inducement offered by a U.S. citizen or resident to the local tax inspector to lower his fanciful deemed profit margin or to exclude sales not properly attributable to the parent, and in a situation where the local "law" is ephemeral and no effective legal redress exists, inside counsel needs strong support. Yet even if the matter is entrusted to a local lawyer or accountant for negotiation, the facts should be clear that inside counsel has in no manner directed, participated in or condoned an FCPA violation. It is especially important that the fees payable to the local consultant are not set at such a level that an inference could be drawn of improper influence.

V. Conclusion

After highlighting the growing importance of the Asia Pacific region, this article has surveyed by country the type and quality of outside counsel available. The choice of a U.S. international lawyer or a local foreign lawyer has been contrasted, and interaction with outside counsel has been discussed in the context of transactions involving sales, investments, and taxes. Although foreign legal questions are sometimes less clear of resolution than American legal questions, the variety of problems encountered in the different cultures of Asia Pacific recompenses the inevitable moments of genuine frustration. If outside counsel is chosen with care and mutual responsibilities are clearly allocated, such moments should be few indeed.

21. Hornick and Wall, Major Tax Changes Implemented, East Asian Executive Reports, 8, March 1984; AMCHAM Indonesia Special Report No. 5, November 1983.
22. *See supra* note 11.