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## Civil Litigation in the Wild Wild East

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The civil justice system in China has made major strides in the last 20 years. However, for Western lawyers and clients, it remains a strange and unfamiliar jurisdiction. This article is an overview of the civil litigation process in China, followed by some tips to keep in mind when litigating in China.

Litigation in China generally follows the following stages:

After a complaint is filed, the case acceptance division of the Chinese Court determines whether to accept the case. This determination is mostly procedural, though sometimes case acceptance divisions may reject complaints if they

determine the causes of action to be substantively defective.

In larger cases, the Court will typically set a time for the parties to exchange evidence, as well as an evidentiary hearing. At this hearing, the parties “cross-examine” the evidence. As discussed in more detail below, the evidence in Chinese civil cases is almost always documentary in nature.

Third, in every case, the Court will mediate the dispute. This is a very important phase in Chinese litigation, as Chinese Courts much prefer a voluntary settlement instead of a trial.

Finally, the trial is held. Trials are generally quite short, with most concluded in a day or two. Thereafter, the attorneys typically will submit final briefing and the Court will then issue its decision.

With respect to timing, “ordinary” cases must be resolved in the first instance within 6 months of filing, although one 6 month extension is generally permitted. However, cases involving foreign parties are not “ordinary” cases and are not

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## Quinn Emanuel's Trial Marathon -- 11 Trials In 60 Days, and a 100% Victory Rate

In the May issue of this newsletter, we reported that during a 60-day period this summer, firm lawyers were scheduled to begin trials in no fewer than eleven cases around the U.S. We believe eleven business trials in two months is without precedent, even for the firm that tries more business cases than any firm in the United States. The claims tried ranged from breach of contract to trade secret theft to fraud, and were before state and federal court juries. The venues from Los Angeles to Florida, from California to Connecticut. The results of most of these trials are now in. We are pleased to

report that two of the cases settled, one trial was continued until October, and three trials are still in process. In the five cases tried to verdict, as our clients have come to expect, the firm was victorious in every one.

In July, the firm won a jury verdict in Mattel's long battle with MGA over the rights to the lucrative line of dolls.

We obtained a seven-figure jury verdict against a hedge fund for several film development companies.

We obtained a complete defense award for leading venture capital firms and their top partners in a fraud case brought by

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subject to these strict timing rules. Cases involving foreign parties are generally resolved in the first instance within 1 year, though complicated cases can take up to 2 to 3 years.

*Tip #1—If possible, pick a good venue:* China is a very large country where local protectionism is typical. Therefore, the case is often won or lost based on the chosen battlefield. Generally speaking, the Courts in Beijing, Shanghai, and Shenzhen *tend* to be the most fair and impartial. These Courts also tend to be more professional than Courts in other areas—the Chinese judges in these larger cities generally have received at least some legal training. Judges in smaller cities may not have any legal training at all.

**Case Study #1:** A multinational (MNC) car manufacturer sued a Chinese car maker for wholesale copying of the MNC's design for its most famous passenger car. For various reasons, the MNC chose to sue in the home province of the Chinese manufacturer—a state-owned enterprise (SOE)—instead of in Beijing or Shanghai.

From the first hearing, it was obvious that the local Court was biased towards the Chinese SOE—the largest taxpayer in the province. For example, the Court ceded to the SOE's demands that the trial be held quickly, setting the trial on a Saturday before a week-long holiday in China. This was highly unusual. However, an early trial date fit with the SOE's aggressive roll-out schedule for the copy-car.

Later, at the trial, the Court attempted to do what it believed was in the best interests of the SOE. Literally 15 minutes into the trial, the Court issued a ruling ordering the MNC to rectify alleged procedural "defects" in the Complaint within 3 months. The MNC's counsel immediately asked for the ruling in writing, ostensibly so the MNC could appeal. Just a few hours later, when it became apparent that the 3-month delay was contrary to the SOE's wishes for a quick defense verdict, the judge attempted to reverse himself and order everyone back for trial immediately. Citing the written ruling, the MNC refused to return for trial until the alleged procedural "defects" were

cured.

*Tip #2—Know the opponent:* China's emphasis is on domestic stability and "rule BY law"; this is a very different concept than the "rule OF law". Under "rule BY law", personal relationships ("guanxi") are more important than clever legal arguments.

Accordingly, it makes perfect sense that the Chinese Courts tend to be quite fair if both parties are MNCs litigating in China, as the MNCs generally focus their cases on the legal arguments.

Chinese Courts are also relatively fair in cases where one side is a MNC and the other side is a smaller, unconnected Chinese company.

However, if the local opponent is well connected (for example, a SOE), there is a higher likelihood that the Chinese Courts will be less fair. In this scenario, it is often better to settle the dispute or to litigate/arbitrate elsewhere (like in Hong Kong), rather than litigate.

**Case Study #2:** A MNC is sued by a SOE for breach of contract. The MNC loses a multi-million dollar judgment. Before the time has run for the MNC to appeal, the SOE convinced two judges to execute by seizing the judgment at 2 separate bank accounts for double the judgment. This effectively froze both of the MNC's Chinese bank accounts, preventing payment of that month's payroll and taxes.

Despite the obvious procedural irregularities, the MNC had no choice but to settle immediately for the full amount.

**Case Study #3:** This is an unusual example, where a Chinese SOE sued a MNC for infringing the SOE's China-based intellectual property—a utility model patent. Utility model patents are the weakest form of patent in China, as they are not examined and require only minimal novelty. In this case, it appeared obvious that the SOE's utility model patent was copied from drawings in the MNC's foreign invention patent, filed long before the SOE applied for its utility patent in China.

Citing various procedural irregularities,

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the SOE’s hometown Court rejected the MNC’s arguments that the SOE’s utility model patent was copied from the MNC’s own foreign patent. Once this battle was lost, the MNC had no defenses to infringement, since the SOE’s utility model patent was based on the MNC’s own product.

The SOE also convinced the local Court to execute evidence preservation orders against the MNC to determine sales of the accused product. Using this evidence, in late 2007, the Chinese Court issued a \$44 million judgment against the MNC for infringing the SOE’s utility model patent. This judgment is 175 times higher than the highest reported verdict for utility model infringement in China.

*Tip #3—Preparation is key:* This holds true for litigation anywhere, but especially so in China. This is because there is almost no discovery in China.

For example, there is no party-initiated discovery beyond an exchange of evidence that each party believes helpful to its case. However, there is no mechanism for a party to compel production of evidence from the other party (or third party) that the other party (or third party) does not wish to produce. It is completely up to the discretion of the judge whether to “preserve evidence”, i.e., to make a trip to the other side (or to a third party) in order to gather adverse evidence that the party would otherwise not voluntarily produce.

Chinese Courts also have no power to compel witnesses to appear. Even if witnesses were to appear voluntarily, there is no penalty for perjury. Accordingly, it is assumed that witnesses almost always lie on the stand.

Given these constraints, civil litigation in China focuses nearly exclusively on documents gathered by the party or by the party’s investigators. Once the evidence is gathered, preparing it for submission to the Court is an exhaustive and time-consuming process. Many common law lawyers find this aspect of civil litigation in China to be the most frustrating.

Typically, all documents should either be either originals or have been notarized

by 2 Chinese notaries. If the documents were created overseas, the documents must be (1) notarized in the home country, (2) legalized by the Chinese Consulate in the home country, and (3) translated by a certified translation agency.

In order for investigation results to be accepted, investigators must act under the supervision of 2 Chinese notaries. Typically, these actions focus on market investigations, trap purchases, and attempts to locate the source manufacturer. As investigations are often hit-or-miss, retaining 2 Chinese notaries until the investigation is successful can be quite costly and time consuming.

The litigation itself should not be filed until all of the documents are ready, the investigations complete, and the notaries have issued their final reports. This is because once the case is filed, the litigation process itself is very fast with trials typically held within a few months.

**Case Study #4:** Even with pure counterfeits of consumer electronics—typically an open and shut case, it can take a very long time to properly gather and prepare the evidence. For example, from the initial sighting of the counterfeit on the market to initiation of the action, it usually takes between 9 months to a year to ready the case for filing:

- (1) initial investigation and determination of counterfeit (2 weeks to a month);
- (2) following up on the initial investigation to determine the manufacturer and various distributors of the counterfeit (additional 1-2 months);
- (3) in-depth investigations into the manufacturer and various distributors (additional 1-2 months);
- (4) setting up and attending trap purchases with Chinese notaries (additional 2 months);
- (5) preparation of final notary reports (additional 2 weeks);
- (6) simultaneous with the investigations in China, the client needs to gather evidence relating to development, marketing, and sales of its genuine product at its home office; if the home office is overseas, all of the documents need to be notarized, legalized, and translated; and

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(7) filing the complaint, convincing the Court to make evidence preservation trip, coordinating the evidence preservation trip, including follow-up investigation to confirm products still in stock and working around the schedule of the judges (additional 2-3 months).

*Even if the litigation battle is ultimately won, focusing exclusively on litigation in China to advance business interests can cause a company to lose sight of the larger picture.*

*Tip #4—Treat litigation in China as just one part of the overall business strategy:* Even if the litigation battle is ultimately won, focusing exclusively on litigation in China to advance business interests can cause a company to lose sight of the larger picture.

Treat litigation in China as just one part of the global business plan. Use the Chinese civil justice system to supplement political and business positions.

**Case Study #1 (cont.):** The MNC car manufacturer did a good job of bringing political pressure to bear. After the first hearing, it was obvious that the local Court was biased. Realizing that it was facing an uphill battle, the MNC enlisted its country's embassy to bring political pressure. The MNC provided a briefing memorandum to various officials at the embassy, including the ambassador. Its embassy ensured that the copy-car issue was brought up at each and every meeting with Chinese officials—whether high-level or not.

In addition, the MNC requested its own China CEO and the embassy commercial liaison to postpone their vacations in order to attend the trial. This let the local Chinese Court know that its actions would be closely scrutinized.

Finally, the MNC also sued the SOE in the MNC's home country in Europe, seeking to block exports of the copy-car.

This MNC understood that civil litigation in China was just one component of its global business strategy. It also made sure that its local Chinese operations were fully committed to the cause of the MNC's home office in Europe.

Even with the political pressure it brought in China, the MNC ultimately lost the Chinese litigation. However, the MNC achieved several important business

goals. First, the MNC won its case in Europe, blocking the SOE from exporting any of the copy-cars to Europe. Second, the MNC managed to delay the launch of the copy-car in China. Even after the launch of the copy-car, the SOE was operating in uncertain legal waters. Finally, the MNC sent a clear message to the SOE that copying of this particular MNC's automobiles would not be tolerated. The next time the SOE looks for a car to imitate, the SOE will likely not choose this particular MNC's models.

*Tip #5—Choose good local counsel; consider hiring “local local” counsel:* Chinese Courts only recognize PRC-qualified attorneys in litigation matters. This means that, when it comes to litigation in China, one *must hire* local Chinese counsel. There is no shortage of creative, smart, bilingual Chinese lawyers in the larger cities. However, sometimes a case has to be brought (or defended) in a more remote area of China. In this situation, it may be helpful to also hire “local local” counsel who lives and practices in the more remote jurisdiction. This can be a tricky balancing act.

On the one hand, the lawyer should be familiar with the judges in his/her jurisdiction. On the other hand, the lawyer should not be so familiar with the judges so as to engage in questionable conduct (*see* Tip #6).

*Tip #6—Expect the unexpected:* Civil litigation in China really is the Wild Wild East. There are always surprises for the common law lawyer.

For example, *ex parte* communications are not only commonplace in China, they are regularly initiated by Chinese Courts. To take another example, if an MNC wins a civil case, it is quite common for Chinese judges to ask for a letter from the MNC praising their work on the case. These “recommendation letters” can help Chinese judges' chances for promotions.

Unfortunately, corruption is also present. Because most Chinese judges know that U.S. corporations are subject to the Foreign Corrupt Practices Act and/or internal corporate policies, judges will often

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find creative methods to communicate and obtain their desires.

**Case Study #5:** A famous MNC alcohol brand sued a perfume manufacturer for using the MNC’s alcohol trademark to sell perfume. Because the defendant’s mark was a clear counterfeit, the infringement was clear. Also, the perfume manufacturer was small and did not have much “pull” with the local Court.

Regardless, the judges dragged out the case, making numerous requests for the MNC to:

- (1) pay for the judges to fly to and stay in Shanghai, Beijing, and Hong Kong, ostensibly so the judges could visit the MNC’s advertising agencies to investigate the level of fame of the mark in China;
- (2) send lawyers to accompany and entertain the judges, including taking them to and paying for entry into various tourist attractions in each city;
- (3) provide numerous “samples” of alcohol products bearing the genuine mark for the judges to “study”; and

(4) pay for the Chief Judge of the Court (who was not officially assigned to the case) to fly to the U.S. to visit the home plant in order to “investigate” the MNC’s home offices and manufacturing plant.

The MNC ultimately agreed to the first three requests. However, the MNC refused the last request, letting the judges know that the MNC would appeal any adverse decision. Ultimately, the MNC won the case.

**Conclusion:**

Given how rapidly China is modernizing, the civil justice system should continue to improve in the years to come. Even now, foreign companies can, and often do, win civil cases in China. However, if a client initiates litigation in China expecting a process similar to that of the US or Europe, then that client is bound to be disappointed. Litigating in China requires time, focus, dedication, and most of all patience. Q

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the founder of an internet company.

We had been brought in eight weeks before trial to defend a Silicon Valley semiconductor company against breach of contract claims in a trial in Delaware. We obtained a defense judgment before the plaintiff rested its case.

In a widely covered consumer class action for Sprint, where the Court tried damages and an offset defense to a jury prior to determination of liability, we prevailed on the offset defense, with the jury awarding \$225 million in offsetting damages to Sprint that exceeded the amount being sought by the class. (The judge has not finalized a decision on liability, though her tentative decision indicates that she disagrees with the jury verdict and will seek to allow some recovery by the class.)

The firm also obtained a favorable settlement in the re-trial of the SPS Technologies/Motorola case in Florida involving satellite vehicle tracking technology. We represented Motorola in

defending against \$10 billion in damages claims asserted by well-known plaintiff’s lawyer Willie Gary. Still in trial is one of many lawsuits arising out the Parmalat bankruptcy. The firm represents Dr. Enrico Bondi, Extraordinary Commissioner of Parmalat, who is seeking \$1.2 billion from Citibank before a New Jersey state court jury.

Prior to our trial marathon, it had already been a good year for the firm’s clients. In a two-month period earlier this year, the firm won a \$30 million jury verdict for L.A.-based developer Mammoth Lakes Land Acquisition, LLC in a contract action against the Town of Mammoth Lakes, obtained a \$2.1 billion settlement from Enron and Citibank to resolve an action we pursued for the six so-called Yosemite/CLN trusts, and obtained a \$2 billion settlement for Chapter 11 debtor Solutia in an action against three major banks to enforce an exit loan commitment. Q

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