MNC Insurance in China: Are You Protected?

You may think you know it all when it comes to covering your operations, but think again. Your innocence may astound you

BY DAVID LIVDAHL, JENNY SHENG & DANIEL QIN

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Multinational companies (MNCs) often develop a set of template commercial contracts and operating policies specifically for their business operations and expansions in China. These templates are normally tailored from a PRC law perspective, based on the MNC’s offshore headquarters templates. However, it appears that many MNCs in China tend to use the same insurance provisions and policies that their headquarters use, without tailoring the insurance policy requirements and standards specifically for their China business.

In a recent transaction involving the Chinese subsidiary of an MNC that wanted to engage a Chinese engineering consultant, it only took a few days for this company and the consultant to agree upon the major terms of the consulting agreement. However, the execution of the agreement was delayed for two months, simply because the parties were not able to agree on insurance terms and the company had little discretion to modify the insurance language in the MNC’s template for consulting services agreements. We believe that many MNCs encounter the same problem in China.

Unexpected problems

Not surprisingly, this happens to many MNCs that have global policies for insurance, which require their suppliers – including suppliers of goods and service providers – or contractors to procure insurance coverage according to the types of insurance and minimum amounts set forth in the globally applicable policies. Some MNCs require their suppliers and construction contractors to take out employer’s liability insurance, public liability insurance, professional liability insurance and business automobile liability insurance, along with additional types of insurance depending on the nature of the contract (such as collective casualty/personal accident insurance for construction workers and aircraft liability insurance for construction contractors). The typical amounts of insurance required are in the range of US$1 million.

These policies may have worked well in the US or other developed countries, but some MNCs may find it difficult to implement these standard insurance policies in China. Very often, the business teams of these MNCs may have little or no authority to modify such policies and they end up waiving many of the insurance requirements for their contracts.
after difficult negotiations that ironically result in no insurance coverage at all. Alternatively, some MNC contracts with suppliers may contain minimum coverage requirements that mirror the requirements applicable in other countries, but the business units often do not confirm whether such insurance obligations of the suppliers are enforced or not.

At the other extreme, some MNCs turn to arrangements other than insurance for protection. In lieu of insurance, they require their suppliers to provide a performance bond issued by credible banks to ensure performance of a contract, or they may retain a portion of the contract price (5% to 10%) during the warranty period. They rely heavily on the process of selection of reliable suppliers and believe indemnity clauses in a contract backed by a bond or retainer provides them with good protection. Such arrangements may work well in some cases, but will prove inadequate when serious accidents happen.

Many MNCs are weighing the impractical insurance coverage provisions and the risks of zero insurance coverage protection, and are seeking practical solutions.

**Source of the problem**

There are multiple things that can cause difficulties for MNCs trying to implement their standard insurance policies in China. To begin with, MNC policies for insurance may not have been fully localised or customised for use in China, which causes various problems. The required amount of insurance may be unusually high for certain types of insurance. Take business automobile insurance, for example. It may be difficult to get coverage in an amount higher than RMB1 million (US$157,000) in China. Requiring at least US$1 million in compensation for automobile accidents appears unreasonable or unusual for Chinese suppliers or contractors, considering that damages awarded for car accidents are much lower than in the US.

In China, the compensation for death or injury from automobile accidents is linked to the annual disposable income of urban residents, or the annual net income of rural residents per capita in the victim's area for the preceding year. For example, if an automobile accident causes the death of a Beijing resident in June 2012, the compensation for the death will be RMB658,060, (US$103,000), which is 20 times the annual disposable income of Beijing residents per capita for 2011 (RMB32,903). Other damages or losses could also be available to the victims or their families, such as emotional distress compensation, which usually ranges from RMB50,000 to RMB100,000. The level of compensation for death or injury varies from region to region. Outside Beijing, compensation for a death may be much less, since the annual disposable income of urban residents, or the annual net income of rural residents, can be much lower. For example, the compensation for death of urban residents in Hubei province is just RMB367,480 for 2012. Automobile owners in China are also required to take out compulsory motor vehicle accident liability insurance, which can be used to cover compensation for death or injury caused in automobile accidents first, and the shortfall can then be covered by business automobile insurance. Given the above, requiring at least US$1 million in compensation for automobile accidents appears unreasonable or unusual in China.

Another factor is that insurance products may have different names or functions in China. The coverage of public liability insurance is one example. Public liability insurance is a policy designed to cover a business when it is legally liable to pay compensation for personal injury or property damage occurring to members of the public within the geographical boundaries specified in the policy, and caused by an occurrence connected with the business or its products. In some countries, public liability insurance usually includes product liability – which protects a business against injury to customers, and damage to their property, as a result of a product it sells or supplies – and is known as public and product liability insurance, or alternatively, public liability insurance can be extended to include product liability insurance.
We have seen insurance provisions regarding public liability insurance in some MNC contracts requiring coverage of product liability. This provision may work in countries like Australia, but not in China, because public liability insurance in China does not cover product liability, and public liability and product liability are usually covered by different policies. Therefore, requiring suppliers in China to obtain public liability insurance in order to cover product liability will cause confusion and may result in no coverage for product liability.

On the other hand, historically Chinese suppliers and contractors are unwilling or reluctant to procure insurance. Many Chinese companies do not fully understand or appreciate the importance of insurance, and some Chinese companies will even ask MNCs to pay for their insurance. In their view, insurance is not part of the standard practice in China – for example, employer’s liability insurance is much less common in China than in the US – and unnecessary insurance will increase their costs and reduce their profit margin. Therefore, the ratio of those having insurance coverage is surprisingly low in China. For example, reportedly only 9% of construction projects are insured in China. So in this light, it is not surprising that Chinese suppliers or contractors push back on the insurance requirements of MNCs.

Due to their lack of experience, Chinese companies also often claim that certain types of required insurance are not available in China, although such insurance or its equivalent can be found. A good example may be professional liability insurance. MNCs often require their service providers to obtain professional liability insurance if professional services are involved. Few Chinese insurers are able to offer such insurance, and the insurance, when available, is mostly limited to traditional professions such as design, legal or accounting services. Most Chinese companies are not aware that professional liability insurance may extend to professionals other than designers, lawyers and accountants. Since the development of the Chinese insurance market is uneven, some insurance available in first-tier cities may not be available in second- or third-tier cities – another reason that some Chinese companies claim the required insurance is unavailable.

To make matters worse, while most Chinese suppliers or contractors are inexperienced in insurance matters due to lack of relevant training, some MNC employees in China negotiating contracts do not fully appreciate the significance of insurance, or understand what is exactly required under the policies as well as the reasons for these requirements. As a result, they cannot effectively convince Chinese suppliers or contractors of the necessity of insurance, or assist them in locating the correct products from the right insurance companies.

**Take expert advice**

Delays in reaching an agreement on insurance will adversely impact the business of MNCs. First of all, the negotiation process may be prolonged. Second, without the right to modify the policies, or by not knowing how to revise insurance language, the business teams of MNCs often have to waive the requirements, resulting in no coverage for their corporations in China, although their operations in China may be covered by insurance carried by their headquarters.

To solve these problems, many MNCs have realised that their global policies need to be customised for use in China. It is necessary to revise the insurance language based on insurance products available in China, and to use the correct terminology. It is equally important to set the required amount at a reasonable level, considering the practice in China. Instead of requiring contractors to procure employer liability insurance at a minimum amount of RMB8 million for a limited number of employees involved in the performance of the contract, it may be more appropriate to require compensation of RMB200,000 to RMB500,000 for each employee.
MNCs having a problem with their insurance policies in China should seek the assistance of insurance brokers and experienced lawyers. Experienced brokers can not only advise on what types and amounts are usually used in China, but also from which insurers the required coverage can be obtained at the most favorable rate. With the help of lawyers, different templates can be developed for contracts as needed, which can significantly assist in negotiations between MNCs and their Chinese suppliers or contractors.

Some MNCs have only one template for all kinds of service contracts requiring, among other things, professional liability insurance without exception when professional services are involved. In some circumstances, it is desirable to prepare different templates for different service providers. For example, when the design institute engaged to prepare drawings has obtained professional liability insurance and a consulting firm is engaged to review and provide comments on such drawings, it may not be a good idea to require the consulting firm to have the same professional liability insurance as the designer, since the consulting firm only has secondary liability.

Our suggestions to MNCs regarding their PRC insurance policies are:

1. Locate a reliable and experienced broker to assist in selecting insurers and determining the types and amounts of insurance coverage;
2. Categorise the commercial contracts into different groups based on the nature and amounts of the contracts, and work with legal counsel and/or an insurance broker to allocate specific types and amounts of insurance policies to each group of contracts;
3. Establish a feedback system where the business team reports to the head office in China regarding the implementation of insurance policies in each region, and for each business;
4. Have a locally based insurance coordination team to examine and supervise the implementation of insurance policies, and update the insurance policies in China.

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跨国企业在华保险：你得到保护了吗？

在处理保单问题时，你可能自以为已经对所有事都了然于胸。但请三思！或许你会惊异地发现这样想太过天真。

BY DAVID LIVDAHL, JENNY SHENG & DANIEL QIN (CHINA BUSINESS LAW JOURNAL – JUNE 2012 EDITION)

跨国企业通常为其在华业务专门制定一套商业合同及经营政策模板。这些模板文件一般都是以跨国企业海外总部的模板文件为基础，再根据中国法律的要求作出修改调整。但是对于保险事项，许多在华经营的跨国企业似乎都倾向于照搬其总部的保险条款和保单内容，却不愿专门制定适用于中国业务的保单要求和标准。

在最近一项涉及某跨国企业下属中国子公司的交易中，该公司需要聘用一家中国工程顾问公司。该公司与其顾问仅用数日便对顾问协议的重要条款达成协议，但却拖延了两个月才完成该协议的签署，原因就是双方无法就保险条款达成一致意见，而子公司又无权自行修改其母公司的顾问服务协议模板中关于保险事宜的条款。我们相信，许多跨国企业在中国都面临着这样的问题。

未防不测

许多在全球范围内采用统一标准保单的跨国企业会遭遇上述情形并不令人惊讶。他们要求供应商（包括产品与服务供应商）或承包商按照跨国企业全球保单规定的险种和最低额度投保，某些跨国企业要求其供应商和建筑承包商投保雇主责任险、公众责任险、专业责任险和商用车辆责任险，以及根据合同性质需要投保的其它险种（例如为建筑工人投保团体疾病险/个人意外险和建筑承包商需要的飞机责任险），要求的保额通常都在100万美元左右。

这些保单在美国或其他发达国家能很好地得到执行，但某些跨国企业可能发现，同样的保单却很难在中国推行。很多时候，这些跨国企业的业务团队可能很少甚至没有权限修改这类保单，而他们经过艰难的谈判后最终只能在合同中放弃许多保险要求，最终往往导致根本没有任何保险保障的尴尬结果。在另一些情况下，某些跨国企业与供应商之间的合同可能参考其他国家的做法，纳入最低承保要求的条款，但糟糕的是，业务单位通常不会确认供应商是否真正履行了这些保险义务。

某些跨国企业则走向另一个极端：放弃保险，转而寻求其他保护措施。作为保险的替代措施，他们要求供应商提供由可靠银行出具的履约保函以保证供应商将履行合同义务，否则他们可能在保证期内扣留一部分的合同价款（5%~10%）。这类安排可能在某些情况下有用，但不足以应付严重的意外情况。许多跨国企业在认真衡量各类不切实际的保险条款以及零保险的风险后，都在迫切寻求切实可行的解决方案。

问题根源

很多因素都会给试图在中国推行标准保单的跨国企业造成困难。首先，跨国企业的保单可能没有专门针对中国的具体情况进行本地化调整，从而招致各种各样的问题，例如投保金额过高。以商用车辆险为例，在中国可能很难找到投保金额超过100万元人民币（15.7万美元）的险种。在中国机动车人身伤害事故的损害赔偿金比在美国要低很多，因此要求至少100万美元的汽车事故理赔金在中国供应商或承包商看来不切实际。该类安排可能在某些情况下有用，但不足以应付严重的意外情况。许多跨国企业与供应商之间的合同可能参考其他国家的做法，纳入最低承保要求的条款，但糟糕的是，业务单位通常不会确认供应商是否真正履行了这些保险义务。

在中国，对车辆事故所致伤亡的赔偿金额与城镇居民的可支配年收入或农村居民上一年的人均净收入有关。例如，若某北京城市居民在2012年6月因车辆事故身亡，其死亡赔偿金将为65.8万元人民币（10.3万美元），即2011年北京城镇居民人均可支配收入（32903元人民币）的20倍。在中国机动车人身伤害事故的损害赔偿金比在美国要低很多。例如要求至少100万美元的汽车事故理赔金在中国供应商或承包商看来不切实际且有悖常理。

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的伤亡，金额不足部分可通过机动车商业保险赔付。鉴于以上情况，在中国要求至少100万美元的汽车事故理赔金是不切实际、有悖常理的。

此外，保险产品在中国可能会有不同的名称或功能；公众责任险即是一例。公众人士在保单规定地域内因该企业或其产品而遭遇任何人身伤害或财产损失，此时公众责任险就能分担企业需要支付的赔偿金。在某些国家，公众责任险承保范围通常包含产品责任，企业因销售或供应产品而对客户造成人身伤害或财产损失时，可以得到该公众责任险的保护，因而公众责任险又称为公众产品责任险。或者在另一些国家，公众责任险可扩展至包括产品责任险。

某些跨国企业合同的保险条款中，要求对方在购买公众责任险时，涵盖产品责任保险。此类条款可能在澳大利亚等国适用，但不适合中国，因为公众责任险在中国不包含产品责任，而且公众责任和产品责任通常需要分别投保。因此，要求中国供应商为投保产品责任险而购买公众责任险的做法只会令人不解，甚至导致未投保产品责任险的结果出现。

另一方面，以往经验表明，中国供应商和承包商不愿购买保险。许多中国公司并不完全理解或不能体会到保险的重要性，某些中国公司甚至会要求跨国企业承担投保费用。他们认为，保险并非中国的商业习惯（例如雇主责任险在中国的普及程度要比美国差很多），而且不必要的保险还会增加成本、影响利润。因此，在中国购买保险的企业所占比例极低得惊人。举例来说，据报道中国仅有9%的建筑工程项目购买保险。有鉴于此，中国供应商或承包商推搪跨国企业的投保要求也就不会令人感到惊讶了。

由于缺乏了解，中国公司还经常声称在中国买不到所需购买的某类保险，而实际上市场上就有这类保险或具有相同功能的险种。专业责任险就是一个很好的例子。跨国企业需要专业服务时，通常会要求其服务提供商购买专业责任险，但现有中国保险公司有能力提供这种保险；即便有专业提供，多数也仅限于传统的专业服务领域，如设计、法律、会计等行业；大多数中国公司不理解专业责任险的范围可扩展到设计师、律师、会计师以外的其他专业服务人员。由于中国保险市场发展不均衡，某些可于一线城市买到的保险可能无法在二、三线城市买到，这也是某些中国公司声称买不到所需保险的另一个原因。

多数中国供应商和承包商虽然缺少必要的培训，对保险事务没有经验，但更糟的是，某些在华跨国企业负责合同谈判的人员也不能全面领会保险的重要性，或未能透彻了解保单项下的确切要求和提出这些要求的内在原因。结果，他们当然无法有效地说服中国供应商或承包商关于投保的必要性，或协助他们向合适的保险公司寻求他们所需的保险产品。

采纳专家意见

在保险条款上的纠缠会对跨国企业的业务造成不利影响。首先，可能会拖延谈判程序；其次，在没有保单修改权或者不了解如何修改保单措辞的情况下，跨国企业的业务团队经常会弃保单要求，以至该跨国企业的在华业务完全无法获得保险的保障（即便其中国业务可以纳入总部所购保险的承保范围）。

为解决这些问题，许多跨国企业已经意识到他们的全球保单需要修改调整后才能在中国适用。跨国企业应根据中国现有的保险产品使用正确的术语修改保单措辞。考虑到中国的实际情况，合理设定投保金额也同样重要。与其要求承包商为数量有限的雇员购买最少800万元人民币的雇主责任险，不如要求为每名雇员投保保险金额在20万至50万元人民币之间的保险，这样也许更为妥当。

对在中国适用怎样的保单存在疑问的跨国企业，应向经验丰富的保险经纪人和律师寻求帮助。有经验的经纪人不仅会为企业在华需要投保的险种和金额提供意见，还会告知具体可向哪家保险公司购买所需保险才能获得最优惠的费率。在律师的协助下，可按具体需要制作不同的模板合同，这样对跨国企业与中国供应商或承包商进行谈判大有帮助。

某些跨国企业在需要专业服务时，各类服务合同一律只提供一种专业责任险条款模板。某些情况下，有必要为不同的服务提供商准备不同的保险条款模板。例如，当聘请设计图纸的设计院已购买专业责任险，而一家咨询公司受聘负责审核其设计图并出具意见时，要求咨询公司投保同一种专业责任险可能就不太适合，因为咨询公司在此情况下只承担次要或从属责任。

我们对跨国企业在中国购买保险的建议如下：

1. 寻找可靠且经验丰富的保险经纪人协助挑选保险公司和决定所需承保的险种与金额；
2. 根据商业合同的性质及合同金额将之归类分组，与法律顾问或保险经纪人合作为每一组合同设定具体需要投保的险种及金额；

3. 制定反馈体系，便于业务团队向中国总部报告保单在各地区、各业务领域的执行情况；

4. 在当地设立一个保险事务协调小组，负责审查、监督中国地区的保单执行情况并更新相关保单内容。

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