Global Privilege and Professional Secrecy Guide - People's Republic of China

01 - Discovery

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# What disclosure/discovery is required in litigation?

In the context of civil litigation conducted in the courts of the People's Republic of China (PRC),1 there is not yet a consistent, established concept of formal adverse party discovery. There is, however, a process known as evidence exchange (zhengju jiaohuan). Generally speaking, parties are required to conduct their own investigations and to produce evidence in their possession to meet their respective evidentiary burdens. No document requests are issued to the opposing party, and no interrogatories are conducted.

Nonetheless, the process in PRC civil litigation is evolving, and parties sometimes can find means to work around the absence of a formal discovery process and requirements. For example, a party may petition the relevant PRC court to collect evidence from their opponent or third parties if the petitioning party can establish that the evidence exists, is relevant, and is objectively difficult to obtain or at risk of destruction. Sometimes, PRC courts will grant such a petition and permit a limited evidence collection or even an evidence preservation exercise. However, it is worth noting that even when a PRC court does grant such a petition, the opponent or third party from which the evidence is sought is able to avoid complying with the court's request for evidence collection and preservation. Therefore, enforcing the order could be difficult. Although sanctions exist, they do not extend to a dismissal of the claim or a strike-out of the defense.

In addition to the difficulties of collecting evidence in the PRC, the authenticity or admissibility burdens for party-introduced evidence can be significant. PRC courts tend to hold parties to a very high standard regarding the authenticity of their evidence. In most cases, parties should be prepared to prove even the most basic of information (e.g., that the signature on a contract is authentic or that the email retrieved from a company computer was not manufactured).

The lack of a formal adverse party discovery process in the PRC often makes it difficult to pursue a civil case before a PRC court, particularly when the case is brought by a foreign party or foreign investor against a Chinese party and involves claims concerning concealed activities by the defendant (e.g., trade secret infringement, fraud and civil conspiracy). The absence of such a process is often viewed favorably by a party defending a claim in a PRC court. The defending party will likely be faced with discovery burdens significantly smaller than might arise if that party were defending a claim in courts of other jurisdictions, such as those of the United States.

That being said, the amended Civil Procedure Law of the People's Republic of China and the Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings have provided certain help for the party that does not possess the evidence. For example, if a party in control of written evidence refuses to submit it without justifiable reasons, the people's court may determine that the content of the written evidence is truly as claimed by the other party. Also, a party who neither admits nor denies facts unfavorable to them as claimed by the other party, but fails to explicitly admit or deny such facts after the judge has delivered an explanation and made inquiries, shall be deemed to have admitted such facts.

[1] Please note that references to PRC exclude Taiwan and the Special Administrative Regions of Hong Kong and Macau.

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