"A WHITE HORSE IS NOT A HORSE": A CHINESE COURT IS NOT A COURT

Introduction

Whenever I am asked for my opinion concerning the present state of the legal system in China, I am reminded of the story of an old and learned Chinese scholar towards the end of the nineteenth century. When asked by one of his students what he thought of Western Civilization, he contemplated silently for a minute or so and then replied "I think that would be a very good idea!" That is precisely my response with respect to the Chinese legal system.
This paper is presented as part of a discussion on the Chinese legal system and the use of arbitration as a dispute settlement mechanism available to investors in China. Both because my fourteen years in Shanghai were largely focused on litigation in the Chinese "courts", and also because Ed Chiasson is focussing on arbitration issues, I shall refer but fleetingly to arbitration as it relates to China. I would make three observations only:

1) Any foreign investor or licensor in China, if he/she has obtained competent legal advice, will have insisted on a contractual term stipulating that all disputes between the Chinese and foreign parties shall be submitted to arbitration, rather than to the "courts" of China. This has worked until recently to insulate the foreign business community in China from the corruption of the Chinese "judicial" system.

2) For that reason, the foreign victims of the Chinese "courts" have seldom been investors or other foreign businessmen with establishments in China. Rather, they have overwhelmingly been foreign ship owners whose vessels are routinely arrested on the basis of transparently specious claims by Chinese importers. The function of the Chinese "courts" has been to consistently and invariably issue "judgements" against these ship owners in order to offset any losses the Chinese importers may have suffered through the vagaries of world market prices.

3) Assuming the foreign investor builds arbitration into any contract with a Chinese partner, should it be foreign arbitration or arbitration in China before a panel of the China International Economic and Trade Arbitration Commission? (CIETAC). In my view, the only rational choice is international arbitration. I personally favour the Stockholm Chamber of Commerce. However, the reasons why I have always insisted on foreign arbitration are not those which might be assumed. Unlike the Chinese "courts", CIETAC has a good reputation internationally for both competence and impartiality. Its panel includes a number of foreign arbitrators, and it is not at all uncommon for a CIETAC arbitration panel to issue an award in favour of the foreign party (there is nowadays virtually no possibility of a Chinese "court judgement" in favour of a foreign party). So why not agree to arbitration in China?

a) The first reason involves an irony of the first order. Strange as it may appear at first blush, it is easier to enforce a foreign arbitration award in China than it is to enforce a domestic award. This is because the arbitration award must ultimately be enforced by the "court" in the jurisdiction where the defendant is located. The "courts" are invariably in bed with the local defendant and will do everything in their power to delay and obstruct enforcement. In the case of CIETAC awards, it is easy: the local "judges" simply refuse to process the application and the holder of the award has no remedy. It is extremely difficult to enforce any arbitration award against a Chinese party, but in the case of a foreign award, the foreign party does have some leverage and is sometimes able to prevail after a few years. The leverage arises from the fact that China is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This means that the government of the foreign award holder has the right to press the Chinese government to abide by its obligations under the Convention.

b) The second basis for insistence on foreign arbitration is equally ironic. Though arbitration may be preferable to litigation, no party to any contract wants to become involved in either process if it can be avoided. Ideally, disputants will make every effort to effect a negotiated settlement when differences arise. It is trite to observe that the possibility of a negotiated settlement is wholly dependent on a mutual willingness to compromise and demonstrate flexibility. Our experience has been that where a contract calls for CIETAC arbitration in Beijing or Shanghai, the Chinese party often refuses to seriously discuss the dispute, sits back with folded arms, and simply dares the foreign party to submit the matter to CIETAC. Chinese parties often assume that CIETAC must be as thoroughly corrupt as are the Chinese "courts", that a hometown decision is therefore assured and that there is consequently no possibility that they could lose an arbitration in China. The irony is that they are wrong! But this is their perception. Conversely, they do not relish the idea of going to Stockholm. They are unfamiliar with the country, they are unfamiliar with the arbitration rules there, and they recognize that the award would be made on the basis of legal principles rather than on the basis of the parties' respective nationalities.

The Underlying Problems of the Chinese "Judicial System"

I returned to Canada at the end of May, 2003 after practising law in "Greater China" for nineteen years, fourteen of those years in Shanghai. During the course of my final year in China, I lectured on the Chinese "court" system to the Shanghai Chapter of the Canada China Business Council, the Australian Chamber of Commerce in Shanghai, the American Chamber of Commerce in Shanghai, and to a group of fifteen CEO level representatives of Fortune 500 Companies in China.

This latter meeting was convened by the Economist Network. At the end of the session the chairperson polled participants on whether their respective corporations would invest in China if head offices were to receive the detailed information that I had provided about the realities of the Chinese legal system. Almost all responded that if their companies were not already in China, the realities of the legal system, if disclosed to their head offices, would almost certainly deter them from investing.

At the request of a British client, I also prepared a very detailed description of the practice in Chinese "courts" for a British cabinet minister about to visit China. I regularly apprised members of the trade sections in the Canadian and British Consulates-General (and to a lesser extent, their American counterparts) concerning the daily workings of the "courts". Our discussions centred on the fact that judicial independence is unknown in China, that the "courts" are in reality nothing more than very low level and unprestigious administrative organs of the Communist Party, and that since about 1999 it has been virtually impossible for a foreign party to prevail against a Chinese party in any dispute handled by a Chinese "court".

In 1999 a directive was sent from Beijing to all the courts in China, admonishing "judges" that whenever they have before them a dispute between a Chinese party and a foreign party, they must "ensure that their judgement reflects the national interest". The effect of that directive was immediately palpable.

What is the Role of the Chinese "Courts" Within the Chinese "Legal System"?

The development of the Chinese "legal system" is truly impressive so long as it is clearly understood that this term begins and ends with written rules determined by the government alone, and intended solely as behavioural guidelines for foreign investors and Chinese citizens. The "courts" have no powers of judicial review whatsoever. When the government or individual ministers violate the Constitution or any other statute there is no remedy available. There is no such thing as the practice of constitutional law in China because it is absolutely impossible for any Chinese "court" to hear a constitutional challenge to any decision or policy of China's leaders.

Conversely, the most powerful individual in the legal system at every level is not a member of any "court". He is the Chairman of the Political Legal Committee of the People's Congress. In any case sufficiently sensitive to warrant his intervention, this individual can simply over-rule the highest "court" and substitute his judgement for that of the "court". He holds infinitely more power than does the Chief Justice of the "court".

It is essential to understand that China's so-called "courts" are nothing more and nothing less than very low level administrative organs of the Chinese Communist Party. There is not a modicum of judicial independence. There are several reasons for this:

1) Judges are appointed and may be removed by the Communist Party (theoretically by the People's Congresses at each level, but these are mere rubber stamp bodies completely controlled by the Party);

2) "Judgements" are normally not made by the individuals who have heard the case in the public trial, but by an invisible back room body known as the "Judicial Committee", which receives direct input from the local Party Boss and which may in one afternoon decree judgements in up to 25 cases, having neither attended the hearings nor read the documents pertaining to any of them.
3) Supreme Court "Judges" are required to attend regular lectures by Party theoreticians, in which they are instructed that while it is of course important to pay attention to the law, they should be even more concerned with the social and political impact of their decisions.

4) Even the Chinese Constitution, as irrelevant as that document is to Chinese society, stipulates that the judiciary is under the leadership of the National People's Congress. Moreover, by statute, the "courts" and the entire judicial process are placed under the supervision of the Procuratorate (the prosecution arm).

5) Quite aside from legal theory or statutory provision, the practice is for the Party to dictate required results to the "courts".

Both Jiang Zimin and Li Peng, during the period when I had direct and unimpeachable sources within the Chinese Supreme Court, routinely telephoned the President of the Supreme Court (in effect, China's Chief Justice) to apprise him of a case which would shortly be submitted to his court and to provide instructions on the "judgement" required.

6) The "court system" of China, though definitely not every judge within that system, is corrupt from top to bottom, although the form of corruption varies according to the size of the case, whether it involves a "foreign element", and whether it is "politically "sensitive".

a) At the lower levels, particularly in the case of civil litigation between Chinese citizens, the Party will often have no interest in the case and "judges" either on the visible tribunal or on the "Judicial Committee" may have the freedom of action necessary to decide the case. This allows them to augment their meagre incomes by indulging in the common garden variety of corruption: filling their pockets with "reimbursements" from Plaintiffs or Defendants, or both.

b) In the absence of simple bribery, the corruption is found in the very structure of the "courts", resulting in a system in which "The one who hears the case does not make the judgement; the one who makes the judgement has not heard the case."

c) However, by far the most deleterious form of corruption is of course the fact that the "courts" are presented visually and publicly as judicial institutions but in reality their strings are pulled and manipulated, marionette fashion, by Communist Party ideologues completely outside the vision of judicial observers.

The fundamental issue here is that the Chinese Communist Party and its leaders are above the law and are not subject to the decisions of the "courts" in any respect. On the contrary, the "courts" are under the direct leadership and instruction of the Party and only the Party has the right to interpret the meaning of any law or regulation. It follows that no inherent "right" arises for any natural or legal person by virtue of the law itself. As in a Lewis Carroll fantasy, "the law means whatever the government, not the 'court', says it means."

Those who cling to the illusion of progress in the Chinese "courts" usually point to the undeniable improvement in training of judges and the raising of their entry level requirements. These are very real developments and in the long run they cannot help but be beneficial. A few years ago, hardly any "judges" throughout the country had law degrees and the majority were retired army officers who had never enjoyed a single day of legal training. Now, every new judge must hold a law degree. The standards of the law schools from which they graduate are rising steadily. Moreover, increasing numbers are either doing advanced degree legal studies abroad, or being trained by agencies such as CIDA. But none of this has the slightest effect on the system, so long as these "judges" enjoy zero judicial independence and cannot determine the "judgements" in the cases they hear.

A "court trial" in China today is dramatic theatre and nothing more. It usually has no influence on the outcome. Visually, three "judges" sit at the front of the courtroom, which has the outward appearance of a real courtroom. Each party has a lawyer, who calls witnesses for the Plaintiff or Defendant, as the case may be. Each lawyer cross examines the adverse witnesses and the "judges" also question the witnesses. Documents are passed up to the collegiate bench. But when the public drama concludes, the "judges" who have presided do not determine the outcome. Rather, the presiding member of the panel passes a recommendation to a totally invisible body in a back room, the "Judicial Committee", which determines "judgements" in batches after ascertaining the result the Party wishes to see. The Judicial Committee is not bound in any way by the recommendation of the presiding panel member.

Two things are required before any progress can be made in the system. The Judicial Committees must be abolished and those who hear the case must make the judgement. Second, the Party cannot be above the law and the courts cannot be placed under the supervision of the Party, the Procuratorate, or any other outside agency.

It is errant nonsense to seriously discuss the "rule of law" in China so long as the Chinese Communist Party remains above the law in all respects, both in theory and in practice. The "rule of law", and judicial independence, are fundamentally anathema to the continued monopoly of political power by the Communist Party. And until that changes, it will not matter one whit if every Chinese "judge" holds a Harvard Ph.D in law.

In summary, foreign litigants have been systematically victimised by the Chinese "courts" for years and there has been no remedy whatsoever. Protests from the foreign community are made but invariably ignored by China and there has been no leverage which can be utilised.

It was against this background that I discussed solutions with the British, Canadian, and U.S. trade representatives in Shanghai. It was extremely frustrating for me and for them that there appeared to be very limited ways in which pressure could be brought to bear on the Chinese government to create genuine courts and to implement the rule of law. One approach which we all thought had some potential was to bring complaints to the WTO, citing specific cases of foreign corporations victimised by the Chinese "courts". However, that line of attack has not, to my knowledge, progressed.

The Experience of Foreign Defendants in Chinese "Courts"

For reasons of time and space, I shall cite but one line of cases which well illustrates the function of the "courts" as accomplices in the fleecing of foreign businesses by unscrupulous Chinese claimants. I refer to what came to be known simply as the "soybean cases".

In December of 1997 and January of 1998, the bottom dropped out of the world soybean market, with prices decreasing between 16% and 25%, depending on the type and source of the soybeans. Just prior to this market drop, a large number of Chinese companies had purchased substantial quantities of soybean meal on the world market and when the crash occurred these cargoes were on board many different vessels en route to China. All the importing companies had downstream contracts with the actual intended end-users. When the market dropped, the end-users walked away from those contracts, because they could now purchase the same product for a substantially reduced price. In short, the importers were looking at huge losses.

The result was that virtually every vessel carrying soybean meal was arrested immediately upon arrival in China. In most instances, camera crews were waiting to record "discoloration" of the cargoes, something which always occurs with all soybean cargoes and which is entirely meaningless and harmless and in no way affects the quality of the product. But the importers alleged "wet damage", contamination of the cargoes, shortages by weight, and whatever else came to mind. There were between two and three hundred of these vessels arrested and in almost all instances the claims were transparently bogus. But in every instance, the China Commodities Inspection Bureau (CCIB) submitted reports to the "courts" substantiating the claims. In certain notable cases, the leading Chinese experts on soybean meal, and on the proper carriage of the product, gave evidence before the Chinese "courts" that the conclusions of CCIB were quite simply scientifically impossible.

But in 100% of all the soybean cases, "judgement" was given in due course for the Chinese importers. Remarkably, the "damage" to the cargoes was always assessed at between 16% and 25% of the cargo's contractual value. These were all large judgements, ranging from one to several million U. S. dollars. In essence, the Chinese "judicial system" took the position that there was no justifiable reason why Chinese market speculators should absorb any losses on the world market when there was a never ending queue of foreign ships arriving which could be arrested for the purpose of compelling foreign ship owners to indemnify the Chinese speculators for those market losses.

Implications for the Future of Foreign Investors in China

Until very recently, with few exceptions, the only foreign parties with the misfortune to make contact with the Chinese courts were ship owners. This is because, as we have seen, foreigners entering into contractual relationships with Chinese parties almost invariably insist that all disputes be arbitrated, rather than litigated. But the foreign ship owner has no choice; as soon as his vessel is arrested, he is forced to provide an irrevocable bank guarantee to the local "court" and he is immediately subject to its jurisdiction. He does not land in court on the basis of any contract.

However, the rapacious exploitation of foreign ship owners by the Chinese Maritime "Courts" is now taking on an ominous significance for investors and licensors. Many Sino-foreign joint ventures have been in China for twenty years or more. The joint venture itself is legally a Chinese corporate citizen and normally will be unable to opt for foreign jurisdiction. Increasingly, Chinese third parties will be bringing claims against these joint ventures for disputes arising out of supply contracts and other domestic of contracts. Moreover, it is inevitable that tort claims founded in personal injury and death, or product liability, will follow as a wider array of Chinese claimants becomes aware of the tremendous success Chinese claimants have enjoyed in the Maritime "courts". There can be no doubt that this unrestrained extortion will be imposed on an ever growing number of foreign corporations in China.

What Legal Tactics and Strategies Are Available to the Foreign Business Community?

One of the point form headings for this section, listed in the brochure, is "strategies for successful litigating". There is basically only one word of advice I can offer on this topic: "Don't! If you litigate against a Chinese party in China today, you will lose. There is little more to say on the subject. The contents of any Chinese statutes and the facts in dispute are irrelevant to the result.
For these reasons, due diligence becomes perhaps more important than anywhere else in the world. A potential investor in China must have intimate knowledge of his potential Chinese partner and must be wholly confident in the integrity of that partner.

A few other good rules to follow:

1) Never, under any circumstances, do business with anyone wearing a uniform; in other words, no joint ventures or other contracts with the army or the police;

2) Beware of the allure of projects which have the enthusiastic support of the local government, the mayor, or the governor of a province, especially if they tell you that because of their support you can easily circumvent restrictive laws and regulations:

a) Often the enthusiasm masks a highly inefficient and bleeding enterprise for which the local politicians are seeking a "cash cow";
b) The Chinese lack of respect for the Rule of Law operates in only one direction:

i) If in the course of a dispute you attempt to claim rights which are clearly set out in the law, you will find that legal codes are never binding on the government or its officials; but ii) If, for example, with the help of the local mayor or provincial governor, you do not comply with the strict letter of the approval process and if the later success of your enterprise should make it an attractive target for takeover, the law will suddenly become all important, you will be deemed to have never received legal approval, and you may lose the enterprise altogether;

iii) Moreover, what happens if you call in the Canadian consular officials to help you? This is, in my experience, far more effective than attempting legal recourse. And our Canadian embassy and consular officials do an excellent job of going to bat for Canadian business people in trouble. But if you have not complied with the relevant laws, you will have effectively pulled the rug out from underneath them and left them with no case to argue.
3) Do not cut financial corners by foregoing the best legal, accounting, and consulting advice. The big players, who recognize the cost of doing business and are prepared to pay for proper assistance, are not "burned" nearly as often as are those who "save" on legal and accounting fees and often place their fate in the hands of a local "Mr. Fixit" who claims blood or other relationships with key government leaders or local officials.

However, despite the advice to never become enmeshed in Chinese litigation, there will be times when foreign corporations with presences in China will be drawn into it against their will and will have no choice but to participate in the process. If you are a prospective Plaintiff against a Chinese business entity, particularly a large and influential one, there is simply no prospect of achieving a remedy from a Chinese "court", at least in the absence of special political considerations dictating an abnormal result. In short, as a prospective Plaintiff, you are advised to absorb the losses you have suffered, walk away, and avoid "throwing good money after bad" in the Chinese "court".
If you should find yourself a defendant in a Chinese "court", the situation is not entirely identical. Although the ultimate result, if the matter ever proceeds to "judgement", will inevitably be a decision in favour of the Chinese Plaintiff, probably in an amount close to the full sum claimed, there are legal strategies which can be employed in order to facilitate an out of "court" settlement at some point before the matter is formally decided. Here, the selection of good and experienced lawyers is essential.

In my view it is advisable to use both an experienced foreign law firm and one of the best available Chinese law firms, working as a team. Chinese lawyers working alone are vulnerable to extremely heavy and improper pressures from the "judges", as well as from interested government agencies, and it requires the utmost courage for them to put forward their foreign client's case with vigour, irrespective of the accusations which must be made against the Chinese plaintiff and often against government departments. But when the foreign lawyer is directly instructing the Chinese lawyer, and supervising the conduct of the case on a daily basis, a "troublesome" Chinese lawyer can deflect criticism by noting that he is simply implementing instructions.

Canadian lawyers in China, such as Bob Kwauk, as well as the trade representatives in the Canadian Embassy and local Consulates-General will be very helpful in recommending competent Chinese law firms.

What exactly can your Sino-Foreign legal team do for you in the unfortunate event that you find yourself a defendant in a Chinese "court"? We referred to certain ironies earlier, in our discussion of arbitration options. The "court" system has its own ironies. One consists of the fact that while Chinese "courts" and "judges" routinely and systematically ignore substantive law, or misstate it, or include diametrically opposed interpretations of the relevant law in the same "judgement", they are usually scrupulously strict in applying the procedural law which applies to civil lawsuits between Chinese and foreign parties.

Reasons for Judgement in any jurisdiction are inherently subjective. They involve the reasoning process and one independent judge may come to an entirely different conclusion than another. We are all familiar with Supreme Court decisions in Canada in which five judges will over-rule a decision from a lower court, and the other four will write opinions upholding that court. The loser may complain bitterly, but will ordinarily receive little sympathy, because the public will realise that a complex issue was involved, that the outcome depended on many complex factors, and that every lawsuit by definition ends in one party which is unhappy with the judgement.

The political entities controlling the Chinese "courts" from behind the curtain recognize that individual foreign parties who have lost their cases will attract few supporters if their only complaint is that the ultimate "judgement" is unfair and unwarranted. Other than the party involved, who has the interest or the time to wade through long arguments about the law and facts of the case?

In contrast, most procedural laws are clear, precise, objective, absolute and easily tested for compliance. Time bars, for example. If Chinese law states clearly that a claim must be brought within one year, but the Chinese "court" allows a Chinese

claimant to sue a foreign party after three years, simply ignoring the time bar, this illegality can be immediately, clearly, and objectively demonstrated to the entire foreign business community. The political rulers of China understand this completely and they live in dread of publicity with the potential to affect the flow of Direct Foreign Investment. For that reason, Chinese "courts" will usually enforce time bars.

Also, there are often rules of service set out clearly in Chinese law with which Chinese claimants do not comply. Parties may be incorrectly named, or the wrong subsidiary may have been sued. In these circumstances, it is often possible to delay and draw out the procedure for a very long period. I have been successful in many cases, through bringing a series of interlocutory motions, to keep a matter before the "courts" for as long as six years before finally negotiating a settlement with the claimant.

It may be useful to describe a typical scenario which has recurred many times over the last few years. Both Plaintiff and Defendant recognize that the Plaintiff has absolutely no legitimate cause of action known to the law and that its suit would be dismissed by any genuine court. But Plaintiff and Defendant are both equally aware that if the matter is allowed to proceed to "judgement" in a Chinese "court", the Plaintiff is virtually guaranteed a victory, probably for the full amount of its claim. That being so, what can the members of your legal team do for you in this situation? The answer is that they will point out and demonstrate to the Plaintiffs their capability of delaying this action for many years, but if Plaintiffs will agree to a very substantial discount of their claim, they can have the cash in their account within a matter of days. By way of illustration, if we have a totally spurious claim for US $1,000,000, a claim utterly devoid of supporting facts or law, we might be successful in persuading the Chinese Plaintiff to accept $500,000 today, rather than wait years to collect the full amount. The claim may not be genuinely worth ten cents, but $500,000 is preferable to $1,000,000 from the perspective of the foreign victim.

Prospects for Creation of Genuine Courts in China

But while one must in the short term resolve to avoid the Chinese "courts" at all cost, is there a prospect for improvement of the Chinese "judicial system" in the longer term? I believe that the only viable vehicle for reform is pressure from the governments of countries which are important sources of investment for China, or have the potential of becoming such in future.

Canada has adopted a possibly complementary but discrete strategy for reforming the Chinese legal system. Canadian jurists have had some input in drafting certain of the Chinese legal codes. CIDA has made a substantial investment in the training of Chinese judges, and many Chinese lawyers have been invited to Canada for study and/or observation of the Canadian courts. These efforts all have considerable merit and I believe the day will come when they will bear fruit, albeit perhaps indirectly. However, at this precise historical moment it must be reluctantly admitted that none of these measures has had any impact on the Chinese "courts" or the "judicial" process. The "courts" continue to function as they have for years, and in many ways they are more venal and corrupt than they were ten or fifteen years ago. That is not the most common view of Chinese legal developments, which are described on the contrary by many influential opinion leaders as having made huge and rapid strides in implementing the rule of law.

Who are the opinion leaders who have shaped the world's view of the "developing" Chinese legal system? Do their views accord with reality? What do we mean when we use the term "Chinese legal system"? What role do the Chinese "courts" play in the legal system? Does the Chinese government have any intention whatever of implementing the "rule of law", ever? Finally, even within the pathetically meagre limitations of the Chinese "legal system", have the government's actions conformed to Chinese law as it exists today? It is necessary to specifically address all these questions and understand their answers before we can begin to comprehend the reality of the Chinese legal system, though space precludes us from addressing all of them in this paper.

To much of the international community, China has in recent years been portrayed as a country whose leaders are determined to implement the "rule of law", a country which is steadily and rapidly constructing a credible legal system which will meet all international standards and expectations. Nothing could be further from the reality. I am often told that I should not judge the Chinese legal system by measuring it against mature and sophisticated systems in other countries which have developed over many centuries. Let me be very clear that that is not my standard of measurement!

First, many commentators point out that China "has only had a legal system since July 1st, 1979, so "Of course, it's not perfect"; "Rome wasn't built in a day"; "At least it's moving in the correct direction, right?" WRONG!

Two points:

1) I of course accept that China cannot be expected to construct a legal system overnight which will match the standards of western systems. I would be optimistic if it were true that the trend is in the right direction. IT IS NOT! CHINESE "COURTS" ARE, IN CERTAIN IMPORTANT ASPECTS, SUBSTANTIALLY WORSE TODAY THAN THEY WERE FIFTEEN YEARS AGO AND THEY CONTINUE TO DEGENERATE.

2) I do not criticize China for not meeting western standards. I do not use western yardsticks to evaluate China's performance. I evaluate the performance of the Chinese legal system by measuring it against its own written laws. THE CHINESE GOVERNMENT REPEATEDLY AND SYSTEMATICALLY IGNORES ITS OWN LAWS AND THE LEGAL PROCEDURES

WHICH ARE SET OUT IN ITS WRITTEN STATUTES. THE "COURTS" SELDOM EVINCE ANY INTEREST IN LAW; MOST JUDGES NEVER READ THE LAW AND 100% OF THE "JUDGEMENTS" EMANATING FROM CHINESE COURTS ARE POLITICALLY, RATHER THAN JUDICIALLY, DRIVEN.

The overwhelming majority of foreign lawyers practising in China would say that the Chinese legal system has improved tremendously over the past fifteen years or so. I do not dispute this, so long as we are very clear in our definition of "legal system". These lawyers invariably have in mind the impressive outpouring of statutes and regulations which have provided a great corpus of legislation covering all aspects of investment in China and have made business there much more predictable. It is today far easier for a foreign lawyer in China to advise his clients on Chinese government policy toward investment in specific sectors of the economy, and of the viability of any specific enterprise contemplated. But this "legal system" (read "legislative framework") has nothing whatever to do with the "court system"; nor is it in any way relevant to establishing the "rule of law" in China.

The Unexpected Intersection of Commercial and Human Rights Issues

In closing, I would like to address a matter which is relevant to this entire discussion, but not central to it. Normally, human rights is not a topic of great concern to the business community, which is prone to conclude that the subject is political and that politics and business must never be allowed to mix. However, human rights principles and the self-interest of the business community have recently intersected and offered Canada a rare opportunity which in my view, the Canadian government has squandered. With reference to the earlier discussion of the common search amongst the trade representatives of Canada, Britain, and the U.S. for some effective method of pressuring China to play by the rules in legal matters, it appears to me that the opportunity recently presented itself, but Canada ignored it in favour of short term and probably illusory trade benefits.

I refer to the case of Lai Changxing, a refugee applicant in Canada who is accused by the Chinese government of massive economic crimes in China. Canada need not take any stand on the validity of the charges. But the fact is that the Chinese legal system, under the close control of the Chinese government, has for years thumbed its nose and sneered at all foreign critics while perpetrating one travesty after another on foreign litigants in Chinese courts. At the same time, the Chinese government and legal system has consistently perpetrated outrageous human rights abuses against its own citizens, documented in great detail by Amnesty International and other credible human rights organizations, and has treated all international criticism with contempt.

Now, with the Chinese government petitioning Canada to extradite Lai Changxing for trial in China there are two basic issues which should have been foremost in the collective mind of the Canadian government. First, could Lai receive a fair trial and full opportunity to obtain legal representation and make full answer and defence to the charges against him if sent back to China? Second, would he be killed if returned? (China now executes about fifteen thousand people per year, the former Prime Minister of China stated that Lai deserved to be executed ten times over, and former relatives and colleagues of Lai have died mysteriously in prison over the past year or two)

Helpless to influence the Chinese legal system in any way in the past, Canada was offered a golden opportunity to tell the Chinese government that Canada would like to cooperate with China in the apprehension of criminals, but the abuses of the Chinese "judicial" system are so egregious and the court system so corrupt that Canada cannot in conscience send anyone back to face the farce of a Chinese criminal trial. We should have said that if China wants the cooperation and respect of the international community, China will have to earn that respect. Until China ceases to treat the international community with contempt in this sphere, we cannot acquiesce in its demands.

Instead, the Canadian Government opted fort a public whitewash of the Chinese "court" system, and in so doing opened itself to ridicule. Through its counsel at the Lai hearings, the Canadian Government argued that torture does not occur in the Chinese system because it is specifically prohibited by the Criminal Procedure Code and that the Chinese "courts" enjoy judicial independence because the Chinese Constitution says so. But counsel for the Canadian Government certainly outdid herself when she rationalised the 100% conviction rate in the Chinese criminal "courts" on the basis that the Chinese police and prosecutors are so scrupulously careful and thorough in their investigative procedures that they simply do not make mistakes and never bring a case to court if they are not absolutely certain of the validity of the charges. In other words, in the view of our Canadian Government, Canadian procedures and safeguards are disgracefully sloppy in comparison to the Chinese practices. In China, where the police, prosecutors, and "courts" are incapable of mistakes, according to the Canadian Government, it is obvious that there could never be a David Milgaard, a Donny Marshall, or a Guy Paul Morin.

In conclusion, I would argue that although human rights concerns do not constitute the main focus of the foreign business community, a genuine judicial system is necessary to safeguard the legitimate business interests of that community. A "judiciary" which has no independence from government will infringe legitimate economic rights just as brazenly as it will infringe fundamental human rights. In that indirect sense, the foreign business community in China should be concerned with human rights abuses if for no other reason than self-interest.