



Ten Things to Know Before Counseling Operations in China

Career Development



Working across cultures and borders can be challenging for anyone in today's global economy, but when you're responsible for managing risk in a place far from home, it's another matter entirely. Whether you are a general counsel coordinating a global team, a subject matter expert coordinating with business and legal leaders in another geography, or headed abroad on an expat assignment, you've got some work to do if you want to maximize your effectiveness in China. While not comprehensive, these 10 items will get you started on the right foot.

- 1. Legal documents should use Mandarin.** While many companies (particularly WFOEs, Chinese subsidiaries of non-Chinese companies) expect employees to be able to conduct business and negotiate in English, relying on English versions of contracts or policies when you may need to enforce them can be a mistake. Chinese courts will be sympathetic to arguments that the meaning was not clear, and may have practical challenges in reading and understanding them themselves (just as a US judge would be if handed a document in Mandarin). Translation into Mandarin before signing (bilingual contracts are the best practice in most cases) is a worthwhile investment for anything you may need to enforce. Translation services that exist can help you with this in many cases, but you'll want someone with fluency in both languages and an understanding of legal concepts to confirm alignment of meaning and intent, which can be tricky.

Direct and clear drafting is advisable in any jurisdiction, but is particularly important when the language is going to be translated or interpreted by someone operating in a second language. For example, “三脚猫” translates literally into “three-legged cat.” This doesn’t mean much to most English speakers before it is explained that it roughly means “jack of all trades (master of none).” Be very precise about what you intend to do, and what you require of the other party.

- 2. Mandarin ? Pinyin.** Another point about language — Mandarin and its latinized approximation, Pinyin, which is typically used in the international media, are not the same. The leader of China’s reform and opening throughout the 1980s was “邓小平,” which is “Deng Xiao Ping” in Pinyin. “邓小平” is also “deng xiao ping,” however, and indicates a willingness to “wait for a small bottle.” If you are relying upon search engines that typically work in English (Google, most third party diligence services, etc.) to get you useful results by searching for a company or employee name in Pinyin, you’re going to get a lot of noise, and possibly not much else. Additionally, you should work with local counsel in China to determine appropriate resources, service providers, and search engines for such research. For a variety of reasons, Chinese search engine results are not as on-point or comprehensive as elsewhere, so there is no substitute for looking in specific, targeted places for the information you need.
- 3. Know your Chinese history.** Following global sea voyages by the eunuch Zheng He during the early 15th century, upon acceding to the throne, the HongWu Emperor stopped all expeditions immediately, burned Zheng He’s fleet, abolished horse-for-tea trade on the borders, and started a period of resistance to foreign influence into China that ran until the 1800s. Following the Opium Wars, China then experienced a century (roughly from the 1840s to the 1940s) when many foreign nations managed “concessions” in many parts of the country where practical Chinese power was reduced (the term “French Concession,” which describes the quadrant of Shanghai that the French inhabited, still invokes this memory). While the economy of China has opened greatly in the last 30 years, this history still lingers in a resistance to being dictated to by foreigners. Presenting yourself and your team as support for local operations, with an intention of helping the local team, will get you much better results than ordering new mandates, processes, and rules to “get China caught up.” Positioning, tone, and sincerity are essential.

Administrative challenges in governing China have existed throughout most of its history. As a result, black or gray markets and “improvising” to get things done are strongly embedded in the culture; they are viewed as practical necessities of how life works by many Chinese (as are other common practices that would strike many elsewhere as out of the ordinary). To get an appointment with a doctor, it would not be uncommon to seek out a ??, or ticket scalper, who will wait in lines each morning and obtain appointments to sell on the market. Before a major surgery, it is very common to give the surgeon a ??, or red envelope, which is filled with cash to ensure the surgeon’s best effort and service. Structure processes to create trust in appropriate places, and be explicit about requirements. It’s best to avoid general moralizing to “be ethical” — for example, telling employees to avoid doing things at work that they wouldn’t do with their own money does not result in operations that match what you mean when you say that.

- 4. Relationships.** You need them, particularly with the government officials and bureaus who are going to be governing the regulations most important to your success. Hire a local government affairs team and supervise/work with them behind the scenes to align desires, but let them take the lead in being the face of your concerns in China. “Lawyering up” and air-dropping lawyers from New York works about as well in China as it does in Alabama — avoid it. Relationships are also important to have in order to stay ahead of shifting requirements —

Chinese regulations are sparse, and interpretation varies across provinces and jurisdictions. Know who will be interpreting them, and know them well enough to obtain guidance before there is a problem. Do not rely on one individual as your contact either — if that person is fired or moves on, you'll lose your entire relationship.

Additionally, the best global law firms are not always the best for your legal needs in China. One of us once sat in on an FCPA pitch from a law firm selling their global experience, despite their closest office to China being located in the Middle East. Law is a restricted industry here, and court appearances are exclusively the province of Chinese lawyers and firms. If you want foreign firm advice, you'll want to ensure they partner with a local firm for the purpose of issuing opinions and appearing in court.

5. **Presence disparity.** The message you craft in English and send out to your “global” team is not going to be interpreted consistently in every locality, and your team in China isn't going to be privy to the hallway conversations and informal chats that local colleagues will be. If your executive team is based in Europe or the United States, recognize how much that impacts how information flows in those locations, and work to be aware of this impact. Make your communications as explicit as possible, and have the right number of expats on the ground in China to help translate priorities, standards, and expectations.

China is an honor culture, and you also should understand the importance of ??, *mianzi* or “face.” Be very conscious of messages (or message style) that could embarrass an employee in front of their colleagues, or senior staff in front of their juniors.

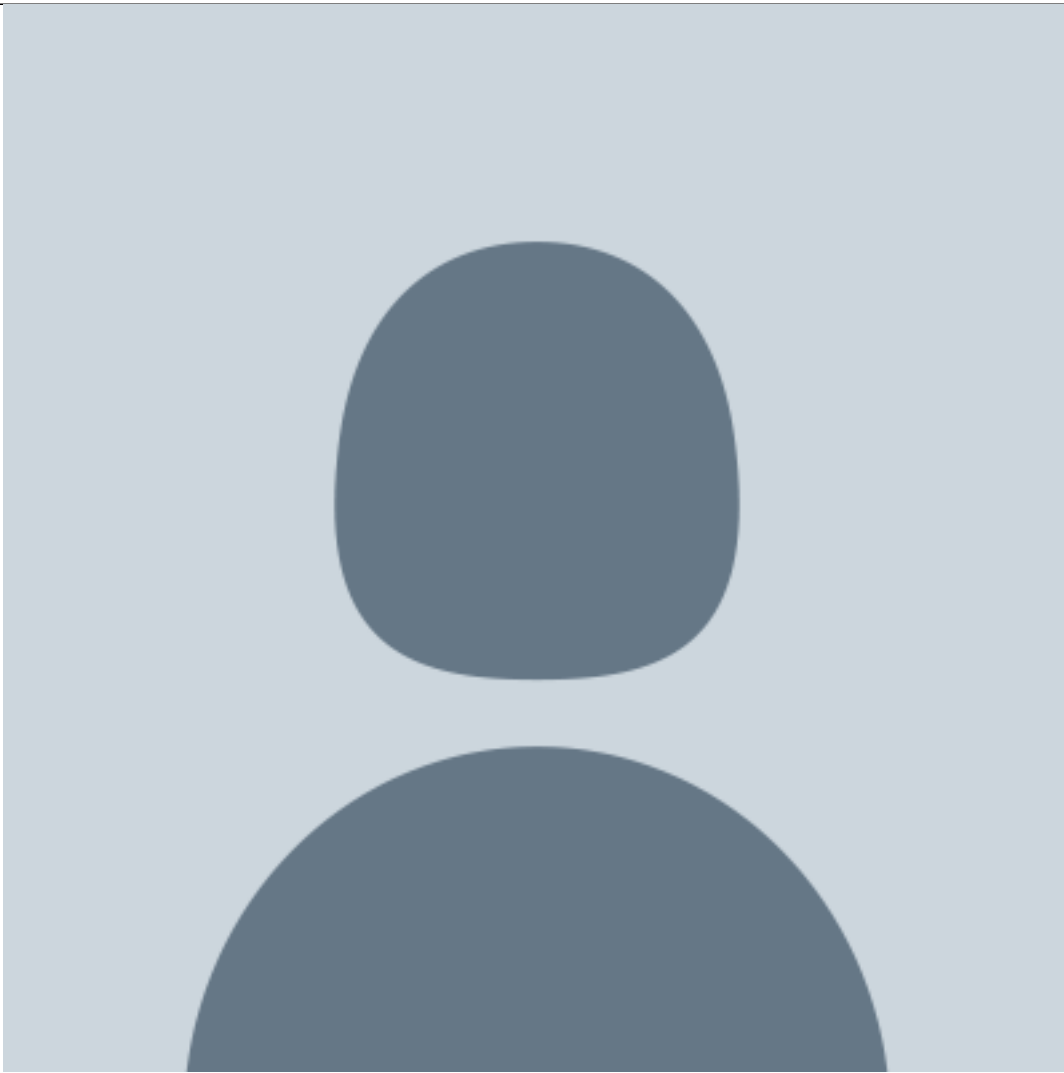
6. **Use arbitration.** You will rarely, if ever, be able to enforce legal judgments obtained elsewhere in China, unless there is a treaty between China and the foreign jurisdiction (there is not with the United States). Using arbitration for dispute resolution gives you more certainty, as China is a member of the New York Convention; however, foreign arbitral awards still must be enforced through the PRC courts to be meaningful for you, which can remain a challenge. Both Beijing and Shanghai have good arbitration venues that include arbitrators experienced in dealing with Chinese-foreign disputes. Your China counterparty will also more likely accept these venues, for strategic and logistical purposes. Many foreign companies still opt for Hong Kong or Singapore arbitration, as they are neutral jurisdictions that are relatively close to China and will also have experienced arbitrators dealing with Chinese-foreign disputes in both languages.
7. **Localize your offerings.** Less a legal point, but incredibly important for your business to understand, particularly if you are B2C. The Chinese middle class is growing at exponential rates, and every company in the world is trying to sell things to them. Consumers have infinite choices — if I want groceries to cook for dinner, I can order them online from half a dozen different outlets and have them waiting at my door when I get home from work four hours later (without paying a delivery fee.) Companies that customize their offerings for China will have more success — good examples include AB-Inbev capitalizing on the year of the horse in the Chinese zodiac by prominently featuring the Clydesdales, sales that end prices in the digit “8” instead of “9” (eight is the luckiest number in China — and avoid four, as its pronunciation roughly approximates the word for death), etc. This can also help engage your local team and give them a larger sense of ownership in what you're building together locally.
8. **In-person due diligence.** Don't try to get by with data rooms if you're reviewing documents for a transaction or acquisition. While digitalization is helpful in some jurisdictions, documents

are very easily faked, and site visits are critical to ensure reality matches description. This is also where good relationships with Chinese law firms can be incredibly helpful. Furthermore, you may be surprised at how forthright local management will be when conducting in-person interviews, which may provide you with important information for evaluating a deal.

Also — have a local team you can really rely upon who understands the cultures of both your home jurisdiction and China completely. Some things really are cultural differences — others will be claimed, but really are not (“untucked shirts” as part of business casual was a recent example for one of us).

9. **Allocate time.** The predominant negotiating style in the United States is linear — i.e., starting with the first point, moving to the second point once the first is agreed upon, and continuing through the list until you have a deal. Chinese style is much more holistic, meaning you’ll feel like you keep returning to the same point after you thought you had reached an agreement; the entire package of points is considered open until each point is agreed upon. Don’t get frustrated by this, nor by the extra time it takes — trying to push past this process will get you an upset partner or a blown deal. Flex your style toward theirs, and you will be surprised by how much more productive your sessions are.
10. **Use ACC.** ACC has a decent number of members in China already, and communities are in the process of being formed in Shanghai, Hong Kong, and Beijing (each held their first events as an in-house community in 2015). Sign up your attorneys in China for membership, encourage them to participate, and explain the value of member-led organizations for their personal development and for benchmarking purposes to them. This can help you accelerate the development of your local team and your ability to work globally together

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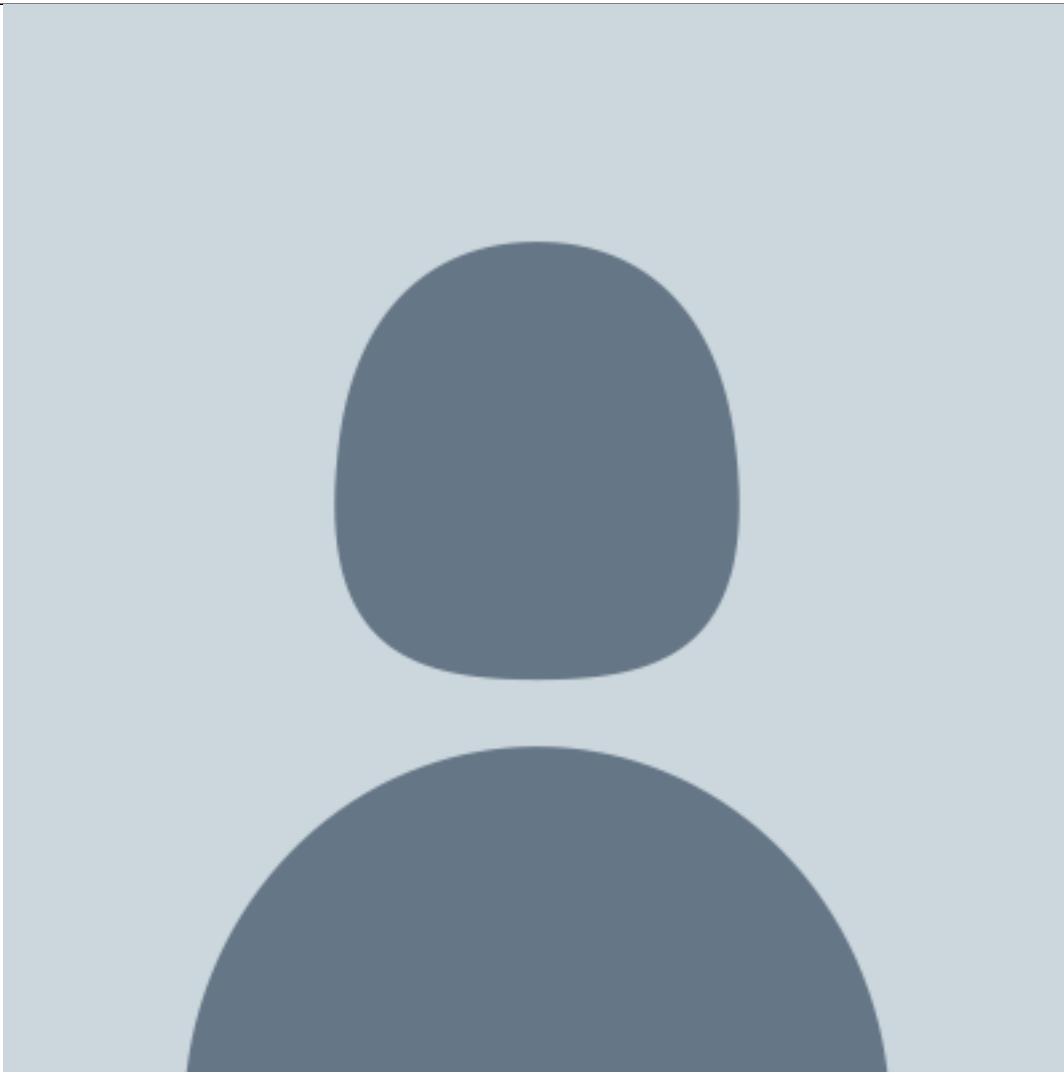


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