

What are the challenges?

Challenges when doing business in China

There are some unique challenges when you are doing business in or with China. These include:

- large parts of the economy are still closed to full foreign participation
- strong competition from well-resourced and positioned state-owned enterprises
- finding and retaining the right skills in the local workforce
- complex business culture
- language barriers
- need for patience to build up trust and networks
- significant time difference
- weather extremes across the country and high levels of pollution in certain urban centres
- anti-monopoly legislation in relation to foreign firms

You should ensure you take the necessary steps to comply with the requirements of the UK Bribery Act. See: <https://www.gov.uk/government/publications/bribery-act-2010-guidance>.

Read the Foreign and Commonwealth Office's (FCO's) latest Overseas Business Risk report for China, at: <https://www.gov.uk/government/publications/overseas-business-risk-china>.

Watch the China-Britain Business Council's (CBBC) recorded webinar on avoiding common scams when doing business in China, at: https://www.youtube.com/watch?v=6OuiZDZ-GE0&index=3&list=PLv_tMYysg7ROD-n2hCkPWBaYTRyxzMpFL.

[Source – DIT/FCO/gov.uk]

Business risk

Commercial / legal disputes and travel bans

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As the number of foreign enterprises investing in China and doing business with Chinese partners has increased, so has the number of commercial disputes.

There are various options available to settle a commercial dispute, principally litigation, arbitration and mediation. The most appropriate option will always depend on the circumstances of the case, and companies should seek the advice of a lawyer who specialises in the laws of the People's Republic of China.

Before entering into a contract in China, companies should take appropriate legal advice, both in the United Kingdom and in China on including dispute resolution clauses and governing law clauses in the contract to plan how, where and under what law, any disputes will be resolved. Chinese law restricts both the choice of law and the types of resolution mechanisms that can be used in China-related commercial contracts, so the contract needs to be drafted carefully. Contracts entered into in the United Kingdom are not generally enforceable by Chinese courts.

Many foreign companies seek to resolve disputes by arbitration rather than litigation. Although it is possible for parties to reach agreement on arbitration after a dispute arises, in most cases an arbitration clause is better included from the outset. Joint ventures operating within China are considered to be domestic Chinese entities and disputes involving joint ventures will mostly be considered to be domestic disputes to be arbitrated in China. The UK Government has published advice on how they can help British nationals with commercial disputes, at: <https://www.gov.uk/guidance/commercial-disputes-in-china>.

[Source – FCO Overseas Business Risk/gov.uk]

Intellectual property (IP)

China has increasingly sophisticated IP and legal systems which are used by large numbers of British companies to obtain IP protection and enforcement relief. However, IP problems still cost British businesses in China hundreds of millions of pounds each year. Damage is not restricted to businesses in the Chinese domestic market – IP-infringing Chinese businesses often have global export capacity.

One source of risk is that IP rights are territorial – that is, they only give protection in the countries in which they have been granted or registered. If you are thinking about trading internationally, then you should consider registering your IP rights in overseas markets. If you are a UK company selling to China, sourcing from China, or even attending the same trade fairs as Chinese companies, your IP is already exposed to risk of infringement.

Another source of risk is that the Chinese IP system works differently from that in the UK. The UK Government provides factsheets on the British Embassy Beijing IP webpage at:

<https://www.gov.uk/government/case-studies/uk-china-cooperation-on-intellectual-property>, to help British companies navigate the Chinese IP system. They also distribute a monthly newsletter informing companies of IP regulatory updates in China. The Embassy and the China-Britain Business Council (CBBC) support over 250 IP cases per year.

Legal advice may also be obtained from legal services providers based in both the UK and China.

General information on IP is provided on the UK Government's intellectual property page at: <https://www.gov.uk/intellectual-property-an-overview>. More detailed guidance on protecting IP overseas in other territories is available from the UK Intellectual Property Office. See: <https://www.gov.uk/government/organisations/intellectual-property-office>.

The CBBC has guidance on IP in China at: <http://www.cbcc.org/services/resources/getting-started/>, and the UK Intellectual Property Office's (UKIPO) also has detailed guidance at: <https://www.gov.uk/government/publications/intellectual-property-rights-in-china>.

The European Commission's China IP Rights SME Helpdesk also offers help for small and medium enterprises (SMEs). See: <http://www.ipr-hub.eu/>.

In addition, the CBBC has a recorded webinar on registration and enforcement strategies for patents in China and trademarks in China at: https://www.youtube.com/playlist?list=PLv_tMYysg7RNU280zoFB6Ggw6xqs0FyG0.

[Source – FCO Overseas Business Risk/CBBC/gov.uk]

Bribery and corruption

Bribery is illegal. It is an offence for British nationals or someone who is ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership, to bribe anywhere in the world.

In addition, a commercial organisation carrying on a business in the UK can be liable for the conduct of a person who is neither a UK national or resident in the UK or a body incorporated or formed in the UK. In this case it does not matter whether the acts or omissions which form part of the offence take place in the UK or elsewhere.

The UK Bribery Act

The Bribery Act applies to non-UK companies operating in the United Kingdom and to UK companies working overseas. It created four prime offences:

- two general offences covering the offering, promising or giving of an advantage, and requesting, agreeing to receive or accepting of an advantage
- an offence of bribing a foreign public official
- a new offence of failure by a commercial organisation to prevent a bribe being paid to obtain or retain business or a business advantage (should an offence be committed, it will be a defence that the organisation has adequate procedures in place to prevent bribery)

The Act recognises that no bribery prevention regime will be capable of preventing bribery at all times. A company will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. Companies must therefore make sure that they have strong, up-to-date and effective anti-bribery policies and systems in place to prevent bribery by persons associated with them.

Bribery and corruption in China

Since coming to power in China, President Xi Jinping has launched a wide-ranging anti-corruption drive. While the main focus has been on corruption within the party and government it has also targeted foreign and domestic companies in key sectors including energy, pharmaceuticals and transportation. It is likely that the anti-corruption drive will continue and there is therefore an increased risk of more British companies being caught up in bribery cases.

China has enacted extensive anti-bribery legislation. For serious cases this allows for up to life imprisonment for offering bribes, receiving bribes can, in some cases, attract the death penalty. The two key laws are the relevant sections of China's Criminal Law and the Law of the PRC against Unfair Competition. In recent years the Supreme People's Court and the Supreme People's Procuratorate (China's public prosecution service) have begun to issue detailed "interpretations" on key aspects of China's legislation. These are designed to help the police and courts in the prosecution of different crimes.

The latest judicial interpretation for the handling of criminal cases of embezzlement and bribery was issued on 18th April 2016, specifying detailed thresholds, as well as what it means in practice by "serious circumstance", "extremely serious circumstances" and "significant loss of national interests" as outlined in the 9th Amendment to the Criminal Law passed in 2015.

Under the 9th Amendment and this new judicial interpretation, companies may be found guilty for providing money or property to former public officials, or close relatives of or any person close to the public officials for former public officials for illegitimate benefits. This act was not previously considered a criminal offence which highlights the increased scrutiny companies and commercial relationships are now placed under.

While the authorities have taken a number of steps to strengthen the independence of Chinese courts, the judiciary is not independent of the party and the rule of law remains weak. There have been instances of the official use of state media channels to pre-empt the judicial process. The courts can be influenced by ongoing political campaigns.

In view of the continuing anti-corruption drive and the stricter measures imposed by the revised criminal law and this new judicial interpretation, companies doing business in China should review their compliance policies and business practices to avoid any potential violation of China's criminal law.

[Source – FCO Overseas Business Risk/gov.uk]

Organised crime

A number of British companies have been attracted by potentially lucrative business offers in China, which have turned out to be scams. We therefore always recommend conducting basic due diligence before making any financial commitments (e.g. checking that your Chinese counterpart is a properly-registered and licensed business). More information can be found on the Chinese Government State Administration for Industry and Commerce (SAIC) website's database at: <http://www.saic.gov.cn/english/>.

An offer that is 'too good to be true' may be, in fact, just that. Any request to pay a fee to have a contract notarised is liable to be a scam:

- verify the data of your business partner
- make due diligence checks
- increase your vigilance when making deals via e-commerce

When making purchases use secure payment instruments. When selling, secure the payment before delivery of the products.

Contrary to what a customer says, it is not always necessary to visit China to finalise a contract. Be wary of a customer who insists otherwise.

[Source – FCO Overseas Business Risk/gov.uk]

Protecting the digital security of your company

British companies, whatever their size, may be subject to cyber-attacks. This can impact on the bottom line thefts of money, customer data or IP – and associated damage to your reputation. As a deterrent the UK Government advises companies to

get their cyber security right. This is a board-level issue that all businesses need to deal with, and the 'Ten Steps to Cyber Security guidance' provides government advice on how to protect your business, see: <https://www.ncsc.gov.uk/guidance/10-steps-cyber-security>. Smaller firms starting out with implementing cyber security measures may find the related 'Cyber Security: what small businesses need to know' guidance more useful (<https://www.gov.uk/government/publications/cyber-security-what-small-businesses-need-to-know>), as well as visiting the government's advisory website 'Cyber Streetwise' at: <https://www.cyberaware.gov.uk/>.

Businesses wishing to implement the most important technical controls, and demonstrate that they take cyber security seriously can apply to be assessed under the Cyber Essentials Scheme, leading to the Cyber Essentials or Cyber Essentials PLUS badge, see: <https://www.cyberaware.gov.uk/cyberessentials/>.

Protective security advice

Business people should be cautious about what information they bring with them to China, and how they use information whilst they are in China – either using IT or speaking in public places, including hotel rooms and public offices. Further protective security advice can be found on the FCO travel advice at: <https://www.gov.uk/foreign-travel-advice/china/terrorism>.

[Source – FCO Overseas Business Risk/gov.uk]

In June 2017 China's new Cyber Security Law came into effect. The main objective of this new law is to strengthen central government control over information flows and data security, as well as preventing cyber-attacks, computer viruses and other network security violations (such as unauthorised data leakage or theft). A further objective is to strengthen China's data privacy regime and protect private citizens.

The new law is expected to have an adverse impact on many foreign technology companies operating in China. See the CBBC Insight at: <http://www.cbcb.org/news/cbbc-insights-china%E2%80%99s-cyber-security-law/?feed=News> for more information and the potential impact on British companies operating in China.

[Source – CBBC Insight]

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