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Riding the Dragon: Law and Legal Opportunities in China

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This article provides a very brief outline of the history of Chinese relations with the West, and the development of the Chinese Legal system from its origins to the present day. Having thus described the framework and environment within which a foreign lawyer practising in China must work, the article then proceeds to examine the options available to a foreign qualified lawyer seeking to practise law in the People's Republic of China (PRC).¹

History and background

China has always held a particular fascination for the West. The romantic notion of the exotic and mysterious East may well have captured the imagination of explorers like Marco Polo throughout the ages, but the relationship between China and the West has always had commercial overtones. For at least two thousand years, the Silk Road (actually, a network of routes) served as the conduit for trade between the great civilisations of East and West.²

From the 15th Century on, sea trade controlled by European powers took over from the land based routes that had been mainly under Arab control.³ Ships could transport greater quantities of goods, faster and more cheaply than caravans of camels or horses.⁴ Ports such as Macau and Hong Kong were the trading posts at the Chinese end of the sea trade routes. Trade volumes increased, which was not altogether welcome on the Chinese side, since Western demand for Chinese products was far greater than the converse. Chinese emperors regarded China as self-sufficient, and in the Ming (1368-1644) and Qing (1644-1911) Dynasties, trade was officially discouraged.⁵

To maintain trade with China and to prevent a trade deficit, the European powers resorted to importation of opium. This was backed up by military force, leading eventually to the Opium Wars.⁶

China in the 20th Century was rocked by a series of momentous events. Principal among these were the Boxer Rebellion (1900-01); the overthrow of the Qing Dynasty and the advent of the Republic (1912); the war between the Kuomintang (Nationalist Chinese) and the Communists, resulting in the Long March (1934); the Japanese Occupation before and during the Second World War (1931-45); the defeat of the Kuomintang and the beginning of the Communist Era (1949).⁷ The Communist Party under the leadership of Mao Zedong (Mao Tse-tung) presided over the so-called Great Leap Forward (1958-62) and Cultural Revolution

(1966-76).⁸ Many of these events had a dramatic adverse effect on trade with China.

The re-opening of the modern PRC to the rest of the world has its roots in the reforms, commencing in 1978, of Deng Xiaoping, who had become the leader of the Chinese Communist Party following the death of Chairman Mao in 1976.⁹ Although the reform process has been gradual, and occasionally marked by adverse events such as the Tiananmen Square Massacre in 1989,¹⁰ China has transformed itself into a modern economic powerhouse, whose economy has been forecast to surpass that of the United States by 2035, and to be double the size of the latter by 2050.¹¹

The sheer size of China can seem staggering to the outsider: a total area of just under 10 million sq km (just slightly smaller than the US); a population (as of 2008) of over 1.33 billion;¹² and a GDP (on a purchasing power parity basis) of US\$7.6 trillion in 2008.¹³ Even in the present economic crisis, China's GDP is still expected to grow by 6% in 2009 and 7.3% in 2010.¹⁴

One of the most visible features of the economic revolution that has taken place in China is its public architecture. The Pudong area of Shanghai, the Beijing Olympic venues, and the new Beijing International Airport are notable examples.¹⁵

The economic miracle that has transformed the major population centres has not filtered down to all sectors of the Chinese population, however, and there is evidence that the slowing global economy has only widened the gap between rich and poor in China.¹⁶

Chinese legal system

Wherever there is business and trade, law and lawyers are not far behind. Like other aspects of its culture, the Chinese legal system can trace its origins back thousands of years. In ancient China, the idea of law was represented by two symbols, or characters: Xing and Fa.¹⁷ The first of these characters connotes punishment and traditionally was associated with the 'five penalties': tattooing, disfigurement, castration, mutilation and death.¹⁸ Nowadays, Xing is used when referring to criminal or penal law; whereas the second character, Fa, refers to human made law in general and may be translated as 'fair' or 'just'.¹⁹

Traditional Chinese Law embraced two distinct philosophies: Confucianism and Legalism.²⁰ The former philosophy taught that human beings are fundamentally good, and bad behaviour can be rectified though instilling a sense of shame and desire to rejoin the harmony of society. According to the latter doctrine, however, human beings are fundamentally self-interested; the only way to regulate their behaviour is through published laws, backed up by a system of penalties. Both philosophies accepted that ultimate authority derived from the ruler, who remained above the law.²¹

The two philosophical foundations were synthesised in laws that were compiled into legal codes. The earliest of these codes to have survived in complete form to the present day is the Tang Code of 624 AD.²² Later imperial dynasties maintained codified laws, culminating in the Great Qing Legal Code. Based on the codified system of the previous Ming Dynasty, the Qing Code underwent some thirty revisions during the entire Qing period (1644-1912).²³

In the late Qing dynasty, efforts at modernisation resulted in the importation of Western Codes into the Chinese legal system. These were predominantly received via Japanese

translations of German legal codes.²⁴ Another important change during this period was that the name of the Department of Punishment (Xing Bu) was changed in the early 1900s to the Department of Law (Fa Bu).²⁵

Following the Communist Party victory in the Chinese Civil War, the Republic of China was re-established on the island of Taiwan. The legal system of Taiwan is based on the following six legal codes: (1) Constitution; (2) Civil Code; (3) Code of Civil Procedures; (4) Criminal Code; (5) Code of Criminal Procedures; and (6) Administrative Laws.²⁶

In mainland China, the civil legal codes were replaced by socialist law adopted and adapted from the Soviet Union. Suspicion of lawyers and the legal system led to the total collapse of the latter, until the reforms of Deng Xiaoping led to the adoption, by the National People's Congress in 1982, of a new State Constitution for China.²⁷ The new Constitution emphasised the rule of law – so that (at least in theory), even party leaders are subject to law and accountable for their actions.²⁸

Gradually, the legal system in the PRC was re-established. Today, modern Chinese law can be traced to the following sources or influences: (1) the traditional Chinese philosophies of Confucianism and Legalism; (2) the socialist views of the Chinese Communist Party; (3) European civil law dating from before the communist ascendancy; (4) English common law, as practised in Hong Kong; and (5) US banking and securities law.²⁹

Difficulties of practising law in China

Foreign lawyers, who are seeking to practise their profession in China, face difficulties which are often greater than for those seeking to practise in the United States or Europe, for example. For individuals who have received no previous education in the Chinese language, the lack of language fluency is one of the major barriers. Mandarin is the official language of China, but there are also many local dialects. In Hong Kong, for instance, the local dialect is Cantonese. A lawyer working in Hong Kong may face negotiations conducted in Mandarin, while needing a basic knowledge of Cantonese to (for example) give directions to a taxi driver to get home!

It is possible to work in China, and particularly in Hong Kong, without speaking any Chinese, but such jobs are usually reserved for those expatriates who possess skills in some specialised area of law, typically US or European banking and finance law.

After the language barrier, the next greatest challenge for many expatriates involves adapting to the cultural differences between China and their home country. These differences range across many aspects of life, in both social and business spheres, and can be profound in many instances. Some changes are obvious and will usually be anticipated before relocation to China. Examples include the differences in food and food ingredients that are available, the different currency, the quality of tap water, and so on. Other differences may not be obvious or anticipated and may come as a surprise, often unpleasant. As a common example, in the urban parts of China and in Hong Kong, the concept of personal space is quite different to (ie, greatly reduced from) the normal western conception.³⁰

Having overcome or avoided the language and cultural problems, the next challenge for the foreign lawyer is to gain an understanding of the Chinese legal system. This problem

is, of course, no different to that faced by any expatriate lawyer seeking to practise in a foreign jurisdiction; however the problem is exacerbated in China because of the difficulty of the language and because of the diverse influences that have contributed to the Chinese legal system, as discussed previously. A further problem is that a well-drafted Chinese law may be applied in a well-reasoned judgment by a Chinese court, but the judgment may be difficult or impossible to enforce.³¹ The situation is different in Hong Kong, which operates a legal system which is very close to the common law system of the United Kingdom and other Commonwealth countries.³²

Even today, practising in certain areas of law in China entails particular difficulties and risks. For example, human rights lawyers may face personal risks not normally considered by corporate or commercial lawyers.³³

Finally, a foreign lawyer, who has overcome all of the above difficulties, faces practising restrictions imposed by the Chinese government and legal system. China does not permit foreign qualified lawyers to interpret its laws or to write legal opinions on them.³⁴ That is not unusual; most jurisdictions contain a similar restriction. More unusual is that Chinese certified lawyers cannot become partners in foreign law firms without losing their local practice qualification.³⁵ Furthermore, only PRC nationals or Hong Kong residents who do not hold a foreign passport may obtain a PRC practising certificate.³⁶

As well as individual restrictions, limitations are also imposed on foreign law firms, although these have been relaxed in recent years. Before China gained accession to the World Trade Organisation in 2001, foreign law firms and banks were limited to one office in the PRC (excluding the Special Administrative Regions – one of which was Hong Kong).³⁷ Foreign firms generally established an office in Hong Kong, but were forced to choose between Beijing and Shanghai as their single PRC office. To cover the other major city, many firms established an alliance with a local firm in that city. Following China's WTO accession, the 'one firm, one office' policy was lifted in 2002, and the number of foreign law firm offices in China has expanded dramatically.³⁸

Despite the remaining limitations, there is still a significant and on-going role for foreign law firms to provide legal services within the PRC. That is because, at least to date, Chinese law firms have yet to develop expertise in highly sophisticated cross-border transactions, the specialty of the large international firms. Furthermore, financiers of foreign investment into China often stipulate that financing documents must be prepared in accordance with, for example, New York or UK law.

Options for practising law in China

There are essentially three options for a foreign lawyer wishing to work in China.

1. Work for a Chinese law firm in the PRC. This option is only really viable if the lawyer is highly fluent in Mandarin, to the level of fluency expected of a local legal practitioner. This is regardless of the fact that the foreign lawyer will be primarily advising on foreign law.

2. Work for a foreign law firm in the PRC. Fluency in Mandarin is highly desirable but not essential in this case, particularly where the lawyer will be advising in specialist areas such as foreign finance or securities law. This option

has the attraction that foreign expatriates are usually paid much higher salaries than those paid by the local Chinese firms, particularly at associate level. However, jobs in this category are usually limited to those who have developed a high level of expertise in a specialist area of law at a major foreign centre such as New York or London.

3. Work in Hong Kong. Because Hong Kong's legal system is closely related to that of the United Kingdom, opportunities for lawyers qualified in the UK, Australia or New Zealand are greater than in the PRC. Legal services offered by the major law firms in Hong Kong can be classified into three categories: (a) purely local Hong Kong work (eg, litigation between two Hong Kong businesses); (b) cross-border work between Hong Kong and jurisdictions governed by UK or US law; and (c) work where one of the parties (the client or a counterparty) is a PRC entity ('China Practice'). In the first case, a local Hong Kong practising certificate is required. The second type of work may be performed by a 'Foreign Registered Attorney' (ie, the lawyer holds a practising certificate in a foreign jurisdiction). The third case is similar to working for a foreign firm within the PRC itself (ie, Option 2 above).

The way forward?

Several possibilities exist for the future of foreign legal practice in the PRC. One option open to China is to further relax the rules to permit foreign lawyers to advise on Chinese law. This is not considered likely, any more than Australia would allow foreign Chinese registered lawyers to provide advice on Australian law without an Australian practising certificate. Less remote is the possibility that China might allow foreigners to acquire PRC practising certificates, or permit Chinese registered lawyers to become partners in foreign firms without losing their local registration. Neither step appears likely any time soon; the latter restriction also prevents mergers between foreign and local Chinese firms.

What is already happening (and indeed has happened in many cases) is the affiliation ('alliance') between a foreign law firm on the one hand, and a local Chinese firm on the other hand.³⁹ These arrangements allow clients to obtain full legal service, including both Chinese and foreign aspects of their transaction. The benefits of affiliation extend to economies of scale associated with joint marketing and training programs.⁴⁰

A final possibility is the emergence of the first Chinese-headquartered international firm. The first steps along this path have already been taken, with the opening by a small number of Chinese firms of 'outpost' offices in California.⁴¹ However, the first truly international Chinese law firm is still a relatively long-term prospect.

Conclusion

The long, rich and diverse history of China, its culture and legal system, and the differences between these features and those of the West, pose great challenges for Western lawyers seeking to practise their profession in the PRC. Nevertheless, opportunities do exist for lawyers in the PRC and in Hong Kong. Fluency in Mandarin is a great asset in obtaining work in either jurisdiction, as is experience in areas such as finance or securities law, particularly if gained in New York or London.

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Research task:

What are the main differences between the legal systems of Australia and mainland China? Are there any similarities?