China legal counsel-your bodyguard for dealing with China

Description

You cannot resist the temptation of China vast market for your products and services, so you start doing business with or even in China.

However China while appearing promising for your business success does not guarantee you a bed of roses ahead. On the contrary, you will find yourself uneasy when operating in a hugely different society. You need to plan for the adverse. For instance, there arises a dispute with your trading partner, supplier or JV partner in China, what will you do? There is not much you can do except taking the dispute to arbitration or litigation. Now comes the biggest problem.

As a cross-border dispute, where will you go to court? In China or in your home country? Where will you have a better chance? You may instinctively choose to sue your Chinese counterparts in your home country, assuming that there is no clause of arbitration in your contracts with Chinese parties. But wait. Your efforts and money spent at home will earn you nothing in the end. Because China, so far, generally refuses to recognize and enforce judgments made by foreign courts outside mainland China unless the state where the foreign court is located has entered into bilateral treaty in relation to judicial assistance in recognizing and enforcing the judgment delivered by the other state. A notable exception is for recognizing and enforcing divorce judgment (for more click here) made outside mainland China. Though things start changing gradually with more and more foreign states entering into bilateral treaty with China addressing recognition and enforcement of civil and commercial court judgments entered by the courts in the other state, Chinaâ€™s major trade and investment partners such as USA, Japan, UK, Germany (our team is working on a case applying for Chinese court to recognize and enforce a judgment delivered by Germany court on the basis of reciprocity as we found that one Germany court had recognized and enforced a judgment made by a Chinese court) etc. are yet to conclude such bilateral treaties with China.

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Then your best bet will be to solve the dispute with a Chinese court or via international arbitration.

Though Chinese judicial system has seen progress over the past, it cannot warrant peopleâ€™s faith in its fairness when it comes to any case with a relatively big amount of value because of the deep-seated corruption problem and its close affiliation to local governments. Moreover, even one is fortunate enough to win a case, he will very likely find that it is just the beginning of another agony, i.e. the enforcement of court judgment. Enforcement of court judgment has been always a headache unless pre-trial or during-trial property attachment is duly worked out. Debtors always have ways to conceal, transfer their assets, rendering a win judgment virtually a real piece of paper only.

Enforcement of arbitration awards is even in a worse situation. Awards granted by International arbitration institutions (other than CIETAC) will have to be firstly recognized by Chinese courts before enforcement, which is an independent proceeding. An obvious downside of international arbitration is that they cannot take property attachment measures against the Chinese party to the arbitration, leaving it more likely to have a winning award unhonored in the end.

It is risky to work and invest in a country where there is no sound judicial system to uphold justice and fairness. This is a risk every foreign investor shall have to take into account. The question is what a foreign investor should do when such risk is inevitable and unavoidable given the slow progress in Chinaâ€™s political reforms (judicial reform is part of it).

The answer I can think of is that foreign investors should try to mitigate and minimize legal risks before problems arise. This requires that foreign investors shall need legal counsels from the very beginning of entering Chinese market and retain your attorney to deal with a situation where a potential dispute might happen. Your legal counsels should take into consideration all possible legal means available under Chinese law when drafting transaction documents in any deal, and shall exhaust any and all legal means in dealing with a contentious situation. In summary, pre-caution is a must when you are dealing with China.

In particular, foreign companies that donâ€™t have business presence in China (the â€œForeign Companiesâ€•) shall also pay due regards to legal risks in China, such as trading companies that source products from within China, foreign travel agencies that bring in foreign tourists into China.

Our legal team has noticed the need of Foreign Companies dealing with China for basic Chinese legal services and has accordingly worked out plan to cater to such needs. One of measures we take is to lower substantially the threshold fee for hiring our legal service, as we understand such Foreign Companies donâ€™t have much need for legal consultation compared with foreign investors IN China. Now the threshold consultation fee is RMB 20,000 per year, or RMB 2,000 per month, optional to clients. Legal fee may be raised in light of clientâ€™s China-related business scale.

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Our legal services will generally cover review of contracts used with Chinese merchants, basic due diligence on Chinese merchants, serving attorney letter on Chinese merchants (for purpose of collecting money or warning, statement etc.) and legal consultation for dispute settlement (litigation or arbitration will be separately charged) and other related services to be specified in retainer agreement between our client and our law firm.

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