

ENTERING THE CHINESE LEGAL MARKET: A GUIDE FOR AMERICAN LAWYERS INTERESTED IN PRACTICING LAW IN CHINA

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I. INTRODUCTION

In the last several years, China's fast growing economy and expanding market have lured many business people from Western countries.¹ The tantalizing business opportunities that arose are comparable to the zealous pursuit of wealth during America's "gold rush" in the 1850s.² Their enthusiasm about China is not misplaced—currently the third largest economy in the world behind the United States and Japan³—China is among the countries with which the United States has the greatest trade deficit,⁴ and among the top three countries that have the most reserve of foreign currencies.⁵ China "ranks second to the U.S. as a host country for foreign investment,"⁶ and it is the fourth largest trading partner of the United States.⁷

China has seen "a proliferation in foreign business interactions."⁸ To safeguard its economic achievements and govern the new complex international relationships, China has started to quantify and codify a modern legal framework.⁹ Hundreds of new laws have been passed during the past few years.¹⁰ The fast growing domestic and international businesses have been putting pressure on the fledgling Chinese legal system, which is still partly

1. "In the past eight years, China has created a novel form of nearly-market economy that has doubled its gross national product. In the '90s, it has been the most successful developing economy in the world, growing at a dizzying 10 percent a year." Robert G. Kaiser, *China Rising: Is America Paying Attention?*, WASH. POST, Oct. 26, 1997, at C1. In his article, the author mentioned the remarkable success and growth of American companies in China, such as McDonald's, General Motors, and Motorola. *Id.*; see also *China's Reach for Greatness*, WASH. POST, Sept. 21, 1997, at C8 (explaining "China could grow by seven times in the next 20 years"); Marc Levinson, *The Big Game: There Are Trade Wars Ahead—but if You're Serious, You Stay in China*, NEWSWEEK, Apr. 1, 1996, at 36, 36 (arguing China has new economic strength).
2. See *supra* note 1 and accompanying text; see also *infra* Part VI.A.
3. Edward F. Morrison, *Emergence of the Greater China Market Law Firms Look to China for Strategic Partner*, MASS. LAW. WKLY., June 21, 1993, at S1, S1.
4. See Beth Belton, *Trade Deficit List Has New No. 1: China*, USA TODAY, Aug. 21, 1996, at 1A; see also Bill Montague, *U.S. Trims Trade Deficit with China*, USA TODAY, May 22, 1997, at 1B.
5. John Tkacik & Dean Cheng, *A Little Credit, Please, for China*, WASH. POST, Feb. 4, 1998, at A19. The other two countries are Taiwan and Japan. *Id.*
6. Levinson, *supra* note 1, at 37.
7. *Chinese Trade Dispute May Bring Higher Prices for Variety of Goods*, J. RBC., May 16, 1996, available in 1996 WL 11094882.
8. Neil Boyden Tanner, *The Yin and Yang of Foreign Economic Contract Law in the People's Republic of China—A Legalistic and Realistic Perspective*, 16 J.L. & COM. 155, 155 (1996).
9. See *infra* Parts II, IV.
10. See 300 New Laws Passed in China Since Reform Moves of the Late 70s (1), XINHUA ENG. NEWSWIRE, Aug. 29, 1996, available in 1996 WL 11980277 [hereinafter 300 New Laws].

dominated by political appointees and laymen who are inexperienced and uneducated in the law, and have little respect for rule of law.¹¹ Yet, China will learn from the Western countries, readapt its socialist economic structure to one of market economy, and turn itself into a country where rule of law, at least in the economic sector, will become a reality.¹² Opportunities are abundant for American firms and lawyers doing business or practicing law in China.¹³

For those who do not understand much about China and force the round Chinese legal system into the square American legal mechanism, practicing law in China may be a difficult task.¹⁴ One common mistake is to impose Western legal categories on Chinese law based on its superficial similarities.¹⁵ Misunderstandings or stereotypes may not only affect the daily operation of an American firm, but may also lead it down a road of political unpopularity or financial disaster.¹⁶ These misconceptions may even delay a firm's entry into China or cause a firm to abandon the idea of doing business in China.¹⁷ Another misunderstanding is to expect the Chinese legal system to work as well as most Western ones.¹⁸ China's "new legal framework is often vague and sometimes misleading."¹⁹ Most of the laws were passed in the last few years and have not been tested by judicial scrutiny; thus, they pose serious challenges to foreign lawyers.²⁰ Finally, China is still a non-market economy.²¹ A large portion of the

11. See *infra* Part V.C-D.
12. See generally Donnda Elliott, *A Land with Lawyers—but not Enough Law*, NEWSWEEK, Apr. 1, 1996, at 50, 50 (explaining lawyers are moving into China); Kaiser, *supra* note 1 (explaining that China is welcoming Western capitalists to create a consumer society); Steven Musson, *Profit Motive Praised for Chinese Firm*, WASH. POST, Sept. 12, 1997, at A27 (arguing the world's largest privatization is going on in China); Liz Sly, *In Small Way, Democracy Comes to China*, CHI. TRIB., Apr. 18, 1997, § 1, at 1 (explaining democratic elections across China).
13. See *infra* Part VI.A.
14. See *infra* Part VI.B.
15. Janet E. Ainsworth, *On Seeing Chinese Law from the Chinese Point of View: An Appreciative Look at the Scholarly Career of Professor William Jones*, 74 WASH. U. L.Q. 547, 556-57 (1996). For example, one major difference, noted by Professor Jones, is that "the mass scholars would identify it as a 'political' practice rather than a 'legal one.'" *Id.* at 557; see *infra* Part IV.
16. The Chinese government actually does not welcome human rights lawyers. See *infra* Part VI.B.
17. See *infra* Part VI.B.
18. See *infra* Part V; see also Elliott, *supra* note 12, at 50.
19. Tanner, *supra* note 8, at 155.
20. See *infra* Parts IV, V.B-C.
21. Luke P. Bellocchi, *The Effects of and Trends in Executive Policy and Court of International Trade (CIT) Decisions Concerning Antidumping and the Non-Market Economy (NME) of the People's Republic of China*, 10 N.Y. INT'L L. REV. 177, 189, 192 (1997). The factors considered include: "(1) free bargaining between labor and management; (2) private ownership

economic sector is still controlled by the state government in the form of planned economy for the purpose of maintaining social and political stability.²² A foreign lawyer should be aware of a system which uses Chinese-style socialism and communist ideology, and which has been reshaped in a capitalist economic context.²³ Thus, an understanding of the Chinese culture and fundamental legal concepts becomes essential.²⁴

Part II of this Note briefly introduces the modern Chinese legal history. Part III discusses the traditional Chinese philosophies and the communist ideology that have significantly influenced the legal development of China. Part IV focuses on the recent legal achievement of the Communist Party, and the legal dilemmas China has faced since the early 1980s. Part V is a sketch of the Chinese legal system's structure and analyzes its prominent features. Part VI analyzes the major challenges the American firms in China have faced and concludes with lessons we can draw from successes and failures of several American firms.

II. MODERN CHINESE LEGAL HISTORY

In the eyes of the Western countries, "China has [almost] always been a non-legal culture."²⁵ Indeed, the only remarkable legal endeavor in feudal China was perhaps "the brief 'Legalist' experiment in the Third Century before the common era."²⁶ "Throughout the Imperial era, China's preference for ideology over rule of law thwarted the development of an independent legal system."²⁷ Modern Western concepts of law were introduced into China along with the forced opium trade in the late Nineteenth Century.²⁸ In 1902, the Manchu

- and control of the means of production; and (3) minimal government control over the allocation of resources. . . . " *Id.* at 189 (citing 19 U.S.C. § 1667(a)(18)(B) (1994)).
22. See *China Looks to Assemble Some Giant Companies*, CHI. TRIB., June 29, 1997, § 5, at 7; *China's Reach for Greatness*, *supra* note 1, at C8; *Chinese Told Economic Reforms Are a Priority: Some Fear Jiang's Plan Could Ruin Communists*, CHI. TRIB., Sept. 12, 1997, § 1, at 6; *Jiang Calls for State Company Selloff but Vows Move Won't Push China Toward Democracy*, CHI. TRIB., Sept. 13, 1997, § 1, at 4.
23. See GLOBAL GROUP & IRON TREE RESEARCH, CHINA 1997: A STATUS REPORT (1997); Liz Sly, *Jiang Tightens Grip on China: Economic Reform to Expand, but with Politics as Usual*, CHI. TRIB., Sept. 19, 1997, § 1, at 1.
24. Edward A. Adams, *Firms Join Legal 'Gold Rush' in China*, N.Y.T.J., July 1, 1996, at 1, 5.
25. Joseph W. Dellapenna, *The Role of Legal Rhetoric in the Failure of Democratic Change in China*, 2 BUFF. J. INT'L L. 231, 236-37 (1996).
26. *Id.* at 235. For a detailed discussion, see *infra* Part III.B.
27. Melanne Andromeca Civic, *A Comparative Analysis of International & Chinese Human Rights Law—Universality Versus Cultural Relativism*, 2 BUFF. J. INT'L L. 285, 304 (1996).
28. Dellapenna, *supra* note 25, at 242.

government started to create a national court system.²⁹ The plans, however, were overtaken by the Revolution of 1911 led by the Nationalist Party.³⁰ The Nationalist Party wrested control of the Republic of China from warlords, but they were driven from the mainland after the civil war by the Communist Party following the Japanese invasion.³¹

No well-established legal system existed when the Communist Party came into power in 1949.³² The early years of the Communist rule failed to establish a functional legal system due to the party's "long established hostility to 'law.'"³³ This hostility came originally from the Chinese Confucian tradition,³⁴ and it was later aggravated by the Marxist theory which regarded all laws as "a tool of the former ruling classes destined to wither away along with the state."³⁵

The Communist Government first demolished the Nationalist legal system,³⁶ and then it established the earliest socialist legal system in the early and middle 1950s. This occurred in the backdrop of the Communist supreme leader Mao Zedong's campaign to encourage freedom of thought.³⁷ After Mao grew tired of allowing divergent ideas, the fledgling legal system was abolished.³⁸ The pro-law politicians took control in 1960 after Mao was discredited in a failed political movement. This was considered the Great Leap Forward.³⁹ However, the legal development was again cut off when Mao used the Chinese adolescents to start another campaign—the "Great Proletarian Cultural Revolution" of 1966—and overthrew the controlling faction.⁴⁰

The true legal development did not start until the late 1970s when Deng Xiao Ping, the late paramount leader of China, began to rehabilitate the system that had been plagued by political turmoil.⁴¹ Two major motives to start the legal reform were "to reenter the international market; and make a second cultural revolution impossible."⁴² Since then, hundreds of laws have been passed and

29. *Id.* at 243.
30. *Id.*
31. *Id.* at 243-45.
32. *Id.* at 245.
33. *Id.* at 245-46; see *infra* Part III.
34. Dellapenna, *supra* note 25, at 245-46; see *infra* Part III.A.
35. Dellapenna, *supra* note 25, at 245-46.
36. Weng Li, *Philosophical Influences on Contemporary Chinese Law*, 6 IND. INT'L & COMP. L. REV. 327, 328 (1996).
37. Dellapenna, *supra* note 25, at 246.
38. *Id.*
39. *Id.* at 246-47.
40. *Id.* at 247.
41. *Id.*
42. *Id.* at 248.

national court and lawyer systems have been restored to meet the demand of the growing economy and international trade.⁴³

III. INFLUENCE OF TRADITIONAL CHINESE PHILOSOPHIES AND COMMUNISM ON CHINA'S LEGAL DEVELOPMENT

The development of a functional Chinese legal system has been a colored one.⁴⁴ Unevenness and disruption in the process of legal evolution has not only been caused by the turbulent Chinese history in the last two centuries, but also by the inertia against and unpreparedness for adopting law as the major means of social regulation.⁴⁵ As one author has pointed out, "The view of law which emerged from China's Imperial history and which continues to influence modern China's politics and human rights, rejected the systemization of law in favor of an ideology-based, self-regulating system of rites, rituals, and customs."⁴⁶ We can gain a perspective from a query of how an ideology-driven society was formed in a feudal Confucian milieu and perpetuated in a Communist environment.

A. Confucianism

Confucianists viewed the natural world as one "dominated by an eternal hierarchy after whose example the world of man must be constructed."⁴⁷ Human beings needed to establish their own rules or "rites" that reflected or imitated this natural hierarchy.⁴⁸ The political system existed to continue the hierarchy and "maintain peace and harmony on earth and between heaven and earth."⁴⁹ Confucian ideas were fully embodied in a hierarchical system of five relations: "[R]uler and subject, father and son, husband and wife, elder and younger brother, and friend and friend."⁵⁰ The fundamental belief was that under the rule of a good leader desirable human behavior could be obtained and social harmony could be maintained.⁵¹ A leader was presumed to be good, wise, and benign.⁵²

43. 300 *New Laws*, *supra* note 10; see *infra* Part V.C-D.

44. See *supra* Part II.

45. See *infra* Parts III.A-C, IV.

46. Civic, *supra* note 27, at 296.

47. Li, *supra* note 36, at 333.

48. *Id.*

49. Civic, *supra* note 27, at 295.

50. Robert Perkovich, *A Comparative Analysis of Community Mediation in the United States and the People's Republic of China*, 10 *TEMP. INT'L & COMP. L.J.* 313, 314-15 (1996).

51. Jonas Alsen, *An Introduction to Chinese Property Law*, 20 *MD. J. INT'L L. & TRADE*

52. Civic, *supra* note 27, at 295.

Placed at the apex of the social hierarchy was the highest ruler, the emperor who "served as the premier Confucian scholar, as interpreter of Confucian tenets, as principal sage, as moral and ethical leader, and as enforcer of the social code."⁵³ Emerging as a natural check on the emperor's power was the Mandate of Heaven, or, in other words, the support from the populace and the natural world evidenced through social and natural harmony or human upheavals and natural disasters.⁵⁴ There was no artificial check on political power.⁵⁵ The ruler "answered to no one but the mystical forces of the universe."⁵⁶

The officials at higher levels acted as exemplars for the lower levels until the bottom of the hierarchy was reached.⁵⁷ People with more seniority or authority in the family or society were at higher levels in the social hierarchy, and thus they had control over family or social matters.⁵⁸ Finally, all relations among people were figuratively linked to the supreme ruler himself.⁵⁹

In this system, the understanding of individual duty and right was totally different from what is found in the Western culture:

The ruler owed a duty to heaven and earth to maintain social harmony. The subjects, in return, owed the emperor a duty of loyalty to follow his example in ordered living and submission to his greater judgment. The state did not owe any duty to any individual and no person could demand individual rights from the state. No concept of rights existed apart from these social and moral duties.⁶⁰

Rights were defined as duties for the society,⁶¹ or as collective responsibility.⁶² The group was more important than individuals,⁶³ and individuals were usually expected to give up their personal well-being for the benefit of the collective good.⁶⁴ Thus, disputes were settled according to what was best for the social functioning group and not in terms of legal rights.⁶⁵ Conflicts and disagreements were settled through compromise because courts

53. *Id.* at 299.
54. *Id.* at 295.
55. *Id.*
56. *Id.* at 304.
57. *Id.* at 299.
58. *Id.*
59. *Id.*
60. *Id.* at 309-10.
61. *Id.* at 295.
62. Dellapenna, *supra* note 25, at 240.
63. Alsen, *supra* note 51, at 4.
64. *Id.*; Perkovich, *supra* note 50, at 314-15.
65. Dellapenna, *supra* note 25, at 242.

were outside the norms of behavior and were to be avoided.⁶⁶ A ruler served both as an exemplar for his subjects and as a mediator or arbitrator for different interest groups.⁶⁷

Confucianism aimed to promulgate a higher standard set by a good leader and guided people through virtue and regulation of moral propriety.⁶⁸ Legal rules, which were viewed as rigid, externalized, and artificial, could not regulate the complex social relationships and could be easily manipulated by a despot to achieve the leader's personal gains.⁶⁹ Furthermore, law "impart[ed] the harmony and cultivation of the individual."⁷⁰ Viewed as a lower standard, law corrupted people's sense of shame and caused them to use specious arguments to evade the law.⁷¹ Therefore, an ancient Chinese judge would be expected to use his moral power to eliminate future lawsuits and keep social harmony.⁷²

The Confucian presumption was that a leader was good and moral, and remained to be so until he was deprived of power by natural disasters or social upheavals.⁷³ This presumption inevitably put people in a defenseless situation when the necessary force to oust the corrupt despot could not be mustered within a meaningful time.⁷⁴ Of course, this was never the concern of the Chinese feudal rulers, nor did they make any obvious effort to dismantle the Confucian hierarchy and give the populace more power in the political process.⁷⁵ Confucianism effectively regulated the Chinese society during the feudal dynasties until the Nineteenth Century.⁷⁶ Its influence in the present Chinese society is still prevalent, though more subtle, despite the fact that the Communist Party denounced Confucianism and adopted a communist ideology.⁷⁷

B. Legalism

The first recorded effort to establish a sophisticated rule-based legal system in China was made by legalists during the Qin Dynasty (221-207 B.C.).⁷⁸ The legalist system "was a rigid code system, supplemented with clearly defined

66. Alsen, *supra* note 51, at 4.
67. Civic, *supra* note 27, at 298-99.
68. Dellapenna, *supra* note 25, at 239.
69. Civic, *supra* note 27, at 296-97.
70. Perkovich, *supra* note 50, at 315.
71. Dellapenna, *supra* note 25, at 240.
72. *Id.*
73. Civic, *supra* note 27, at 295; see *supra* notes 52-56 and accompanying text.
74. See Civic, *supra* note 27, at 295.
75. See *id.* at 299-300.
76. *Id.* at 300.
77. *Id.*
78. *Id.* at 297.

rewards and punishments."⁷⁹ The basic legalist belief was that "society can achieve harmony only if mischief was met with swift and severe punishment."⁸⁰ "State power and control rather than morality" was emphasized,⁸¹ and law was viewed as a deterrent.⁸² Strict regulations were necessary to maintain the society.⁸³ The laws should have been "applicable to all with equal effect."⁸⁴ While legalists presumed that human beings were not naturally moral or virtuous and thus a punishment system was needed to correct people's behaviors, they did little and had no time to develop a system to check the power of the ruling class.⁸⁵ A legal system of this type did more harm than good to a populace that was politically powerless.⁸⁶ This was evidenced in the manipulation of law by then Emperor Cheng to suit his own needs and caused the rule of law to deteriorate into despotism.⁸⁷ As a result, there was a general distrust of legalism and rule of law, which has continued into the modern society.⁸⁸

C. Communism: Democracy, Constitution, and Rule of Law

1. Democracy

The Communist ideology viewed "formal law as a tool of the oppressor classes."⁸⁹ Under Marxism, law "equals the rules imposed by those who govern and are enforced by the will of the ruling class."⁹⁰ Legal establishments served as coercive deterrence and suppression of the enemy of proletarian class—the bourgeois—and as educational tools for the proletarian masses.⁹¹ The Communist rule, or a proletarian dictatorship, "is considered the paramount principle of socialist existence and is not restrained in any sense by the notion of law."⁹² Under this theory, Chinese courts were originally established "for

79. *Id.*
80. Alsén, *supra* note 51, at 4.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. See Civic, *supra* note 27, at 297-98.
86. See *id.*
87. *Id.* at 297.
88. *Id.* at 298.
89. *Id.* at 301.
90. *Id.* *supra* note 36, at 330.
91. Chih-Yu Shih, *China's Socialist Law Under Reform: The Class Nature*
92. *Reconsidered*, 44 Am. J. Comp. L. 627, 628-29 (1996).
- Id.* at 627.

purposes of trying and reforming the 'bourgeois' elements of society."⁹³ The court was actually thought of as a political body.⁹⁴

The concept of communist dictatorship is "useful for striking at the bourgeois enemy."⁹⁵ The concept of democracy, on the contrary, is useful in "resolving contradictions among the people."⁹⁶ Communist democracy is safeguarded "only if the people's dictatorship successfully eliminates its bourgeois enemy."⁹⁷ Thus, democracy is similar to a communist dictatorship: the idea is that "the CCP [Chinese Communist Party] is governing in the best interests of the people."⁹⁸ Although China lacks a general election system⁹⁹ and citizens have no significant role in determining the Party's policies, democracy is claimed to be promoted by the representation of the Communist Party members: "[T]he CCP members are all considered outstanding representatives of the people who are able to rule in the best interest of the PRC [People's Republic of China]."¹⁰⁰ According to Jiang Zemin, the current Chinese president, "China's system of people's congresses at local, provincial, and national levels is the 'broadest people's democracy.'"¹⁰¹

2. Constitution

The Chinese Constitution "is more of a guideline than a practical source of law."¹⁰² It is "solely an instrument of policy, a statement of current government intentions or an 'expression of the will of the ruling class.'"¹⁰³ The court does not rely on the Constitution to decide cases and has no power of review "to ensure that newly enacted laws conform to the Constitution."¹⁰⁴ The power of review under the Constitution is endowed upon the Standing Committee of the National People's Congress, but the power of review has never been exercised.¹⁰⁵

93. Civic, *supra* note 27, at 301.
94. Shih, *supra* note 91, at 628.
95. *Id.* at 629.
96. *Id.*
97. *Id.*
98. Li, *supra* note 36, at 330.
99. Even now, there are no direct elections for lawmakers except for village leaders. *World Lawmakers/China-2: U.S. Not Participating*, DOW JONES ASIAN EQUITIES REP., Sept. 16, 1996 [hereinafter *World Lawmakers*] (on file with the *Drake Law Review*).
100. Li, *supra* note 36, at 330.
101. *World Lawmakers, supra* note 99.
102. Alsén, *supra* note 51, at 9.
103. R. Randle Edwards et al., *Symposium on China Constitutionalism: Introduction*, 9 CHINESE L. J. 1 (1995) (quoting R. Randle Edwards et al., HUMAN RIGHTS IN CONTEMPORARY CHINA 130-31 (1986)).
104. Alsén, *supra* note 51, at 9.
105. *Id.*

Under the latest version of the Constitution, promulgated in 1982, citizens enjoy a wide variety of rights. In fact, citizens enjoy more rights than those enumerated in the United States Constitution.¹⁰⁶ Some Western scholars, however, do not interpret the 1982 Constitution as a guarantor of rights.¹⁰⁷ Rather, it is viewed as "nearly a descriptive statement of goals, a blueprint of sorts describing what may be and can be, but not what must be."¹⁰⁸ According to these Western scholars, civil rights in the Chinese legal history served only "as an aid to the state, and not as a protection against the state."¹⁰⁹ Rights, as the prerogative of the state, are conferred by the state to the citizens "who are legally recognized and participating members of society who fulfill their duties to the state."¹¹⁰ Therefore, in a sense, "rights refer to the intricate web of social and political duties of citizens owed to the community at large."¹¹¹

3. Rule of Law

China does not have a long tradition of respect for law as a restraint on the state.¹¹² "The law manifested itself primarily as an internalized system of control through enforced moral 'persuasion,' supplemented by a limited positive legal code of sanctions."¹¹³ Law is primarily a tool to preserve the state, an instrument of ruling power,¹¹⁴ and is seen as orders imposed by the state on its localities.¹¹⁵ Rule of law is often understood as rule by law. Law does not exist "as an embodiment of commonly held ethical norms, but as a tool for advancing the goals of the state."¹¹⁶ The law's safeguarding function is only secondary.¹¹⁷ Thus, "rule of law did not mean protection of the individual, but expansion of state power and keeping discipline among the people."¹¹⁸ Under this instrumentalist point of view, "[t]he state's policy is the soul of the law."¹¹⁹ "Individual rights are defined by the law, as opposed to the law being shaped by

106. Civic, *supra* note 27, at 310.
107. *Id.* at 311-12.
108. *Id.* at 311.
109. Dellapenna, *supra* note 25, at 250.
110. Civic, *supra* note 27, at 310.
111. *Id.* at 287.
112. Dellapenna, *supra* note 25, at 235.
113. Civic, *supra* note 27, at 304.
114. China's Long March to the Law, N.Y. TIMES, Mar. 21, 1997, at A30.
115. Dellapenna, *supra* note 25, at 239.
116. Mark C. Lewis, *Contract Law in the People's Republic of China—Rule of Tool: Can PRC's Foreign Economic Contract Law Be Administered According to the Rule of Law?*, 30 VAND. J. TRANSNAT'L L. 495, 500-01 (1997).
117. AIsen, *supra* note 51, at 17.
118. *Id.*
119. Lewis, *supra* note 116, at 501.

natural rights."¹²⁰ Party policies and regulations, as quasi-laws, have played a rather significant role in the rule of the Communist Party.¹²¹ It is even easier to understand why "it is not as important for an action to be just as it is for the action to be in line with the Party policy."¹²²

IV. LEGAL DILEMMAS IN THE 1980S-90S

In the late 1970s, the Chinese government started to reconstruct its legal system. China had almost no laws before the Third Plenum of the Eleventh Communist Party Congress Central Committee in 1979.¹²³ One of the major reasons was that "[t]he radical and constantly changing ideological shifts under Maoism left the people distrustful of any system based exclusively on ideology."¹²⁴ A second major reason was that the Chinese government had changed its focus of attention since the early 1980s, moving from destructive political campaigns to constructive economic development.¹²⁵ This was evidenced by its petition for entry into the General Agreement on Tariffs and Trade [GATT], presently the World Trade Organization [WTO].¹²⁶ In order to meet the entry requirements, China has been committed to transforming a non-market economy to a free-market economy.¹²⁷

The Chinese legislature has also sped up the law-making process. In 1996 alone the Eighth NPC reviewed thirty-one draft laws and approved twenty-two measures.¹²⁸ The Eighth Congress was claimed to have "placed legislation as its highest priority in its five-year work agenda, in order to facilitate the

120. *Id.*
 121. Alsén, *supra* note 51, at 19.
 122. *Id.*
 123. 300 *New Laws*, *supra* note 10.
 124. Civic, *supra* note 27, at 306. The late paramount Chinese leader, Deng Xiaoping, in addressing the need of a legal system, said that "democracy should be guaranteed by a system and by laws, and . . . the system and laws will not be changed with shifting leaders and shifting viewpoints and the attention span of the leaders." 300 *New Laws*, *supra* note 10 (quoting Chinese leader, Deng Xiaoping).
 125. Kaiser, *supra* note 1.
 126. Bellocchi, *supra* note 21, at 188.
 127. *Id.* at 189. At the close of the Fifth Session of the Eighth National People's Congress (NPC), Qiao Shi, then Chair of the NPC, "urged legislators to accelerate the pace of law enactment to establish the framework of a legal system catering to a socialist market economy." *Rule of Law Urged as Sessions Close*, 40 *BEIJING REV.* 13, 13 (1997). Shi pointed out that "the key to strengthening socialist democracy and building a legal system lies in governing the country in accordance with the Constitution and laws." *Id.*

128. *China Worked Out 22 Laws in 1996*, XINHUA ENG. NEWSWIRE, Feb. 21, 1997, available in 1997 WL 3745296.

establishment of the socialist market economic structure in the country . . .¹²⁹ Most of the legal reform, however, has been economic in nature.¹³⁰ Social and political stability remains an important concern.¹³¹ The reform is not intended to change the Communist Party's political status quo: "[F]ew, if any, of the Chinese leaders saw the legal reforms as a renegotiation of the social contract between the state and its citizens."¹³² "China may be becoming more legalistic in style, but it remains essentially Leninist in political substance."¹³³

The apparent lag in the political reform is partly a result of the reality that social stability and national unity have always been the concern of the Communist Party.¹³⁴ China introduced new laws "to bolster its campaigns against dissent, ethnic separatism and subversive Western ideals" because of the increasing fear concerning domestic rebellion and foreign intrusion.¹³⁵ Contrary to the idea that rule of law implies that the party gives up its political supremacy, the major theme of a recent session of the NPC was the need to stress the party's uncontested role in the political process.¹³⁶

Sedition statutes are introduced to prosecute political opponents.¹³⁷ "Dissidents continue to be sentenced without trial; in fact, for the moment, opposition appears all but dead."¹³⁸ For example, Liu Xiaobo, a leading Chinese dissident, "called on Beijing to reassess the June 1989 army crackdown on pro-

129. *Id.* Progress has been made in many areas. For example, China's congress approved changes in the criminal law and eliminated the notorious "counterrevolutionary" statute once used to stifle dissent. China's Parliament Relaxes Crime Statutes Abolition of Notorious Laws Viewed with Cautious Optimism, MILWAUKEE J. SENTINEL, Mar. 15, 1997, at 3 [hereinafter China's Parliament Relaxes Crime Statutes]. New administrative laws were enacted to allow Chinese citizens to sue the government "to seek compensatory damages and to establish limits on the range of penalties that bureaucrats can impose on people." Thomas Friedman, China Moving Slowly Toward Rule of Law, SAN ANTONIO EXPRESS-NEWS, Mar. 7, 1997, at 5B.

130. Dellapenna, *supra* note 25, at 248.
131. Andrew Halper, a Beijing-based lawyer with the Canadian firm of Goodman, Phillips & Vinberg noted that "[w]e're still in a situation in China where law . . . is considered a very important tool for the promotion of economic development and the preservation of social and political stability." Steven Mutsaers, China's Congress Votes for Party's Primacy: Need for Unity Behind Jiang Outweighs Calls for Rule of Law, WASH. POST, Mar. 14, 1997, at A34 (quoting Andrew Halper).
132. Dellapenna, *supra* note 25, at 248.
133. Mutsaers, *supra* note 131. But see Steven Mutsaers, Marx? Engels? China Turns the Radicals Chic, WASH. POST, Mar. 2, 1998, at A13 (discussing the diminishing influence of Marxism in China).
134. A Dangerous Gamble in China, CHI. TRIB., Sept. 17, 1997, § 1, at 18.
135. China Introduces Laws to Curb Dissent, Ethnic Separatism, FORT WORTH STAR-TELEGRAM, Mar. 7, 1997, at 14.

136. Mutsaers, *supra* note 131.
137. China's Parliament Relaxes Crime Statutes, *supra* note 129, at 3.
138. Law School for China, PROVIDENCE J. BULL., Mar. 31, 1997, at B4, available in 1997 WL 7323828.

democracy demonstrators on "Tiananmen Square," and was sentenced to three years in a labor camp to make toothpicks.¹³⁹ Dissidents like Wang Dan and Wei Jingsheng "were sentenced to long prison terms on charges of 'conspiring to overthrow the government and forced to clean toilets with their own toothbrushes.'" ¹⁴⁰

The Communist Party's determination to strengthen its rule is evident in the new defense law, which abdicates NPC's role in overseeing the Chinese military and subjects the armed forces to the leadership of the Communist Party.¹⁴¹ National defense serves to not only repel foreign attacks, but also to quell domestic rebellions and riots aimed at splitting the country and subverting the socialist system.¹⁴²

An even better example is the Chinese government's attitude towards Hong Kong's civil liberty laws. Just prior to Hong Kong's return to China, Beijing's appointed legislature passed laws restricting the territory's freedoms of assembly and association.¹⁴³ "[t]he new laws will allow police to ban political demonstrations on grounds of 'national security.'" ¹⁴⁴ In the eyes of the Chinese government, civil liberty laws contradict the Constitution that Beijing drafted for the territory.¹⁴⁵

The government's zealous control even extended to the international business area at one time.¹⁴⁶ It sent orders to foreign law offices in Beijing demanding "quarterly reports on information usually considered confidential."¹⁴⁷ The information required included "client lists, locations of projects under

139. *China Rejects Jailed Dissident's Lawsuit*, DEUTSCHE PRESSE-AGENTUR, Mar. 30, 1997 (on file with the Drake Law Review).
140. *China's Parliament Relaxes Crime Statutes*, supra note 129; see also Charles Huizler, *China May Alter Laws on Dissidents: Human-Rights Groups Call Plan Cosmetic*, SACRAMENTO BEE, Mar. 1, 1997, at A15. The trial of Wang Dan, a student leader of the 1989 pro-democracy movement, was said to be totally contrary to the accepted Western ideas about fundamental human rights. *China/Wang Dan/Appeal-3: Most China Lawyers Hesitant*, DOW JONES INT'L NEWS SERV., Oct. 31, 1996 (on file with the Drake Law Review); *China's Wang Dan To Appeal After Vigorous Defense*, DOW JONES ASIAN EQUITIES REP., Oct. 31, 1996 (on file with the Drake Law Review).
141. Mufson, supra note 131.
142. Charles Huizler, *China Seeks Laws Aimed at Fighting Subversion*, SEATTLE POST-INTELLIGENCER, Mar. 7, 1997, at A2.
143. Liz Sly, *Laws Curb Hong Kong Liberties*, ORANGE COUNTY REG., June 15, 1997, at A24.
144. *Id.*
145. *China's Legislature Guts Hong Kong Civil Liberties: Committee Calls Bill of Rights Unnecessary, Strikes Down 14 Laws and Portions of 10 Others*, FORT WORTH STAR-TELEGRAM, Feb. 24, 1997, at 8.
146. See Bellocchi, supra note 21, at 177-79.
147. *China Wants Lawyers' Confidential Info*, DOW JONES INT'L NEWS SERV., Sept. 18, 1996 (on file with the Drake Law Review).

consideration, affiliations with Chinese law firms, business reference lists, and the value of deals in negotiation."¹⁴⁸

The source of the ambivalence was probably the Constitution itself. Despite the new pragmatism, the 1982 version still described an ideologically-motivated legal system.¹⁴⁹ "Several sections . . . are actually in conflict with one another regarding the status of ideology relative to law."¹⁵⁰ "Article Five, for example, seems to place rule of law above the Party and its ideology: 'all state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law.'"¹⁵¹

The Preamble indicates, however, that the Party and Communist ideology must be the nation's guiding force: "Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and follow the socialist road"¹⁵²

Article One further states: "the working class—the alliance of workers and peasants—is the leader of the 'democratic dictatorship.'"¹⁵³ "The Party and its guiding ideology is thereby established as the preeminent force, because it is through the Party structure that this democratic dictatorship is exercised."¹⁵⁴ The dilemmas have caused an imbalance in China's legal development as well as inconsistencies and disruptions in legislative and administrative proceedings.¹⁵⁵ It would be premature to presume that the reform will eventually turn China into a Western-style democracy. Much of the economy can be privatized, formalized, and promoted to the international standard, but China may still remain a "democracy" with "Chinese characteristics."¹⁵⁶

148. *Id.*
149. Civic, *supra* note 27, at 306.
150. *Id.*
151. *Id.* at 306-07 (quoting XIANFA [Constitution] [ZRGX] ch. 1, art. 5 (P.R.C.)).
152. *Id.* at 307 (quoting XIANFA preamble (P.R.C.)).
153. *Id.* (quoting XIANFA ch. 1, art. 1 (P.R.C.)).
154. *Id.*
155. See *supra* note 12 and accompanying text.
156. See generally Kaiser, *supra* note 1 (discussing China's transformation to a market economy). The political suppression and economic freedom indeed have created a unique hybrid, which the author would rather term as "socialism with capitalist characteristics." *Id.*

V. CHINESE LEGAL SYSTEM

A. Legislative Branch

The major legislative bodies are the "National People's Congress (NPC), its standing committee [SCNPC], and local people's congresses and its standing committees of provinces, municipalities, and 'quite big cities' designated by the State Council."¹⁵⁷ The NPC has "the power to amend the Constitution, and . . . amend and enact all basic laws."¹⁵⁸ "appoint and remove the premier and members of the State Council . . . approve the national economic plan and state budget,"¹⁵⁹ and "elect the President of the Supreme People's Court, and the President and Vice President of China."¹⁶⁰

Members of the NPC are elected by secret ballot for a five-year term by provincial-level people's congresses.¹⁶¹ The NPC meets annually for about two weeks to review major new policy initiatives presented to it by the State Council after endorsement by the Communist Party's Central Committee.¹⁶² The standing committee of the NPC (SCNPC) is elected at the first session of each congress and performs the work of the NPC when the NPC is not in session.¹⁶³ Governing the State Council and the Supreme People's Court, the SCNPC has the power "to interpret the Constitution and supervise its enforcement."¹⁶⁴

B. Executive Branch

Administrative bodies such as the "State Council, its departments, and commissions, and local people's governments," have the power to make administrative rules.¹⁶⁵ They further have the power to practice administrative specification and interpret law and regulations consistent with the departmental

157. Peter Howard Come, *Lateral Movements: Legal Flexibility and Foreign Investment Regulation in China*, 27 CASE W. RES. J. INT'L L. 247, 252 (1995).
158. Elizabeth A.R. Yee, *Hong Kong and China in 1997: An Examination of Possible Legal and Economic Implications for United States Businesses*, 36 SANTA CLARA L. REV. 595, 607 (1996).
159. ERNST & YOUNG, *DOING BUSINESS IN CHINA* 105 (1994).
160. Yee, *supra* note 158, at 607.
161. See Wu Bian, *China: NPC Exercises Power on Behalf of the People*, BEIJING REV., Sept. 16, 1996, available in 1996 WL 11664869 (noting that the NPC is elected for a term of five years); see also *Tibet Elects Deputies to National People's Congress*, XINHUA ENG. NEWSTRE, Jan. 15, 1998, available in 1998 WL 2783570 (reporting that the Sixth People's Congress of the Tibet Autonomous Region elected deputies to the NPC by secret ballot).
162. BUREAU OF PUBLIC AFFAIRS, U.S. DEPT. OF STATE BACKGROUND NOTES NO. 42, CHINA 5 (1998).
163. ERNST & YOUNG, *supra* note 159, at 105.
164. Yee, *supra* note 158, at 607.
165. Come, *supra* note 157, at 252.

policy.¹⁶⁶ Concern over abuse of power arises because the Chinese administrative bodies serve as legal drafters as well as interpreters and implementers of agency policies. Because Chinese legal drafting is often characterized by "principle-like pronouncements, vagueness and ambiguity, broadly worded discretions, undefined terms, omissions, [and] general catch-all clauses," laws often lack standards of implementation, thus leaving much discretion to implementing authorities.¹⁶⁷

Administrative specification is a process "by which principle-like laws are narrowed down though a succession of enactments [by administrative organs at different levels] so that they can be applied to local reality."¹⁶⁸ In this multi-layered process of specification, "law gradually loses some of the characteristics that set it apart from policy—universality, certainty, and consistency. This problem is furthered in the party by the oft-cited requirement that local enactments need only be consistent with the spirit . . . rather than the letter of law."¹⁶⁹ This practice granted administrative bodies "the power to draft the rules that they please [within] certain vaguely specified limits as broad laws leave them with the responsibility of filling in the detail."¹⁷⁰ Laws lose their transparency after going through this specification process because the documents produced by administrative bodies "are not necessarily published and are inherently changeable, subject . . . to the whims of agency officials."¹⁷¹

Administrative interpretation is the most important mode of legal interpretation as well as "an authoritative supplement and accretion to legislation."¹⁷² Administrative bodies, both central and local, have "the authority to make interpretations in regard to the specific application of administrative rules and regulations not subject to judicial and procuratorial work."¹⁷³ Furthermore, local administrative bodies "are charged with making interpretations concerning the specific application of laws and regulations of a local character."¹⁷⁴ The underlying rationale seems to be that "only the enacting body or its representative or controlling organ is competent to interpret any piece of legislation in a manner that is generally binding."¹⁷⁵

166.	<i>Id.</i> at 263-64.
167.	<i>Id.</i> at 250-53.
168.	<i>Id.</i> at 264.
169.	<i>Id.</i> at 293-94.
170.	<i>Id.</i> at 294.
171.	<i>Id.</i> at 250.
172.	<i>Id.</i> at 295.
173.	<i>Id.</i>
174.	<i>Id.</i>
175.	<i>Id.</i> (quoting Joseph Y.S. Cheng, <i>The Constitutional Relationship Between the Central Government and the Future Hong Kong Special Administrative Region Government</i> , 20 <i>CASB W. RES. J. INT'L L.</i> 65, 79 (1988)).

C. Judicial Branch

In the early history of the People's Republic of China, every aspect of the law was ruled by Communist ideology "at the exclusion of all other legal tools."¹⁷⁶ Because of numerous political turmoils, "China had sent its legal force into exile, dismantled the legal system and did not produce any law graduates."¹⁷⁷ In the late 1970s, when a legal system was reinstated, "there was a severe shortage of trained legal personnel."¹⁷⁸ Demobilized army officers were employed to serve as judges at the lower levels.¹⁷⁹ "[A] significant part of the legal system was filled with people with little or no legal training."¹⁸⁰ Established on such a weak foundation, the present Chinese judiciary is faced with two major challenges: resolve the problems of judicial incompetence, and establish the court's authority and formal precedential value of judicial decisions.¹⁸¹

The courts are "under heavy influence from party and regional interests,"¹⁸² and "lack importance as an institution."¹⁸³ The power to interpret the Constitution or laws is not vested in the judiciary, but in the chief legislative body.¹⁸⁴ Courts do not have any power to declare inconsistent administrative rules invalid, although they "reserve the power to refrain from applying administrative rules that conflict with other enactments."¹⁸⁵ In turn, the courts' weakness causes difficulties in forming an enforcement mechanism to carry out its decisions,¹⁸⁶ and an appeal usually becomes a formality.¹⁸⁷

D. Attorney System

The role of attorneys in a socialist society is different from that in a common law system: "From an orthodox perspective [of Leninism], the attorney system is definitely and exclusively an instrument for striking the ruled class. In the new thinking, however, the attorney system holds the function of supervising

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| 176. | Civic, <i>supra</i> note 27, at 301. |
| 177. | Alsén, <i>supra</i> note 51, at 16. |
| 178. | <i>Id.</i> |
| 179. | Donald C. Clarke, <i>Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments</i> , 10 COLUM. J. ASIAN L. 1, 10 (1996). |
| 180. | Alsén, <i>supra</i> note 51, at 17. |
| 181. | Yee, <i>supra</i> note 158, at 608. |
| 182. | Alsén, <i>supra</i> note 51, at 18. |
| 183. | Yee, <i>supra</i> note 158, at 609. |
| 184. | Alsén, <i>supra</i> note 51, at 18. |
| 185. | Corné, <i>supra</i> note 157, at 254. |
| 186. | <i>Id.</i> |
| 187. | Hutzler, <i>supra</i> note 142. |

parts of the state establishment."¹⁸⁸ China's attorney system was dismantled by political movements during the early decades of the Communist rule, and China "had virtually no home-grown lawyers from 1957 until 1980."¹⁸⁹

Private law firms were virtually non-existent in the 1980s, and it was not until 1988 that the first Chinese "cooperative" law firm was founded.¹⁹⁰ Initially, the first law firms specializing in international trade were owned by either the government or state universities.¹⁹¹ The approval of law firm partnerships was "based on a subjective decision by the Ministry of Justice"¹⁹² until 1996, when Lawyer's Law was passed to set out the conditions for opening a private law firm and established more open and objective criteria for private firms.¹⁹³

Most Chinese lawyers still work for the government, but "a small number of law firms are privately owned and these private lawyers seem to be prospering."¹⁹⁴ In 1997 there were 100,000 practicing lawyers and 8,265 law firms in the country.¹⁹⁵ Some Chinese firms even established business offices abroad.¹⁹⁶ "Since 1986, the Ministry of Justice has held the Chinese National Bar Examinations" regularly.¹⁹⁷ The Ministry plans "to increase the number of Chinese lawyers to 150,000 by the end of decade."¹⁹⁸

Because Chinese legal reform is very recent and at best inconsistent, Chinese lawyers, although improved, are "woefully inexperienced."¹⁹⁹ Many factors other than the law itself and the lawyers' skills play an important part in a

188. Shih, *supra* note 91, at 633.
189. Victoria Slind-Fior, *China's Riches Lure Lawyers*, NAT'L L.J., Nov. 29, 1993, at 23.
24. 190. Dellapenna, *supra* note 25, at 252. The firm was founded in Shanghai by five attorneys. *Id.*
191. R. Randle Edwards, *Legal Training for China Ventures, Legal Aspects of Doing Business with China 1985*, 349 PLI/COM. 295, 302-03 (1985).
192. China: *New Law May Result in More Private Firms*, LAW. INT'L, June, 1996, at 1, available in LEXIS, ASIA/PC Library, China File.
193. *Id.*
194. Edward H. Lehner, *China Revisited*, N.Y.L.J., Oct. 2, 1997, at 2.
195. China Official Vows to Improve Prisoners' Environment, CHINA DAILY, Apr. 1, 1997, at 1, available in LEXIS, ASIA/PC Library, China File.
196. *Id.*
197. Li, *supra* note 36, at 329.
198. Slind-Fior, *supra* note 189, at 25.
199. Matt Formey, *Outside the Law: Reform Reversals Hit Foreign Law Firms in China*, FAR E. ECON. REV., Jan. 2, 1997, at 18, 18. Competent lawyers were once difficult to find, and a foreign attorney would have the strange experience of negotiation with a cadre-turned-lawyer. "I did a negotiation with a Chinese lawyer who was just terrible, a cadre who was appointed to be a lawyer." Slind-Fior, *supra* note 189, at 25 (quoting Nicholas C. Howson, Associate at Paul Weiss' Beijing office).

case.²⁰⁰ There are "few legal precedents to teach approaches to complex legal issues."²⁰¹ "[W]inning a case requires not only the skill of a good lawyer, but perhaps even more important, a lawyer with good connections."²⁰² Ethics and professional integrity are still lacking: Chinese firms are often accused of protecting the secrets of its clients.²⁰³

E. Dispute Resolution Mechanisms: Mediation, Arbitration, and Litigation

1. Mediation

Under Confucian teaching, maintaining a harmonious relationship is often more desirable than winning a victory.²⁰⁴ Mediation and conciliation can prevent friction and disharmony and "regain perfect harmony in the face of conflict."²⁰⁵ "The supreme goal of universal harmony . . . established a firm preference for formal mediation over litigation for questions of rights and violations of law,"²⁰⁶ and the "social ethic is oriented toward mediation and compromise . . . rather than . . . the abstract question of justice."²⁰⁷

The mediation rules promulgated in 1989 established a modern dispute resolution model in China.²⁰⁸ Under the new rules, Urban Neighborhood or Village Resident Committees, as well as large workplaces "such as government institutions, businesses, schools, and mines" may establish mediation committees.²⁰⁹ The dispute resolution agreement is enforceable, but the enforcement is not mandatory.²¹⁰

Currently, many Chinese laws "either mandate or encourage the disputing parties to use the [mediation] mechanism to solve their problems,"²¹¹ and mediation is often required and widely used in domestic cases.²¹² Application for

200. See *infra* notes 276-78 and accompanying text.
201. Forney, *supra* note 199, at 18.
202. CORPORATE COUNSEL'S GUIDE TO DOING BUSINESS IN CHINA 14.001 (Kenneth A. Cusshaw & Jianyi Zhang eds., 1995).
203. See Forney, *supra* note 199, at 18.
204. Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China*, 15 UCLA PAC. BASIN L.J. 122, 123 (1996).
205. Perkovich, *supra* note 50, at 315.
206. Civic, *supra* note 27, at 308.
207. *Id.*
208. Ge, *supra* note 204, at 124.
209. *Id.*
210. *Id.*
211. *Id.* at 125.
212. Mediation is a widely used dispute resolution mechanism: [T]he Chinese 1983 Contract Arbitration Regulations expressly provide: "In handling cases the arbitration organ shall first conduct mediation." China's new Arbitration Law again permits a tribunal to mediate a case before passing its award.

2. Arbitration

mediation has also been extended to arbitration and litigation proceedings.²¹³ In the case of court mediation, the mediation agreement has the same effect as a court judgment upon its delivery to the parties.²¹⁴ In the international area, "internationally oriented organizations representing the China International Economic and Trade Arbitration Commission [CETAC] and the China Maritime Arbitration Commission [CMAC] are required or permitted by their respective rules and regulations to attempt mediation before proceeding to arbitrate."²¹⁵ The Arbitration Rules of CETAC "permit an arbitral tribunal to mediate a case . . . if both parties have a desire for mediation or one party so desires and the other party does not object when consulted by the tribunal."²¹⁶

The modern arbitration system, based on 1995 Arbitration Law, has played a significant role in resolving domestic disputes.²¹⁷ Under this law, "most of the domestic disputes are arbitrable."²¹⁸ Arbitration is also one of the most important ways to resolve disputes in the international area.²¹⁹ The law specifically provides for arbitration and the rights of foreign parties in the arbitration proceeding.²²⁰ The CETAC's jurisdiction extends to "disputes concerning

Under the latter, the disputing parties may also begin mediation on their own initiative.

Mediation has also had a place in Chinese litigation proceedings. The Civil Procedure Law of China devotes a whole Chapter to dealing with this alternative dispute resolution model. According to the Civil Procedure Law, a judge or a collegial panel assigned to try the civil case shall conduct mediation first if the parties concerned so require or do not object If no agreement is reached through mediation or if either party backs out of the settlement agreement before the mediation statement is served, the court will proceed to trial without delay.

Id. at 126-28 (footnotes omitted).

213. *Id.* at 125-28.

214. *Id.* at 127.

215. *Id.* at 125-26.

216. *Id.* at 126.

217. *Id.* at 129.

218. *Id.*

219. *See id.* at 130-31.

220. Jun Ge described that:

(1) The Rules expressly permit foreign arbitrators to be included in the Panel of Arbitrators Foreign parties . . . have the power to nominate one of the foreign panelists as an arbitrator, assuring at least one on a three-person panel (2) Arbitration can be carried out in English or other foreign languages as agreed upon by the parties involved (3) Foreign parties can use their own non-Chinese attorneys in the proceedings. (4) The Rule sets forth a nine-month time limit for a

international or foreign economic relations and trade bounded or not bounded by contracts²²¹ In 1995 and 1996, the CIECTAC "administered more international arbitration cases than any other arbitration institution in the world"²²²

3. Litigation

China does not have a long tradition of civil litigation: its first formal civil procedure law was enacted in the early part of this century.²²³ In current Chinese civil procedure law, there are "no dispositive devices such as motions to dismiss, judgment on the pleadings, or summary judgment," and "[a] full trial is almost always warranted" once the case is accepted.²²⁴ There are no discovery mechanisms or procedures, but "the court has the right to obtain evidence itself."²²⁵ There is no jury system, and judges decide both the facts and the law in a case.²²⁶ The appellate courts are "free to thoroughly review the lower courts' decisions regarding the facts and the law by means of a collegiate panel."²²⁷ An alien litigant "must retain a Chinese attorney if he/she chooses to have counsel."²²⁸

VI. PRACTICING LAW IN CHINA

A. Promises

China is becoming the "hub of the wheel of Asia's economic progress."²²⁹ It is not only providing a market for Fortune 500 companies, but also for "middle market" companies.²³⁰ Factors such as a continuing thaw in

tribunal to conduct a hearing and render its award (5) The arbitral award . . . is final and binding upon both disputing parties.

²²¹ *Id.* at 132 (quoting Arbitration Rules of CIECTAC art. 2 (1995), revised and adopted by China International Chamber of Commerce on Sept. 4, 1995, effective Oct. 1, 1995).

²²² Sally A. Harpole, *How China Organizes Arbitral Tribunals: Arbitration in China*, DISP. RESOL. J., Jan. 1997, at 72, 72.

²²³ *Ge, supra* note 204, at 133.

²²⁴ *Id.* at 135.

²²⁵ *Id.*

²²⁶ *Id.* at 134.

²²⁷ *Id.* at 136.

²²⁸ *Id.* at 135.

²²⁹ *Slind-Fior, supra* note 189, at 24 (quoting Jerome Alan Cohen, former head of East Asian Legal Studies at Harvard Law School, now of counsel to New York's Paul, Weiss, Rifkind, Wharton & Garrison).

²³⁰ Morrison, *supra* note 3, at S1.

Sino-United States trade relations,²³¹ Chinese companies beginning to seek public offerings on the New York Stock Exchange,²³² and the Communist Party's recently announced massive new privatization drive²³³ seem to augur a period of growth for both Chinese and American firms participating in China's economic reconstruction.²³⁴ Many previously forbidden sectors, such as securities, real estate, retail, and software, are opening up for foreign participation.²³⁵ Optimistic about their future in China, international attorneys are prepared to seize business opportunities in this already lucrative legal market.²³⁶ They predict that "most of China's ailing, state-run companies, in no condition for a successful float on major stock markets, will be transformed into closely held corporations."²³⁷ In this massive transformation, "[e]ven preliminary negotiations to arrive at agreements will produce work for lawyers."²³⁸ American law firms like Davis, Polk & Wardwell,²³⁹ Morrison & Foerster,²⁴⁰ Sidley & Austin,²⁴¹ and many others²⁴² are all preparing to jump on this Chinese bandwagon.²⁴³

China's legal service sector was opened to foreign law firms in 1992.²⁴⁴ Initially welcomed to China as a sign of legal reform, foreign law firms were expected to function as "the semblance of a sound legal system to allay investors' fears."²⁴⁵ Later, the Chinese government probably realized the importance of

231. William Flannery, *Practicing Law Where Laws Are Lacking*, ST. LOUIS POST-DISPATCH, July 7, 1996, at 1B.
232. Karen Donovan, *Securities Lawyers Go East—China for Stock Offerings*, NAT'L L.J., Mar. 8, 1993, at 21, 21.
233. "At the 15th Communist Party Congress in Beijing, government leaders pledged to sell most of China's 130,000 state companies." Josh Karlen, *Lawyers See a Lucrative New China*, NAT'L L.J., Sept. 29, 1997, at A14, A14. For an analysis of China's privatization campaign and its significance, see Mutson, *supra* note 12.
234. See *supra* notes 1-7 and accompanying text.
235. Slind-Flor, *supra* note 189, at 24.
236. Karlen, *supra* note 233, at A14.
237. *Id.*
238. *Id.*
239. Interview with Joseph P. Hadley, Attorney, Davis, Polk & Wardwell, in New York, N.Y. (Sept. 22, 1997).
240. Interview with Peter B. Kanter, Attorney, Morrison & Foerster, in San Francisco, Cal. (Nov. 3, 1997).
241. Interview with Michael J. Sweney, Attorney, Sidley & Austin, in Chicago, Ill. (Sept. 23, 1997).
242. Interview with Mark R. Goodman, Attorney, Lord, Bissel & Brook, in Chicago Ill. (Sept. 24, 1997); Telephone Interview with Michael Herbst, Attorney, Bogle & Gates, in Seattle, Wash. (Oct. 12, 1997).
243. See Karlen, *supra* note 233, at A14.
244. See China: O'Melveny & Myers Largest U.S. Law Firm in Shanghai, DOW JONES ASIAN EQUITIES REP., Oct. 22, 1996 (on file with the Drake Law Review).
245. Forney, *supra* note 199, at 18.

B. Risks

1. Political Stability of China

Grave concern about China's political stability was raised when the Chinese students' pro-democracy movement was crushed in 1989.²⁶⁰ Doubt arose from this military crackdown over whether foreign economic investment could remain unaffected by changes in leadership and policy.²⁶¹ A few foreign lawyers worried that "violence and bloodshed" would return and a contract would not be a shield from such political turmoil.²⁶²

Such concern caused a few firms to partially, or even totally, withdraw from China.²⁶³ McCutchen, Doyle, Brown & Enersen, a San Francisco firm, pulled out of Shanghai after the Tiananmen Square events, even though it had been in China four years.²⁶⁴ McCutchen relocated its China practice in Taiwan.²⁶⁵ Seattle's Perkins Coie has adopted a similar strategy . . . "Paul, Weiss, Rifkind, Wharton & Garrison closed its Hong Kong branch . . . one year after the [1989] uprising."²⁶⁷ The uprising also delayed the opening of Skadden, Arps, Slate, Meagher & Flom's one-associate Beijing office for more than one year,²⁶⁸ and caused Morrison & Foerster to decide to service its China practice from Hong Kong.²⁶⁹

2. Sino-United States Relations

The intricate Sino-American relationship in recent years has made operation in China even more challenging for American firms. Over the years, "China and the United States have played a dangerous game of economic chicken over trade disputes, with each side threatening a trade war if the other didn't back down."²⁷⁰ Between Washington and Beijing, there remain "serious political differences . . . over human rights, Taiwan and arms sales by China."²⁷¹ Under the circumstances, it is hard for American firms to make a very strong

260. Edward A. Adams, *U.S. Lawyers in China: Slower Business Makes Some Put Off Expansion*, NAT'L L.J., Oct. 23, 1989, at 24, 24.

261. *Id.*

262. *Id.*

263. See *infra* notes 355-60 and accompanying text.

264. *Id.*

265. *Id.*

266. Adams, *supra* note 252, at 9.

267. *Id.*

268. Slind-Fior, *supra* note 189, at 25.

269. *Id.*

270. Flannery, *supra* note 231.

271. *Id.*

commitment to China, although some firms may seem undaunted.²⁷² The near misses in the economic war between China and the United States still give pause to American firms thinking about entering the Chinese market.²⁷³

3. Chinese Government Restrictions

Even if a firm is strongly committed to China, earning a license to enter the Chinese legal arena can still be very difficult.²⁷⁴ The competition for a license is fierce. When China began to grant foreign firms the formal right to set up law offices in 1993, more than 100 law firms entered the contest.²⁷⁵ In 1996, more than 200 law firms participated in the grueling competition for the fourteen licenses.²⁷⁶ Forty of America's oldest and largest law firms competed for one of the four licenses going to United States firms.²⁷⁷ Shanghai has already approved more than twenty foreign firms, with another sixty-plus eager firms still on its waiting list.²⁷⁸ Actually, a number of firms can no longer wait for an official approval, and they are "sending lawyers to work out of hotel suites on a project-by-project basis, or opening up full-blown unapproved offices."²⁷⁹

To successfully compete for a license, a foreign law firm must first understand and resolve the conundrum that "you have to be [in China] to get approved, but you can't be there until you're approved."²⁸⁰ Under the Chinese regulations, a firm cannot get a license until it shows substantial China activity, "but it's hard to show China activity without having a base of operations

For example, the managing director for the Shanghai office of the St. Louis firm Armstrong, Teasdale, Schaffly & Davis, George Martin said: "[T]he problems are government-to-government and will not affect most business sales." *Id.*

See *infra* notes 367-71 and accompanying text; see also *infra* Part VI.C. The challenges were such that the managing partner of the Beijing office of Deacons and Graham & James, Sally A. Harpole remarked: "It's a very difficult market to enter . . . Firms have to find attorneys who can speak the language, and bankroll an office for the long haul . . . [T]here is a limited amount of business to go around." Adams, *supra* note 252, at 9.

272. For example, the managing director for the Shanghai office of the St. Louis firm Armstrong, Teasdale, Schaffly & Davis, George Martin said: "[T]he problems are government-to-government and will not affect most business sales." *Id.*

273. *Id.*

274. See *infra* notes 367-71 and accompanying text; see also *infra* Part VI.C. The challenges were such that the managing partner of the Beijing office of Deacons and Graham & James, Sally A. Harpole remarked: "It's a very difficult market to enter . . . Firms have to find attorneys who can speak the language, and bankroll an office for the long haul . . . [T]here is a limited amount of business to go around." Adams, *supra* note 252, at 9.

275. Slind-Fior, *supra* note 189, at 25.

276. China Awards Law License to Altheimer & Gray, *supra* note 255; Carol McHugh Sanders, *Firm Looks for Growth in Emerging Market*, CHI. DAILY L. BUL., Aug. 5, 1996, at 1, 1.

277. China Awards Law License to Altheimer & Gray, *supra* note 255. Other United States firms granted a license included O'Melveny & Myers (Los Angeles), Brown & Wood (New York), Haythe & Curley (New York). Sanders, *supra* note 276, at 1. The fourth United States firm granted a license was Carlsmith Ball Wichman Case & Ichiki (Honolulu). Adams, *supra* note 24, at 5. The also-rans were: New York's White & Case, Sullivan & Cromwell, and Kaye, Scholer, Fierman, Hays & Handler; Chicago's Sidley & Austin, Minneapolis's Dorsey & Whitney, and San Francisco's Morrison & Foerster. *Id.*

278. Germany's Largest Law Firm Opens Office in China, XINHUA ENG. NEWSWIRE, Nov. 15, 1996, available in 1996 WL 13771876.

279. Adams, *supra* note 24, at 5.

280. *Id.*

there.²⁸¹ The key to this puzzle is to understand "the cultural differences between the Chinese and U.S. regulatory systems. The rules . . . are not meant to guide firms on how to conduct their business Instead, the Chinese treat the regulations as a source of authority for the government to expel foreign firms should they choose to."²⁸²

Even if a firm is granted a license, it is allowed to have only one office in mainland China.²⁸³ This one-city rule forces a firm to choose among several Chinese cities—usually between Beijing and Shanghai.²⁸⁴ Shanghai is often regarded as China's most important financial and commercial center while Beijing, as the capital of the nation, "used to control the economy by administrative fiat."²⁸⁵ Baker & McKenzie moved around this rule by operating a consultation business—B & M China Consultants Ltd. in Shanghai, which was primarily operated by non-lawyers with the assistance of lawyers occasionally visiting from its Hong Kong office.²⁸⁶ It opened a similar consulting office in Guangzhou.²⁸⁷ The one-city rule, however, eventually forced some firms to close their unauthorized operations.²⁸⁸ Although Coudert Brothers was licensed to operate in Beijing, it received a violation notice from the Justice Ministry in early 1995 and was forced to close its Shanghai office, which had been operating since 1984.²⁸⁹ Baker & McKenzie was also forced to close its offices at an earlier time for violating this rule.²⁹⁰ The move to disguise the unlicensed offices as consulting firms or commercial companies has not saved some firms from losing their privileges.²⁹¹

The harshest restriction on foreign law firms²⁹² is probably that non-Chinese citizens are not allowed to practice law in China,²⁹³ and representative

281. Sanders, *supra* note 276, at 1.
 282. Adams, *supra* note 24, at 5.
 283. Ann Davis, *Shanghai Exit for Coudert*, NAT'L L.J., Jan. 30, 1995, at A6, A6.
 284. *Id.*; see, e.g., China: O'Melveny & Myers Largest U.S. Law Firm in Shanghai, *supra* note 244.
 285. China: O'Melveny & Myers Largest U.S. Law Firm in Shanghai, *supra* note 244.
 As of Dec. 15, 1996, "Shanghai has given approval to 21 foreign law firms to open representative offices, with another 60-plus on the waiting list for approval from the local government."
 286. *Germany's Largest Law Firm Opens Office in China*, *supra* note 278.
 287. Davis, *supra* note 283, at A6.
 288. Frank, *supra* note 251, at 6.
 289. Davis, *supra* note 283, at A6.
 290. *Id.*
 291. *Id.*; see also Andrew Browne, *U.S. Lawyers Leave Shanghai Amid Crackdown Fear*, REUTERS NEWS SERV.-FAR E., Dec. 15, 1994, available in LEXIS, ASIA/PC Library, China File (pulling lawyers out of Shanghai under government pressure).
 292. Davis, *supra* note 283, at A6.
 293. The registered firms are limited to:
 consulting on laws of the country where the law firm is authorized to practice law and advising on relevant international customs and practices, accepting assignments

offices are "prevented from hiring licensed Chinese lawyers."²⁹⁴ Chinese attorneys employed by foreign firms are required to surrender their Chinese licenses.²⁹⁵ Foreign firms have even been barred from "such simple acts as issuing opinions."²⁹⁶ Specifically, they are not permitted to give opinions on Chinese law.²⁹⁷ Foreign attorneys "primarily serve as advisers on business transactions and draft legal instruments."²⁹⁸ They essentially have to subcontract legal work to local lawyers.²⁹⁹ This restriction has caused some American law firms to rely only on their Hong Kong offices.³⁰⁰

Following a restrictive measure in 1996 which required the foreign firms to present the government with client lists and references,³⁰¹ the Ministry of Justice imposed stringent new regulations on foreign law firms in early 1997 to restrict their ability to hire local and foreign staff.³⁰² The severe restrictions³⁰³ required

from Chinese clients or Chinese law firms or work to be undertaken in their home country, and acting as agents for foreign clients and employing Chinese law firms to handle legal matters in China.

Kenneth Y. Choy, *Law Firms in China*, N.Y.L.J., July 29, 1996, at 2, 2; see also *China—Foreign Law Firm Regs.*, M1961216, MARKET REP., Mar. 22, 1995, in NAT'L TRADE DATA BANK, available in LEXIS, ASIA/PC Library, China File.

293. Abdon M. Pallasch, *Chinese Law Firm Adds to International Flavor in Chicago*, CHI. LAW., June 1996, at 12, 12; Choy, *supra* note 292, at 2.

294. Jerry B. Edmonds, *China Severely Restricts Foreign Law Firm*, NAT'L L.J., Feb. 21, 1994, at 12, 12.

295. Pallasch, *supra* note 293, at 12.

296. Forney, *supra* note 199, at 18.

297. *Id.*

298. Adams, *supra* note 260, at 24.

299. Johnson, *supra* note 258.

300. *Id.*

301. Forney, *supra* note 199, at 18.

302. Kathy Chen, *China Set to Impose Tough Rules on Foreign Law Firms*, EMERGING MARKET REP., Dec. 12, 1996 (on file with the *Drake Law Review*).

303. Some restrictions include:

- Article 15 The office of foreign law firm and its personnel may engage in the following professional activities:
- (1) to provide its clients with the consultation on the legislation of the State where the lawyers of the law firm are permitted to engage in lawyer's professional work, and on international Conventions, international trade law and international customary law;
- (2) to handle legal affairs in the State [the law firm's "home" jurisdiction] where the lawyers of the law firm are permitted to engage in lawyer's professional work [.]
- (3) to make a mandate to a Chinese law firm for handling legal affairs in China on behalf of its clients in foreign countries.
- Article 16 The office of foreign law firm or its personnel are not allowed to engage in the following professional activities:

"foreign law firm's Chief representative in China to hold passports from the firm's home country,"³⁰⁴ and the firm cannot appoint a lawyer as chief representative unless that lawyer practiced law in the country for at least three years.³⁰⁵ The rules forced a European law firm to replace an American lawyer as its chief representative.³⁰⁶ It also caused Seattle-based Williams, Kastner & Gibbs to refrain from applying for a representative office in Shanghai, subsequently forcing it into a long-term alliance with a privately-owned Chinese law firm instead.³⁰⁷

The apparent reason for the restrictions is to protect Chinese firms,³⁰⁸ and "to allow the new Chinese firms that began in 1980 a time to get their feet on the ground."³⁰⁹ Local law firms have been lobbying very hard at the Ministry of Justice.³¹⁰ Some foreign lawyers thought that the Chinese government did not want foreign law firms to overwhelm the market.³¹¹ According to them, the government feared that "foreign firms would hire away all the best licensed lawyers from local firms,"³¹² and the government hoped that "China [would] rapidly evolve to the point it doesn't need [foreign lawyers], and be able to supply all necessary legal services through [Chinese] lawyers."³¹³

The full implementation of the new rules, however, was "indefinitely delayed" after "intense lobbying by foreign businesses, embassies and law firms." ³¹⁴ Later, China offered "to scrap some of its major restrictions on foreign law firms within one year of its entry into the World Trade Organization" in

- (1) to accept mandate for handling China's [sic] legal affairs;
- (2) to interpret Chinese law to its clients [.]
- Article 17 No Chinese lawyers shall be employed by the office of foreign law firm [.]
- Article 26 The Ministry of Justice shall be responsible for the interpretation of these provisions."
- Edmonds, *supra* note 294, at 12 (quoting Interim Provisions of the Ministry of Justice and the State Administration for Industry and Commerce on Setting Up the Office of Foreign Law Firm in China) (alterations in original).
304. Chen, *supra* note 302.
305. Forney, *supra* note 199.
306. *China/Foreign Law Firms—2: Permits Hiring Local Attorney, EMERGING MARKET REP.*, Dec. 12, 1996 (on file with *Drake Law Review*).
307. Edmonds, *supra* note 294, at 12.
308. Forney, *supra* note 199, at 18.
309. Slind-Fior, *supra* note 189, at 25.
310. Chen, *supra* note 302.
311. Frank, *supra* note 251, at 6.
312. Chris Klein, *China Relents on Its Law Firm Rules: Restrictions Would Have Kept Chinese Nationals out of Western Law Firms*, NAT'L L.J., Jan. 6, 1997, at A7, A7.
313. Adams, *supra* note 24, at 5 (brackets in original).
314. Klein, *supra* note 312, at A7.

Geneva on December 4-5, 1997.³¹⁵ The offer was considered insufficient for some undisclosed reasons and the offer was not accepted.³¹⁶

4. Recruiting Difficulty and Attorney Defections

Staffing a Chinese office is often difficult because of the scarcity of good Chinese lawyers.³¹⁷ American law firms are usually reluctant to send out their best lawyers to foreign posts:

By their very nature, satellite offices are hard in terms of recruiting. Mr. [Rolf R.] Boer [Chair of Foley & Lardner's international business practice and head of the management committee] says. "Talented foreign lawyers don't want to work in small, ancillary U.S. firms, and frankly, we can't afford to send the best U.S. lawyers to foreign outposts because we need them for our domestic practice."³¹⁸

While young American lawyers are generally more willing to work in China, "they occasionally worry about being far away from the New York or California power centers for too long, ending up in a cul-de-sac as China specialists and jeopardizing their chances at partnership."³¹⁹

The Chinese language poses another problem. It is important to speak Chinese. "Unless the lawyers are fluent Chinese speakers, just getting around can be a nightmare."³²⁰ Handel C.H. Lee, then head of Skadden Arps' Beijing office, strongly believed in sending ethnic Chinese-speaking lawyers to China.³²¹ He noted that in the translation process a lot of information was lost.³²² A Chinese-speaking lawyer could also build special relationships with Chinese clients.³²³

315. John Zarocostas, *China's Services Offer Falls*, NAT'L L.J., Dec. 15, 1997, at A13, A13. The offer is as follows:
The offer would completely lift the geographical limit that restricts foreign law firms to 19 cities. . . . China also said it plans to remove provisions stipulating that the total number of foreign law offices in China not exceed 80 and that each foreign law firm establish only one office. China still insists, however, that foreign lawyers live in the country at least six months a year and not employ local Chinese lawyers.

316. *Id.*
317. See Klein, *supra* note 259, at A19 (recognizing American firms have difficulty in attracting lawyers to their Chinese offices).
318. *Id.*
319. Slind-Fior, *supra* note 189, at 26.
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.*

A number of American firms are able to staff their Beijing offices with lawyers proficient in Chinese.³²⁴ Coudert Brothers' Phillip W. Chritton acquired his Chinese language skills as a University of Wisconsin undergraduate.³²⁵ Paul Weiss's, Helena Kolenda, and Nicholas C. Howson were such fluent Chinese speakers and readers "they could draft their own legal documents in the language."³²⁶ Davis Wright partner Jerry Zhu grew up in Shanghai, and Becker & Pollakoff's partner, Michael Zhang, is a native of Guangzhou.³²⁷

Some other factors—"the attraction of [China's] vast, emerging economy and the potential legal pitfalls of doing business there"³²⁸—help create a greater demand for lawyers with a Chinese practice.³²⁹ Some law firms' Chinese practice is expanding so fast that they constantly need new lawyers,³³⁰ and some Chinese lawyers are repeatedly being contacted by other law firms.³³¹ In this situation, it is hard for Chinese lawyers to maintain their loyalty when the opportunities are good elsewhere.

Two examples of lawyer defections occurred to Coudert Brothers and Skadden Arps, and show how much attention the home offices need to pay to the Chinese operation. In 1993, Coudert Brothers' leading Japan partner, Charles R. Stevens, brokered a deal with Freshfields and helped the British firm pick up "a large chunk of Coudert Brothers's China practice," including five partners and one associate.³³² In 1997, Handle Lee, then an associate of Skadden Arps, led the defection of two-thirds—four lawyers—of the firm's Beijing team to a Houston-based firm, Vinson & Elkins.³³³ At least one firm responded to this loyalty problem: Baker & McKenzie offers regional partnerships to retain Chinese lawyers and drive up profits.³³⁴

324.	See generally <i>id.</i> (noting prevalence of lawyers proficient in Chinese language and culture).
325.	<i>Id.</i> at 25.
326.	<i>Id.</i> at 26.
327.	<i>Id.</i>
328.	Ian Johnson, <i>Legal Moves: China's Growing Economy Attracts Foreign Lawyers</i> , <i>ASIAN WALL ST. J.</i> , Apr. 9, 1997, at 1, 1.
329.	Victoria Slind-Fior, <i>China Lawyers Suddenly Find They Have Become a Very Hot Commodity</i> , <i>NAT'L L.J.</i> , Nov. 29, 1993, at 26, 26.
330.	For example, Baker & McKenzie wanted to double the number of lawyers in their Beijing office within a year. <i>Id.</i>
331.	<i>Id.</i>
332.	<i>Id.</i>
333.	Johnson, <i>supra</i> note 258.
334.	Johnson, <i>supra</i> note 328.

5. *Fierce Competition, Thin Stake, and Other Concerns*

With international practice gradually losing its attractiveness as a new frontier, competition has become a major theme in the international legal market. A United States firm may find itself facing rivalry from competing American firms, British solicitors,³³⁵ Dutch law firms, and the "newly assertive Australians."³³⁶ Accounting firms, such as Price Waterhouse and Arthur Andersen, are becoming competitors of law firms in the international area and are "taking a considerable bite out of traditional law firms' business."³³⁷

Currently, American firms' major rivals are British solicitors, "who have an aggressive export policy for legal services."³³⁸ Competition "comes in the form of battling for multinational clients,"³³⁹ and wooing lawyers from each other's country to work on international transactions governed by that country's law.³⁴⁰ Coudert Brothers lost quite a few points in this game. In 1993, it lost a huge chunk of its China practice to London-based Freshfields,³⁴¹ and it was forced to close its unlicensed Shanghai office in early 1995 after the British firms allegedly "tattled on their American competition to the Chinese."³⁴² Baker & McKenzie was also scathed in this competition as it was forced to close its unapproved Shanghai office as a consequence of British firms' allegedly unportsmanlike play.³⁴³

After going through all the hardships, the low level of profitability in China may seem disappointing to United States firms.³⁴⁴ It is nearly impossible to maintain New York levels of profitability, even though the hourly rate for a top China lawyer can far exceed that in New York.³⁴⁵ Firms use a lot of money

335.	Klein, <i>supra</i> note 259, at A1.
336.	<i>Id.</i>
337.	<i>Id.</i>
338.	<i>Id.</i>
339.	<i>Id.</i> at A18.
340.	<i>Id.</i>
341.	<i>Id.</i>
342.	Davis, <i>supra</i> note 283, at A6.
343.	Klein, <i>supra</i> note 259, at A18.
344.	Adams, <i>supra</i> note 24, at 5.
345.	Johnson, <i>supra</i> note 258. The reasons for low profitability were explained:

Skadden, for example, is known for demanding that its foreign offices have New York-levels of profitability, a feat that few China-based lawyers can achieve even with hourly rates that are far higher than those in New York. Fees for a top China lawyer can top \$300 an hour for an associate with three years' experience, while senior associates bring in \$400 and senior partners over \$500. By contrast, junior associates in New York charge no more than \$200 an hour, senior associates \$300 and most partners no more than \$400. Despite those staggering China fees, profits are squeezed by high rents and expensive expatriate packages that include housing allowances that sometimes approach \$10,000 a month in Shanghai or Beijing.

to work on building relationships, opening offices, renting quality office space, and paying fringe benefits to the American lawyers, which generally include "housing subsidies, cost-of-living adjustments, and at least one paid trip home a year" ³⁴⁶ The benefit package may "sometimes approach \$10,000 a month in Shanghai or Beijing," ³⁴⁷ and an estimated cost for one lawyer can be as high as \$800,000 a year. ³⁴⁸

While China may look like a promising market in the years to come, it is suggested that a law firm entering the Chinese market look realistically at the practical situation there. Davis Wright's partner Jerry Zhu once warned about American firms' inflated expectations about China: "I think Americans tend to be romantic about Asian countries, China in particular. Many companies, not only law firms, have unrealistic expectations, and then they come back frustrated, disappointed, and the next step is to pull back." ³⁴⁹

His warning is not without merit. There are many challenges besides political instability, staffing difficulty, government restrictions, and low profits. There is no certainty that there will be enough business to go around. ³⁵⁰ It may be difficult to conduct legal research in China because "China does not publish law in any central place." ³⁵¹ Only experienced lawyers know where to seek out the laws and administrative procedures. ³⁵² Living in China presents difficulties for some lawyers as "China's developing infrastructure can be a constant source of frustration," ³⁵³ and the regional differences in culture and business style are also challenging. American firms are advised to avoid viewing China as a huge single market, ³⁵⁴ but rather, as a set of different markets like Europe. ³⁵⁵ Added to this list is the "danger of banks collapsing . . . [and] the sort of economic crisis setting back so many of [China's] neighbors [in 1997]." ³⁵⁶

Yet, a firm that is serious about doing business in China and has the economic resources to make a long-term commitment is advised to maintain a

Johnson, *supra* note 328.

Adams, *supra* note 24, at 5.

Johnson, *supra* note 258.

Adams, *supra* note 24, at 5.

Slind-Flor, *supra* note 189, at 26.

Adams, *supra* note 252, at 9.

Slind-Flor, *supra* note 329, at 26.

Id.

Slind-Flor, *supra* note 189, at 24.

Flannery, *supra* note 231.

For example, John Farrell, president of Coca-Cola's China division in Hong Kong,

told the *Newsweek* reporters: "'The Middle Kingdom is vast and culturally diverse . . . I describe China as like Europe.'" Tom Post & Steven Strasser, *No Free Lunches Here*, *NEWSWEEK*, Feb. 20, 1995, at 39, 39-40 (quoting John Farrell).

356. Kaiser, *supra* note 1.

physical presence there.³⁵⁷ The example of Altheimer & Gray illustrates how important it is for a firm to maintain its presence in China, and how much of a commitment and understanding of the cultural differences are required for it to succeed.

C. A Successful Case: Altheimer & Gray

Among the new offices set up in China, Altheimer & Gray is like a rising star. The five licenses granted to American firms in 1996 did not all go to New York or California mega-firms. One went to the medium-sized firm of Altheimer & Gray,³⁵⁸ a second license went to the seventy-lawyer New York firm Haythe & Curley,³⁵⁹ and a third license went to a Hawaiian firm.³⁶⁰ They beat out "many prominent U.S. firms for a China license, including the Chicago-based Sidley & Austin, the New York City firms of White & Case and Sullivan & Cromwell, the giant San Francisco-based Morrison & Foerster and the Minneapolis firm of Dorsey & Whitney."³⁶¹

The Chinese government does not disclose the standards it uses to evaluate the applicants.³⁶² It appears that setting up an unofficial office in China and building relations with government officials are key.³⁶³ Altheimer's corporate law partner, Louis B. Goldman, believed that "winning the license required an intense, long term effort [in China]."³⁶⁴ The physical presence of a law firm in China, even if not in the form of an approved representative office, is important for a firm that is "serious about doing business in China."³⁶⁵ Altheimer opened a "preparatory liaison office" in Beijing in early 1994 as a way of gaining a presence in China.³⁶⁶ Establishing relationships with the Chinese government and other relevant entities also seems to be the key to success: Goldman noted that the firm had done quite a few favors for Chinese government agencies and officials.³⁶⁷

357. Slind-Fior, *supra* note 189, at 25; see also Levison, *supra* note 1, at 37 (describing how a firm that pulls out in a crisis is looked down upon by the Chinese).
 358. Sanders, *supra* note 276, at 1.
 359. Adams, *supra* note 24, at 5.
 360. *Id.*
 361. Sanders, *supra* note 276, at 1.
 362. Adams, *supra* note 24, at 5.
 363. *Id.*
 364. Klein, *supra* note 259, at A19.
 365. Slind-Fior, *supra* note 189, at 25.
 366. Sanders, *supra* note 276, at 1.
 367. Klein, *supra* note 259, at A19. Louis B. Goldman, a co-chair of Altheimer & Gray's international practice group, said:
 "Over the past six or seven years, we've trained many Chinese lawyers. We've held seminars in Chicago and lectured in China. We've given advice in certain legal

Altheimer & Gray's success is also largely attributable to its close connections with the Chinese government.³⁶⁸ Actually, in the past few years, Altheimer & Gray has put much effort in building a close relationship with the Chinese government. In fact, Altheimer & Gray:

regularly held training sessions for Ministry of Justice officials in its unofficial office in Beijing, teaching them how business transactions are structured, and hosted visiting dignitaries in Chicago.

When the Ministry said it was interested in lawyer malpractice issues, the firm translated a typical U.S. malpractice policy into Chinese. . . . When a Chinese firm decided it wanted to open an office in Chicago, Altheimer & Gray prepared the admission application for the firm's lawyer. Its efforts were not limited to Ministry of Justice. When the vice mayor of Shanghai, who runs that city's booming financial district, visited Chicago, the firm arranged for him to meet the city's business elite.³⁶⁹

Another possible factor for success is the way Altheimer has staffed its China office. It employed Ben Chu, Jay Yan, and Feng Xue to handle its Chinese legal work,³⁷⁰ all of whom were Chinese nationals holding American law degrees.³⁷¹ The taste of success has been sweet. The winning of the license put Altheimer "in a prime position to profit from Shanghai's booming project finance business."³⁷² With the license, "it can handle the international side of almost any transaction it would want."³⁷³ Taking advantage of its strong China experience, Altheimer further "plans to operate in China on a nationwide basis and is already handling projects in 10 to 12 cities there."³⁷⁴ The restriction that foreign lawyers cannot practice in Chinese courts does not seem to affect Altheimer's performance because "the bulk of the firm's work will occur outside the courtroom."³⁷⁵ Apparently, Altheimer does not feel too tied up by the

areas, such as malpractice. In fact, we've translated typical malpractice policies for Chinese lawyers to see. We helped a Beijing law firm get an Illinois license." Frank, *supra* note 251, at 2 (quoting Louis B. Goldmann). In some ways the New York firm Haythe & Curley took similar approaches. For example, this firm actively involves itself in China projects—"[a]long with Duke University and the Chinese Science and Technology Commission, the firm is planning a series of seminars on how businesses are structured and managed." Adams, *supra* note 24, at 5.

368. Klein, *supra* note 259, at A19.
369. Adams, *supra* note 24, at 5.
370. Sanders, *supra* note 276, at 1.
371. Frank, *supra* note 251, at 6.
372. Klein, *supra* note 259, at A19.
373. Sanders, *supra* note 276, at 1.
374. *Id.*
375. Frank, *supra* note 251, at 6.

numerous Chinese government regulations and is taking a head start toward tremendous growth in China.

VII. CONCLUSION

While the rule of law is gradually taking hold in China, a basic difference still should be noted: Law in China is more of a guarantee of the state's power than of individual rights. The interplay of the orthodox communist ideology and Western influence plunged China into a legal dilemma when it tried to legalize its economic and political structures without detroning the Communist Party as the supreme ruler of the country. The latest Constitution perhaps best reflects the Communist Party's ambiguous position in China's rapid legal reform: All political parties must abide by the Constitution and the law, but the Party and communist ideology are still the nation's guiding, preeminent forces.

It is unrealistic to "expect China soon to become a country where law plays an important role, as it does in the industrial West."³⁷⁶ In the last several years, however, China has been working to advance the rule of law, which is also in the interest of the Chinese government.³⁷⁷ On the one hand, it is unwise to ignore "the virtual transformation of the Chinese legal system that has taken place in the past several years, and the prospects for further advances."³⁷⁸ On the other hand, it should also be realized that "installing the rule of law will take a greater push, one that must come from the U.S. and other governments as well as from businesses involved in China."³⁷⁹ In China's transforming process, "America will inevitably affect China's future behavior."³⁸⁰ American law firms doing business in China will be playing an important role and are in a unique position to gain advantages and business opportunities from China's transformation.³⁸¹

376. *China/Investment-7: Cultural Clashes on Law, Contracts*, DOW JONES ASIAN EQUITIES REP., Sept. 21, 1996 (on file with the Drake Law Review).
377. Friedman, *supra* note 129.
378. Douglas Eakley, *China Is Showing an Interest in the Rule of Law*, NAT'L L.J., Nov. 10, 1997, at A23, A23.
379. *Law School for China*, *supra* note 138.
380. Michael Oksenberg, *What Kind of China Do We Want?*, NEWSWEEK, Apr. 1, 1996, at 53, 53.
381. See Slind-Fior, *supra* note 189 (discussing opportunities for lawyers in China and noting the need for lawyers and the inexperience of those appointed to the Chinese bar without legal training).

