CHINESE CONCEPTS OF LAW
Aspects Antithetical to the American Perspective

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I. Chinese Legal Culture and Western Views

- As one scholar has noted, “Law is an outstanding example of the problems one faces in trying to fit the Chinese reality into a Western framework.” William C. Jones, Understanding Chinese Law: Thought Control in Prewar Japan, 3 Rev. Socialist L. 219, 226 (1977).

- Prior to the enactment of the Uniform Contract Law (UCL) and an amendment of Article 5 of the Chinese Constitution in 1999, China had never enacted legislation that established a “rule of law.” The lack of a so-called rule of law is at the root of many of the differences between Western and Chinese concepts of law:
  1. The Western Ideal connotes that all individuals have the means and the right to decide what is just and lawful. Karen Turner, Rule of Law Ideals in Early China, 6 J. Chinese L. 1, 44 (1992).
  2. The Chinese Ideal means that the decisions of rulers and officials have to guide and to define the goals of the legal system; societal duty takes precedent over legal rights, and the individual is not the bearer of those rights – rights are created by the state. Law is an instrument of state policy. Id.

- Although China has adopted many new “Western-style” civil and criminal laws such as the UCL within the past two decades, these laws have gone largely unobserved by the Chinese for a number of reasons:
  1. The Chinese have a dramatically different perception of ethics and law — contracts in particular. Relationships, reciprocity and respect are the foundation of the extra-legal rules of Chinese society. Business agreements are negotiated and formed based on trust, and contracts are often considered unnecessary and even disrespectful. The sources of these customs are as follows:
    - Confucian philosophy, Taoism and Sun Tzu
      (a) Confucian Influence on Commercial Law — According to the teachings of Confucius, the rule of law becomes necessary only when individuals wish to act outside their class roles. Class roles are therefore essential to the formation and enforceability of commercial contracts. Inasmuch as contracts form a legal relationship, this legal relationship must be based on a preexisting social relationship determined by one’s role in Confucian society.
      (b) Taoism’s Influence — Governmental intervention through rules and laws is considered unnecessary and detrimental. Taoists disdain the legal rules that Westerners take for granted.
(c) Sun Tzu’s Influence — Instead of addressing contractual or legal problems head-on, as is the manner of Westerners, the Tao Te Ching, Sun Tzu’s seminal work, focuses on dealing with problems by using deception, psychological maneuvering, and the subordination of the individual need to the group need. This is the antithesis of the Western “clean hands” approach to adversarial negotiation and litigation.

• Importance of Family — The Chinese ethic is “family first, business second.”

• Guanxi — So-called “guanxi” are connections and networking that facilitate backdoor deal-making. Guanxi is built by doing favors and giving gifts. Chinese business people devote an extensive amount of time and resources to building guanxi with respectable people. One scholar has noted that “the entrenched nature of the guanxi system has proven to be one of the most powerful obstacles to establishing anything resembling a rule of law in the People’s Republic of China, and is probably the biggest headache of would-be legal reformers in China.” Scott Seligman, Chinese Business Etiquette (1999).

• Mianzi — People must preserve their “mianzi,” which is self-respect or “face.” Reciprocity, the key element of preserving mianzi, often involves the exchange of gifts and favors.

2. There is a disjunction between the complexity of the new laws and the level of legal training in China of both lawyers and judges; therefore, the interpretation and/or enforcement of the laws are that much more difficult. Only about one-fifth of the lawyers in China have legal training, and an even lower percentage of judges have a formal university education in law. Only 19.1% of Chinese lawyers have a college degree or higher; and with judges, only 15% have a college degree, but no law degree.

3. Some power is still reserved to the state that inhibits the freedom of contract. Contracts that “disrupt social and economic order or harm the public interests” will be deemed illegal. UCL Art. 7 (1999).

• The Chinese tend, as a result of some of the cultural influences listed above, to be litigation and conflict-averse.

• The Chinese tend to think of time as cyclical and holistic, which also influences their perceptions of the law. Many Chinese prefer to leave timing and planning open, which is a tendency that might frustrate Westerners who are attempting to form Western-style contracts with them.

• In China, contracts are not “final.” That is, an agreement is the beginning of a business relationship and signals the start of negotiations, not the conclusion of them. Moreover, in part due to the cyclical understanding of time that Chinese culture has, Chinese business people will frequently wish to renegotiate or reinterpret contract terms after already agreeing to them.
II. Dispute Resolution

Besides litigation in Chinese courts (see below), there are generally two accepted alternative methods of dispute resolution in China:

1. **Mediation and Conciliation** — The preferred method of resolving civil disputes in China is mediation or conciliation. Mediation and conciliation are very effective means of dispute resolution in China. There are many locally elected mediation committees, as well as national committees that mediate international trade disputes (e.g., the China Council for the Promotion of International Trade/China Chamber of International Commerce Conciliation Center), that will negotiate disputes between civil parties. If the parties fail to reach an agreement through mediation and conciliation, the next step is legal proceedings in the people’s court. Mediation and conciliation are often conducted prior to or during both arbitration and litigation.

2. **Arbitration** — While arbitration is the most popular method of resolving commercial disputes in China, it is not necessarily the most effective means. The China International Economic and Trade Arbitration Commission (CIETAC) is China’s only international arbitration institution and is one of the world’s busiest trade dispute settlement organizations. Unfortunately, the current consensus is that it is an ineffectual and incompetent organization. Jerome Alan Cohen, a former Harvard Law School professor and one of the few genuine U.S. Chinese law experts, testifying before the U.S.-China Commission in 2001, stated that

   “At a minimum, I would surely no longer advise clients to accept CIETAC jurisdiction unless the contract’s arbitration clause requires the appointment of a third country national as presiding arbitrator. And CIETAC needs to improve the ethical and professional standards of its staff, prevent breaches of confidentiality and conflicts of interest and insulate its arbitration panels from the hazards of politics, corruption, guanxi and ex parte communications that plague the courts.”

(http://www.uscc.gov/tescoh.htm)

III. Enforcement: the Court Systems of China

As a mechanism for enforcement of agreements, the Chinese court system is pitifully weak:

- The most fundamental issue for foreign business people and Chinese citizens is that the court system lacks judicial independence. The local people’s courts are responsible to the organs of the state that created them, and there is no separation of powers between the judicial branch and the state. Judges are both selected by the people’s congresses and paid by them. As a result, judges tend to be Communist Party members, heavily biased toward the views and goals of the Party. They are treated as civil servants instead of special professionals, and their quality as judges is commensurately poor, as is their level of education.

- Mechanisms that Westerners take for granted, such as an adversarial system and juries, are not available in China.

- Chinese judges have been criticized not only for being uneducated (see details above), but also for being protectionist of local and personal interests.
• Chinese parties are so unaccustomed to the concept of Western-style litigation that they do not necessarily even think of court as a realistic possibility. There is considerable bureaucratic and cultural pressure to resolve most disputes without going to court.

• Corruption, inaccessibility and weak infrastructure have yielded long delays and lack of execution of judgments against large, locally-important-but-cash-poor enterprises.

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This information is intended to provide general information for clients or interested individuals and should not be relied upon as legal advice. Please consult your attorney for specific advice regarding your particular situation. If you do not have an attorney, you can contact one of the Porter Wright attorneys below:

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