

Litigating effectively: When in China, do as the Chinese do?

By Rogier van Bijnen

Whenever a Western company loses a business dispute, it usually accepts the ruling of the court and pays up (assuming appeal is no longer possible). Chinese businessmen tend to hold a different view: *it ain't over until it's over*.

When entering into a transaction with a Chinese counterpart, enforcement of the agreement should already be taken into account during negotiations. A (foreign) bank guarantee or escrow is of course a good solution, but this is often a non-starter for the Chinese side.

Many foreign investors hold the view that arbitration outside China is the best way to settle disputes. This is, however, based on a limited understanding of how enforcement in China works in practice. We often advise clients to opt for a Chinese language agreement (with English translation) under Chinese law, with dispute resolution in China.

Judgments by foreign *courts* usually have no value at all in China (save for where bilateral treaties on reciprocal recognition exist, *e.g.* with France or Italy, but even then the treaties tend to have a very limited scope). China is, however, a party to the New York Convention, so Chinese courts should recognize foreign *arbitral* awards unless certain specific exceptions apply. It is no surprise that Chinese courts have relied on these exceptions to protect Chinese parties and refuse recognition (*e.g.*

because a foreign award would be contrary to PRC public policy).

It did not take long for the Chinese government to realize this was bad for international investment and trade, so it introduced the rule that any court refusing recognition of a foreign award should report to the PRC Supreme Court. Since then, only a handful of awards have been refused. Anyone who believes this has solved the problem, however, will be surprised by Chinese creativity: local courts now sometimes simply refuse to register a case, or they delay it indefinitely; if there is no ruling, then there is no obligation to report to the Supreme Court...

For now let's however assume you managed to win the arbitration – this was easy, since your Chinese counterparty did not even bother to show up – and a PRC court has recognized the foreign award. More than a year has gone by since the dispute started and by now you are finally allowed to enforce in China. Guess what? The Chinese party is nowhere to be found, its company is liquidated and all assets have disappeared. While you were winning the arbitration in some comfortable place like Singapore or Hong Kong, your Chinese counterparty has been busy too.

Had your agreement instead given jurisdiction to a Chinese court or arbitration institute, you would have been able to freeze assets immediately prior to the proceedings (this does require a deposit or guarantee from your side). In such case, assets really cannot be

transferred out. So, unless there is any relevant asset abroad, dispute resolution in China is often the best way to put pressure on an unwilling Chinese counterparty and to preserve its assets.

What about the quality of legal proceedings in China? First of all, [China ranks 19th](#) on the World Bank's global contract enforcement ranking (ahead of countries like the UK, Italy, Spain, the Netherlands and Switzerland). This ranking is mainly about speed and costs, but in our experience courts in Shanghai, Beijing and other large cities are rather sophisticated. Of course you don't want to go to court somewhere in the province where your counterparty is the largest employer and has close family ties with the mayor. In such event a reputable Chinese arbitration institute, possibly with foreign arbitrators, is a good solution.

What about the language of your agreement: should the English or Chinese version prevail? Chinese judges will simply refuse to read any English, even those few clauses essential to the dispute. Wouldn't it therefore be better to rely on a Chinese version drafted by your lawyer, instead of arguing forever over a translation made by a third party?

When litigating in China, do as the Chinese do.

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This article is based on a Dutch blog that Rogier van Bijnen wrote for M&A, a website for professionals in mergers and acquisitions in the Netherlands:

www.MenA.nl (<http://mena.nl/artikel/23260/when-in-china,-do-as-the-chinese-do?>)

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