

the trouble of evidence discovery in Chinese litigation proceeding for foreign parties

Description

To institute a lawsuit in China is set to be a big headache or even a nightmare for foreigners or foreign companies. There are many reasons for causing the headache: total ignorance of Chinese substantive and procedural laws, lack of trust in their lawyers hired, lack of confidence in Chinese juridical system and so on, among which the trouble in the cumbersome discovery requirements for evidences submitted to Chinese courts from outside of China.

China Civil Procedure Law has provided no special rules regarding adduction and admission of evidences originating from outside of China. But in 2002, China Supreme Court issued a comprehensive guideline relating to discovery, burden of proof, pre-trial evidence exchange, creating new rules not provided by China Civil Procedure Law at all, triggering debate as to its legitimacy. But in practice, they are followed in general by courts at all level. In this Guideline, Article 11 provides:

Where the evidence submitted to the people's courts are formed outside of China, such evidences shall be notarized in the said country and be authenticated or attested by Chinese embassy or consulates in the country, or be certified in accordance with formalities set out in the relevant treaty to which China and the said country are parties.

If the evidence submitted by parties is formed in Hong Kong, Macau or Taiwan, the relevant certifying formalities shall be conducted.

According to this clause, evidences that are "formed" outside of China shall be notarized and authenticated or attested before they can be admitted into Chinese courts. In other words, without notarization and authentication, evidences discovered outside of China are meaningless.

However, notarization and authentication could be very cumbersome and troublesome which is also lengthy and costly in some countries. My personal experiences in civil and commercial cases have shown that this requirement could make the preparation for filing the case with the court a long process. In an extreme case, in the ongoing international trade dispute on behalf of UK client against a Shanghai local supplier, it takes the client quite a few months to collect evidences and get the same notarized and attested locally because the case involves discovery in three countries outside of China.

With people migrating all over the world, in a simple inheritance case, the clients will have to collect evidences in two jurisdictions involving USA and Taiwan because one of the heir was born in Taiwan and one was in USA.

The word "notarize" or "notarization" can vary from place to place in terms of its legal meaning. Different countries have different notary systems with notarization carried out by different functional agencies in society. In China, we have an independent notary system under which every city has multiple notary offices. In some other countries, notarization is done by law firms. Due to this vast

difference, Chinese lawyers will generally have no idea as to how the notarization will be carried out abroad, and I have no way to make meaningful input in that process.

In practice, the plausibly prudent measure of ensuring genuineness and integrity of evidences has been called into question ever since its outset. What is the value of this mechanism for justice? In many cases, the notarization does not mean much in explaining and certifying the genuineness of evidences esp for evidences that have been formed or come into being already. For example, in an international arbitration case in CIETAC, our client resorted heavily to emails in proving the necessary facts to support his claims. Such emails to be submitted to the arbitration panel shall be notarized. But what kind of notarization should be conducted? Desirably, we hope the notary officer will certify these emails in the way Chinese notary officers do: they witness and record the process of accessing, viewing, downloading and printing of certain emails. But it turned out that the notary officer only certified that the person (the client) had affixed his signature on the documents (printed emails) attached. Though in that case, the other party did not raise challenge to the emails. But the point is why we bother to do the email notarization which has nothing to do with proving the integrity and genuineness of such evidences.

This onerous requirement has prompted some bold judges to interpret the clause differently to the effect that this provision regarding notarization and authentication intends to strengthen the weight of evidences and should not be regarded as pre-condition on the admissibility of such evidences.

Even though, before China Supreme Court repealed or amended this clause, for sake of safety, it will be always advisable for foreign parties to get their evidences notarized and authenticated if the same are to be used in Chinese litigation proceeding.

Date Created

June 2013

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