

October 3, 2005

China Legal System

by Jerome A. Cohen

Over 550,000 foreign direct investment contracts have been approved in China since the start of the PRC's "Open Policy" in 1979. Tens of millions of import/export, processing, assembly, compensation trade, licensing, agency and other international business contracts have also been concluded. Given these statistics and the challenges of doing business in China's exciting but complex environment, it comes as no surprise that many disputes have occurred.

Fortunately, most have been quietly settled through informal negotiation. Yet the China International Economic and Trade Arbitration Commission (CIETAC) handles close to a thousand cases per year (while its Japanese counterpart might handle two dozen in a big year)! Also, China's burgeoning local arbitration commissions are beginning to deal with international business disputes, and arbitration tribunals in New York, London, Paris, Stockholm, Hong Kong, Singapore and elsewhere are increasingly preoccupied with China disputes.

Foreign parties frequently insist on arbitration clauses in their contracts with Chinese companies in an effort to avoid China's traditionally distrusted courts. Yet if they win their arbitration but the Chinese side refuses to comply with the award, in the hope of compelling compliance they usually have to resort to the very courts they sought to avoid. Moreover, since many contracts -- especially those concluded by foreign-invested enterprises with Chinese companies and individuals -- have no arbitration clause, disputes arising under such arrangements go directly to Chinese courts. So too do lawsuits against PRC agencies and officials for alleged administrative law violations as well as tort actions brought by or against foreign-related companies and individuals.

Thus, China's courts cannot be avoided. Can they now be trusted?

China today has a nationwide court system including over 3,000 basic courts and almost 200,000 judges. The task of forging this huge and inexperienced group, originally staffed mostly by former military and police officers without legal education but now increasingly recruited from law school graduates, into professionally competent, honest, impartial and independent decision-makers is formidable. To do so the Supreme People's Court has labored mightily, within the confines of Communist Party policy and the SPC's limited political power.

Yet the courts continue to inspire distrust. Judges are often vulnerable to corruption, political control and the pressures of "guanxi" (social connections based on family, friendship, school or local ties). Since their appointment, promotion, assignment, compensation and removal are all at the pleasure of local government and Party leaders rather than the Supreme People's Court or the provincial high courts, they and the litigants who appear before them are subject to the abuses of "local protectionism". Even PRC arbitration sometimes suffers from the same types of pressures that distort judicial justice. What are the prospects for reforms essential to establishing judicial credibility? Although we can expect an expanding role for the courts and further incremental efforts to strengthen their performance, the major political, ideological, economic and structural changes required to create a judiciary worthy of the name are not on the cards. It would be logical as a first step for the PRC leadership to try to lift local courts out of the mire of "local protectionism" by placing the power to appoint, promote, assign, compensate and remove local judges in the Supreme People's Court or the provincial high courts, so that local judges would become more responsive to national and international legal norms rather than local pressures. It would also be helpful to review the current substantive criteria for making each of these determinations. But such changes will be

very difficult to effect, if only because of the limited power of the center to influence the country's many regions. The much more challenging reforms required to reduce the impact of corruption, "guanxi" and interference from government and Party officials at every level are not yet on the horizon.

Much more is at stake, of course, than providing foreign business with the level of legal comfort it takes for granted in North America or Western Europe. The Chinese Government is plainly confronting a general domestic crisis of confidence -- indeed of legitimacy -- because of the failure of its institutions, especially the courts, to deal fairly and predictably with the rapidly accumulating demands of both rural and urban citizens for social and legal justice. There are few signs, however, that the Party is prepared to shrink its powers to the extent that would be required to launch the process of establishing a truly independent judiciary. Heaven is wonderful; the problem is how to get there. In Taiwan and South Korea it took the profound democratization of the last eighteen years to lead the way.