

## **UNDISPUTED PROGRESS, UNKNOWN OUTCOME**

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The industrial and economic and recently also the social development of China and generally China's breathtaking speed of change are mentioned on an almost daily basis in the media of 'the West'. In parallel to these developments, however, another, equally important change is taking place: China is – on what can be called a spotty but steady basis – becoming an "Etat de droit", and is implementing the rule of law that was and still is one of the main foundations of the economic development of notably Europe and the US during the past 200 years or so.

Historically, the legal system in China was influenced first by the administrative, bureaucratic character of its government over a period of several thousand years, and later the several, fundamentally disruptive political changes during the 20th century. During the past two or three decades notably, China – or more exactly the People's Republic of China, the "PRC" – has stabilized substantially from a political point of view. This stabilization has been accompanied by a renaissance of a rather complex administrative body of law, as well as its counterpart: the government authorities entrusted to administer and implement such law.

Note that until today much of the PRC's law and authorities are still in line with the tradition of China's ancient history and customs. In other words large parts of private business arrangements are, well, not private, but are subject to government scrutiny and approval and thus under the government's influence. Indeed, China is blamed by to foreign

investors for the density of and at the same time a certain lack of transparency with regard to the various licenses required for many or most aspects of economic activities in China. However, things are changing. Effective as per July 1, 2004, the PRC authorities are now subject to the “Administrative Licensing Law”, which has as its very subject matter the regulation of the scope and the related procedures of the numerous government licenses and approvals in China. The new law stipulates surprisingly clear principles for the authorities, which translate into the objective of achieving the ‘rule of law’ that was before often missing in day-to-day government practice. Maybe most important, article 4 of the law stipulates that all licensing shall be based on statutory law, rather than only administrative practice or the pure discretion of the authorities in charge – in other words, the authorities shall only require approvals where the written law stipulates so, and approvals may only be subject to requirements that the written law actually foresees. Admittedly actual practice is more complicated, as many if not all laws stipulate a catch-all clause regarding the requirements for approval of a given activity, such “... and any other conditions as decided by the authorities”. Nevertheless, the legal framework of the Administrative Licensing Law giving clear guidance to the authorities seems to break with earlier tradition where the law tended to restrict private activities, rather than the government’s doings.

Another common thorn in the eyes of foreign investors in China is litigation, debt enforcement, and generally court procedures. It is in fact neither a secret nor wrong that the People’s Courts have historically been plagued by a certain lack of legal quality and an sometimes anecdotal bias against foreign parties. This was rooted more than anything else in history, such as the fact that courts were earlier welcome havens for military officials close to or after retirement from their military duties and who thus started their judicial career with an utter lack of knowledge of the principles of law. Further, the main explanation of the perceived and actual failures is the fact that the

judicial system as such, including the judges, court clerks, law schools and last but not least the lawyers themselves, has pretty much started from zero only some two or three decades ago, with the opening of China after years of internal turmoil. At any rate, during the recent years a gradual improvement of the courts and their output is clearly visible. Next to impatient and often aggressive foreign companies anxious to protect their investment and other economic interests, or simply anxious to see their bills paid, it has been the Chinese themselves who find an ever increasing interest in litigation and the courts, evidenced by daily reporting on consumer protection law suits in the newspapers and even radio shows with call-ins from listeners asking for legal advice for issues as various as divorce and excessive phone bills. All of this sounds familiar, and has indeed greatly contributed to the continuous improvement of the judicial system in China. Naturally, the foreign plaintiff should not yet expect quick and easy results. Lengthy procedures lasting several years are still the rule, notably if the sum in litigation is substantial, and the defendant thus uses all means available for defense of his legal interests. However, and as actual cases show, patience by the foreign investor paired with the willingness to invest in quality legal representation does usually pay off, and may well result in a more or less legal – or in a more Chinese term – in an equitable court judgment.

Winning a law suit in China, much as is the case elsewhere, is after all strongly related to the necessary appropriate legal representation. And indeed, the quality of China's lawyers and law firms can be seen to be improving steadily though from a low start, with at least some of the firms, though probably not the majority, gradually leaning towards and willing to apply modern management methods, IT and other tools for supervision and generally mechanisms of quality control that in Europe and the US have already become a common standard among lawyers and law firms for many years. The challenge notably for large Chinese law firms remains, however, the guarantee of a minimum and notably

constant level of quality of the legal work, and the client (i.e. the foreign investor not familiar with local circumstances) is best advised to assure at all times who exactly handles his legal matters – in order to avoid, to the extent possible, that work is pushed down the ladder to cheaper, but obviously less experienced or even untrained younger staff.

As the experienced foreign investor knows, in China a mere judgment in his favor does unfortunately not yet represent much of a tangible outcome. Rather, the next stage – enforcement – is the next practical hurdle and which is not easy to overcome: Contrary to probably most European jurisdictions, in China the enforcement of judicial decisions in civil matters lays with the courts themselves, rather than with separate, administrative authorities. To make things worse, in the past judges have tended to be much more motivated to ‘seek justice’ by rendering a judgment than to be involved in the more hands-on task, i.e. the less prestigious enforcement of such judgment. As a result it was and still is not uncommon that a final and binding court judgment, obtained after a lengthy trial, was where the actual negotiations between the parties began (again), with the aim of achieving a settlement of how much the succumbing party would actually pay to the winning party. But here again, things are improving, and the foreign investors has today at his disposal procedural mechanism as useful as, for example, the attachment of assets, including that of real estate, which of course greatly enhances the leverage for the party seeking enforcement. Needless to mention that this only applies if such assets and real estate are indeed available, and that is where the old adage: caveat emptor proves as true in China as anywhere else.

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