

Best prepare yourself for legal quirks when you carry on business in China

From Mr Arthur Loke.

Sir, The foreign press often carry stories about the difficulties of enforcing judgments in China. Some reports deal with infringement of intellectual property rights, or of difficulties in getting a judgment in one province enforced in another. For foreigners, the concern usually is no more than the successful enforcement of a judgment concerning a business debt, a process the Chinese themselves wryly say is "harder than reaching the sky".

Successful enforcement now still depends on the location of the court. Beijing and the coastal cities have greater success in enforcement than the cities inland. The hierarchy of the court issuing the enforcement order also matters. However, from time to time, something gives pause for wonderment about the effectiveness of Chinese legal enforcement.

Your correspondent Geoff Dyer reports ("Tussles can mean courting disaster", Investing in China) that a chief judge of a court from Leshan, Sichuan province, enforced his court's judgment against a Danish-owned company in Shanghai, personally travelling 2,300 miles to do it. The judgment allowed the judge to freeze the bank account of the Danish-owned company, and also a section of its factory. The case is being appealed, but the defendant is said to be pessimistic about the outcome.

The report hints darkly of the chief judge doing the bidding of one of the bosses of a big factory in a small industrial town, and being guilty of "legal protectionism". Another point raised by the foreign defendant was that it had no knowledge that it was being sued in the Leshan court.

In a small city like Leshan, it is likely that the collegiate bench at the appeal level has close working colleagues of the chief judge and is subject to similar political and business pressures. However, this case looks perfectly ripe for pushing the procuratorate, which supervises the courts, to start an investigation as a parallel step to the appeal. The procurators perform the roles of

investigators and prosecutors of corrupt judges, and maintain discipline among officials. Last year, according to Xiao Yong, chief justice of China, in his report to the National People's Congress, 461 judges were convicted of corruption. If it is true that a judgment was enforced against the Danish-owned defendant without it being given notice of the lawsuit, that must be a serious mis-step even by Chinese standards.

What happened to the Danish company can happen to any foreign company doing business in China, despite efforts to cordon off contact with the Chinese courts by choosing arbitration over litigation in business agreements. Unfortunately, there is no hermetic protection from the Chinese judicial process once a company has a presence in China doing business. Foreign businesses and their general counsels should recognise this and acquire more knowledge about the Chinese judicial system, and work with lawyers who have specialist knowledge of the Chinese judicial system and Chinese litigation.

It does not help to be disdainful of the ability of Chinese judges, nor to put before them over-sophisticated legal arguments. The defence advanced by the Danish defendant was that "the court unlawfully obtained jurisdiction to hear a dispute about a contract that does not exist". No doubt a fine point, but one that may not resonate with provincial judges.

At present a foreign defendant has no alternative to using a foreign lawyer who understands the quirks of the Chinese judicial process and works with good Chinese litigation lawyers. There is much to be said for hiring a foreign lawyer, himself subject to strict bar rules in his home jurisdiction, to supervise a matter in an area still fraught with the temptation of money and with cultural, economic and political sensitivities. That, however, is the reality of doing business in China today.

**Arthur Loke,
Arthur Loke and Partners,
Singapore 038989**