

Even if they avoid politics, foreign businesspeople are not immune from the vagaries of Chinese justice, writes **Jerome A. Cohen**

Legal pitfalls

The prosecution of naturalised American citizen Xue Feng (薛峰), which concluded last month, is a vivid reminder that China's abuses of criminal justice can reach even those who steer clear of politics and human rights. Xue, a

petroleum expert and businessman, was detained by China's secret police in November 2007 after assisting his employer, a prominent American oil consulting firm, in purchasing a commercial database of Chinese oil wells.

Although the US-China consular agreement required China to notify the US of his detention within four days, notification only occurred after three weeks of US diplomatic pressure. That treaty violation led to another – the failure to permit an American official prompt access to Xue. That meant over a month of incommunicado detention before a consul could advise him. Moreover, their meeting was monitored, and they were not allowed to discuss the case!

Subsequent consular visits revealed that

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Xue had been tortured when he refused to confess to the crimes of "gathering intelligence" and "unlawfully sending abroad state secrets". Xue displayed cigarette burns on his arms and later recounted an incident when an angry interrogator hit him in the head with a glass ashtray, plain violations of both domestic law and China's commitments under the UN Convention Against Torture. Under physical and psychological pressure, Xue finally signed some false statements.

Officials violated Xue's rights in other ways as well. The secret police illegally extended the length of Xue's detention by not obtaining the prosecution's timely approval of his formal arrest. Post-arrest investigation dragged on endlessly.

When the police finally recommended indictment, prosecutors – dissatisfied with the evidence – twice sent the case back to the police for further investigation, as legally permitted, but then exceeded their own time limit before deciding to indict

Xue. The first instance court also delayed its judgment in the case so long that it stopped offering legal justifications.

Because the police claimed that the case involved "state secrets", the Criminal Procedure Law authorised them to deny Xue access to a lawyer until they completed their investigation. Thus, Xue waited over a year after being detained before consulting counsel.

Defence lawyers are monitored and restricted when meeting clients. Also, they are not given sufficient advance knowledge of the prosecution's case to prepare a proper defence. And many find it difficult and even dangerous to conduct their own investigation, since lawyers who prove too vigorous in finding witnesses may face prosecution for promoting perjury.

Xue's veteran counsel, Tong Wei, confronted all these obstacles before trial and others during Xue's first instance trial, and the second instance trial that constitutes an "appeal" under Chinese law. The public was barred from both trial hearings. Tong was not allowed to introduce any defence witnesses or other evidence into the proceedings.

Moreover, as is customary on the mainland, no prosecution witnesses appeared in court, so there was no opportunity for cross-examination. Although Chinese law prohibits coerced confessions from being the basis of convictions, Xue's statements were accepted into evidence and his torture went unmentioned in the Beijing High Court's decision affirming his eight-year prison sentence, despite rules facilitating the exclusion of illegally obtained evidence.

The High Court opinion recited at length the pre-trial testimony of the government's witnesses, but did not address the defence's main legal arguments. Regarding the contention that the data in question should not be deemed "state secrets" or "intelligence", since such information is routinely traded in international practice, the court merely attributed to a witness the statement that: "Different countries treat the collection of information differently. In America, statistics about oil wells are public and can be found on the internet. But this is not the case in China, where information and statistics concerning oil are very sensitive."

Xue's best argument was that it was unfair to convict him of illegally obtaining material that the State Secrets Bureau did not declare protected until several years

after he had acquired it and seven weeks after he had been incarcerated. Yet the High Court, which regarded the bureau's conclusion as unchallengeable, did not respond to this argument. It merely noted the testimony of another witness that it was common knowledge among Xue's friends inside the government agency involved that the material was to be kept secret.

The court made no reference to the universally recognised prohibition against retroactive criminalisation, which China has long acknowledged, or the principle, occasionally practised in China, that ambiguous criminal laws should be interpreted in favour of the accused.

The High Court, like the lower court, rejected without explanation the American embassy request to send an observer to the court hearing, as the US-China consular agreement and Chinese law seemingly require, even in secret trials. But both courts gave the appearance of a partial bow to legal requirements by allowing an American official – in this case Ambassador Jon Huntsman – to attend the pronouncement of the judgment, a much less important proceeding.

Where does this leave Xue? Although Chinese law permits only one appeal, it does authorise applications for post-conviction court review. Tong, however, reportedly considers any realistic legal

remedies to have been exhausted. Efforts on Xue's behalf have shifted to the possibility of the "immediate humanitarian release" requested by Huntsman. Given Xue's uncertain physical and mental health, a good case can be made for medical parole. If his sentence is commuted from eight to six years, he would also be eligible now for the conventional parole available to prisoners who have served half their sentence.

Although Xue has never been accused of spying for the US government, and China has shown little interest in those convicted of espionage for China in the US, one should not rule out an exchange, such as that which recently occurred between Russia and the US.

Whatever Xue's fate and that of his long-suffering family, his case, like last year's conviction of Rio Tinto's Shanghai representative, the Australian Stern Hu, demonstrates that foreign businesspeople ignore China's criminal justice system at their peril.

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