

## **China fools ASIC - as well**

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The irony of ASIC's failed case against Andrew Forrest is that the watchdog apparently made the same mistake as Twiggy: it took the Chinese at their word.

Not only is a memorandum of understanding (MOU) with a Chinese entity not a contract, some contracts turn out not to be contracts either, as many a foreign devil has discovered to his or her cost.

With a legal system that's still evolving, never mind when that system is played with by higher powers, it becomes a tricky business to know just what a company has. From ASIC's point of view, the problem is even trickier in proving a negative: that the company didn't have what it thought it had.

And when ASIC is relying on the input of Chinese parties that might have had another agenda...oh dear.

Back in June, when Justice Gilmour was considering his verdict, an Australian-based legal firm focussed on China matters, MMLC Group, used the Fortescue case as an example of how foreign firms can find themselves in trouble with contracts. After listing myriad approvals that may be required beyond signing a "contract", managing partner Matthew Murphy warned:

"Company officers need to be very careful when making public announcements as to agreements that have been signed with Chinese entities, given that although, they may appear to be binding, from a practical perspective, they may not become executable for many months thereafter and their final form may also differ to that originally agreed upon.

"These issues need to be kept in mind when complying with ongoing disclosure obligations under the laws of various foreign countries so that allegations similar to those raised in the Twiggy Forrest case can not be levied at a disclosing entity or individual.

"Further, confidentiality obligations need to be looked at, and agreed disclosure terms finalised, with a Chinese entity, such that any disclosures by the parties are in agreed form and do not lead to confusion in the market."

Murphy, taking an interest in the case at the behest of clients, correctly tipped ASIC to lose.

“We have had a number of investor clients that were following this case closely,” he said. “They were concerned about the potential fines and other remedies that could be imposed on Mr Forrest and Fortescue, plus associated civil actions that could be filed by investors.

“Many foreigners are surprised to find out that after signing an agreement with a Chinese entity regarding overseas investment by the Chinese entity, that the agreement will require Chinese government approval, prior to it being becoming legally binding, under Chinese law.

“The government approvals can be numerous depending on the venture and Chinese entity involved, but at the very least approval from the Chinese Ministry of Commerce and Chinese State Administration of Foreign Exchange will be needed, and in the larger investment cases, approval from the Chinese National Development and Reform Commission will be needed as well. Most of the time, these approvals are obtained, but every now and then, a government department refuses approval and, under Chinese law, the agreement becomes void.

“Further, some cultural issues need to be considered when signing Chinese agreements. Many Chinese parties will see a first signed agreement as a framework within which they can discuss additional details even though the agreement clearly states that it is legally binding.

“This attitude can lead to great confusion and frustration on the foreign and Chinese side. We have seen numerous cases where bulky agreements have been signed only to see the parties sitting down to renegotiate key points a few weeks later.”

It looks like ASIC as well as Twiggy Forrest was surprised to find that not everything in writing is what it seems.

No-one ever said doing business with China is easy – just ask Stern Hu and many lower-profile souls who have suffered as much and more in the process. Yet it remains the main game, for some the only game, and one that can pay very handsomely.

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