

Sino the times: our increasing need for Chinese precedent

Does the rapidly expanding volume of maritime and commercial activity in China, coupled with a relative lack of information on the country's cases or on the firms practising from within its borders, mean that access to online Chinese case law could become more necessary than ever before for competitive practitioners in Britain and beyond? The short answer to this rather long question appears to be yes. But if such a service existed, what might it provide and what issues would it address?

By **Alistair King** of Justis Publishing, with particular assistance from **Sean Hocking** of PracticeSource.com

Dalian, Tianjin, Qingdao, Shanghai, Ningbo, Wuhan, Xiamen, Guangzhou, Beihai and Haikou: 10 maritime courts in the People's Republic of China; combined yearly number of admiralty matters contested: around 10,000.

Australia: an entire nation state in the Antipodes; yearly number of admiralty matters contested: 10.

Even when their relative populations are taken into account – China's whole populace is less than 60 times the size of Australia's – the ratio of shipping cases in these Chinese courts alone to those in all of Australia is clearly massive.

We'll come back to Australia and other international elements of the discussion in due course but why focus on China?

In February this year, the country overtook Japan to become the world's second largest economy by nominal GDP.

The event surprised few commentators', their long-held collective view being that, by many measures, China will prove to be to the twenty-first century what America was to the twentieth and Britain was to the nineteenth.

Various commercial areas are jostling for their own prominence on the world stage, the seafaring nation's growing shipping industry already being global Number One, a position

it's proudly held for many years.

But recent media murmurs regarding the state's ever more restrictive internet practices and non-Chinese practitioners' widespread uncertainty of its laws and legal system, mean opportunities are being lost by lawyers with clients affected by China, not to mention those with potential clients actually based there.

In 2008 I wrote two articles for this journal on legal globalization. The second of those closed with a short, almost throwaway reference to China, in which Adrian Hughes, a silk at 39 Essex Street Chambers and the Bar's joint Chairman of Britain's China Law Council, told me that "in the past five or 10 years, our mutual collaboration [with the Chinese] has been viewed by practitioners as increasingly relevant to both sides."

Back then, all I could do was nod in agreement. But now Justis Publishing has joined forces with contributors on the ground in China to produce an online collection of Chinese maritime and commercial case law, one of two new series it is actually co-creating, rather than just providing a platform for.

This one, which goes live imminently, will be translated into English and searchable alongside the growing catalogue of overseas case law on the full-text online Justis legal library, which now includes series from Singapore, Bermuda, Jamaica and the British Virgin Islands, alongside its long-established British and Irish fare.

But what will this series contain and how can it actually be put to use by British and other non-Chinese practitioners, given the seemingly stark differences between the common law world and codified China?

I approached Sean Hocking, owner of PracticeSource.com, which incorporates the House of Butter legal blog and Law Librarians News. Born in Australia, raised in the UK and now a longtime resident of Hong Kong, Hocking is a legal publishing expert and writer whose international background shapes the scope of his work. One of his aims is to raise awareness of worldwide legal resources and information management, and he believes that adding Chinese case law for a common law market to the mix could be a winner.

I'll come on to why he believes this. But first I'll put the statistics that open this article in context. They are cited by leading maritime specialist and contact of Hocking's, Alexander Street SC at Sydney's Seven Wentworth Chambers. Street highlights the immense size of China's admiralty jurisdiction and also agrees with my proposition that access to its online case law would be a good idea – as, given Hughes's comments, I'd argue it would be for the many shipping and other commercial barristers in England and Wales.

Though blessed by a larger domestic market than Street, our practitioners are still increasingly looking overseas both for clients and for persuasive precedent from less traditional sources. Will Chinese material contribute to this trend?

With law degrees from Wuhan University's School of Marine Navigation, Beijing-based Philip Peng is a practising lawyer at Hai Tong & Partners, which has clients in such sectors as Europe's busy protection and indemnity insurance trade. Having initially proposed the idea for the new series, Peng is coordinating Justis Publishing's efforts from China, alongside Li Xiaofeng, judge of Qingdao Maritime Court.

Echoing Street's comparison, Peng points out that the number of cases from Chinese maritime courts between 1987 and 2009 was equal to the number from all of the rest of the world put together for that period.

This demonstrates the significance of the sector. But how can we put any associated information to use, either at home or in China?

Scratching the surface reveals transferable similarities between China's legal system and our own.

Peng explains that, despite China's official status as a civil law jurisdiction, "it is a Chinese judicial tradition that if a case involves a complex legal problem that may also be commonly found in other similar cases, the lower court may then briefly report the facts of the case, and the court's tentative opinions regarding how to handle the case, to the Supreme Court. The Supreme Court will analyse the report and the tentative opinions, and then issue the Reply to the lower court illustrating which kind of opinion the Supreme Court thinks tenable. This kind of Reply [of which, he adds, there are many] will be a very important guide for a Chinese court when dealing with similar cases."

He continues: "In the international commercial arbitrations, if the lower court intends to deny the validity of the arbitration clause, or the lower court intends to refuse the arbitration award enforcement application, the lower court must report to the provincial high court; and if the provincial high court agrees with the lower court, it must then report to the Supreme Court for its Reply. The Supreme Court will then analyse the provincial high court's tentative decision and decide whether to uphold the validity of the

arbitration clause or to enforce the arbitration award. This kind of Reply is a very important source of law relating to China's practice in the international arbitrations."

Despite the theoretical framework for recourse to precedent, Peng says there have been problems in disseminating it. "There is no strict law in China dealing with when, how and where these Chinese precedent shall be publicized," he says, "and it seems that there is not a database [other than the one that is about to be released] that can host such a huge number of them."

Peng's systematic approach in rectifying these problems will help practitioners in China. But more importantly for us, it will provide practitioner here with to access a wealth of persuasive, carefully selected new precedent from 2010 onwards.

Furthermore, as Hocking points out, such a series might have the added advantage of reducing the "85% grey or just wrong information" on Chinese law firms, many of which will be mentioned in passing in the reports. So as a happy byproduct, practitioners will be able to keep a keener and more reliable eye on the competition.

So what will the series include?

Peng says that the cases component, which will form the bulk of the series, will comprise: maritime cases, including cases relating to carriage of goods by sea, charter parties, ship collision, marine oil pollution, maritime salvage, general average (an arcane and elusive term I had to look up, concerning ships' cargo), ship building and repair, and maritime labour law issues; and more general commercial cases, including international sales of goods, letters of credit, insurance claims, company and joint venture disputes and anti-monopoly law.

Judicial interpretation and opinions, as well as some important legislation and decrees, will also be included.

How can this material be put to use by practitioners outside mainland China?

Hocking's view is that the series will "break

down the language and cultural barrier" and provide persuasive precedent for practitioners in the UK, US, Australia and beyond.

Closer to China but effectively a separate legal entity is the Special Administrative Region of Hong Kong. Given its obvious proximity to the mainland and my hunch that its practitioners are a few steps ahead in tapping into China's huge maritime sector – and, where possible, using its persuasive precedents – I spoke to another of Hocking's contacts, Edward Ma, a partner at the former British colony's King & Wood law firm.

Ma confirms that, although China is a civil law jurisdiction, "some case law would have de facto influence over the trail of courts at each level." Furthermore, he contends that when the Supreme People's Court issues a formal directive to lower courts, its comments "on that particular case are considered binding in practice."

This clearly has a positive bearing on its persuasive value elsewhere; and Ma says that "getting access to general Chinese precedents would be of help to practitioners outside China in their bid to provide more reliable advice to their clients," which, he adds, "would apply equally to commercial and shipping law."

Ma concludes that "in recent years, as China has been involved more actively in international commerce and trade, more legal issues cannot be solved by decades-old legislation. In such circumstances, case law would be of greater value of reference."

Applying to both sides of the border, this viewpoint could eventually ring truer for common law practitioners looking to China than to the Chinese themselves. Hocking is convinced that Westerners will "compete more effectively with Chinese law firms if they have access to cases from the ground."

This is a new area, not just for Justis Publishing but for the world of legal reporting. So it could take decades to determine the significance of these assertions.

But it would take a braver commentator than me to dissent from the view that China's influence is on the up.