

China

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Litigation

1 Court system

What is the structure of the civil court system?

There are four levels of court of general jurisdiction: basic (at local level), intermediate (at city level or equivalent), higher (at provincial level) and the Supreme People's Court in Beijing. There are also a number of courts of specialist (eg, maritime) jurisdiction.

Cases involving non-Chinese parties must usually be started at the intermediate level, though the basic level courts can take jurisdiction in some very small foreign-related cases and higher level courts may exercise first instance jurisdiction in some very large cases (the thresholds and related practices vary regionally). Each level of court is usually divided into several tribunals according to subject matter.

2 Judges and juries

What is the role of the judge and, where applicable, the jury in civil proceedings?

There are no juries in Chinese courts. Judges hear cases either alone or as a panel of three. Chinese courts also have adjudication committees to 'supervise' major cases. Compared with common law judges, Chinese judges tend to be relatively inquisitorial.

3 Limitation issues

What are the time limits for bringing civil claims?

The ordinary limitation period under Chinese law is two years from when the claimant knew or ought to have known of the alleged infringement of his rights (subject to a long-stop limitation period of 20 years from when the wrongful act was done). There is a shorter (one year) limitation period in certain personal injury, sale of goods, landlord and tenant and bailment cases. There is also a very short (six months) limitation period for employment law claims. Somewhat longer limitation periods apply in certain environmental damage cases (three years), and international goods purchase and sale and technology import and export cases (four years).

Chinese law is unusual (from the international perspective) in that limitation periods may be tolled not only by the commencement of proceedings or by a written acknowledgement of debt, but also if notice of an assertion of claim is given to the party against whom the claim is asserted. Certain types of force majeure preventing a claim from being brought may also suspend the limitation period.

Specific advice must of course be sought as to the precise distinction between the categories of limitation periods, the date on which the time limit starts to run and in order to take advantage

of the rules tolling or suspending the limitation period safely.

In cases of continuing infringement, the limitation period usually runs from when the claimant first knew or ought to have known of the infringing conduct, but there are certain exceptions in the context of intellectual property.

It is only possible for the parties to agree to toll time limits if their agreement constitutes a written acknowledgment of the debt or a notice of assertion of claim.

4 Pre-action behaviour

Are there any pre-action considerations the parties should take into account?

There are no mandatory pre-action protocols, though it is common for parties to contract expressly to negotiate for a defined period prior to commencing proceedings.

A claimant may apply for pre-action freezing injunctions, preservation of evidence orders and injunctions to prevent intellectual property infringement.

5 Starting proceedings

How are civil proceedings commenced?

The claimant starts proceedings by filing a very simple document known as a bill of complaint. The court should then decide whether to accept it or not within seven days (there are rules, but also a degree of discretion, governing acceptance; non-acceptance is appealable). If accepted, the court should send the copy of the bill of complaint to the defendant within five days and the defendant must file a bill of defence within 15 days from his receipt of the copy of the bill of complaint. A judicial panel will then be established.

6 Timetable

What is the typical procedure and timetable for a civil claim?

The timetable varies. By virtue of the relatively simple nature of the process, most cases appear to be completed more quickly than in typical common law jurisdictions. However, sensitive or complex cases often take a long time to resolve.

7 Case management

Can the parties control the procedure and the timetable?

Control of the proceedings is in the hands of the court, though in practice parties often try to influence the progress of a matter by communication with the court.

8 Evidence

What is the extent of pre-trial exchange of evidence? Is there a duty to preserve documents and other evidence pending trial? Are any documents privileged? Would advice from an in-house lawyer also be privileged? How is evidence presented at trial? Do witnesses and experts give oral evidence?

The evidence rules in China are very different from those of common law jurisdictions. For example, Chinese law does not provide a duty to preserve documents and other evidence pending trial.

The court, upon the application of the parties, may arrange for evidence to be exchanged prior to the hearing and is required to do so in cases involving copious evidence or complex cases. The party making an allegation bears the burden of proving it.

There is no general duty to search for and disclose unhelpful documents (ie, no 'discovery'), although the court may (of its own motion or at the request of the other party) order a party to produce a specific document. There is no clear concept of legal professional privilege (other than as an aspect of the broader concept of confidentiality), though the absence of a discovery obligation makes this issue less acute than it would be in a common law jurisdiction (albeit still sometimes problematic).

In commercial cases, the primary focus at the main hearing (or hearings) is usually on the documentary evidence, with much attention often being given to questions of authentication.

In practice, the court often will not compel attendance of witnesses. Scope for cross-examination of witnesses is limited, and penalties for giving false testimony are rare in practice.

9 Interim remedies

What interim remedies are available?

There are interim remedies available to freeze assets or preserve evidence, but their efficacy varies from place to place, and with the particular legal context. Problems with enforcement and significant requirements for the provision of security by applicants often operate as a practical barrier to the freezing of assets.

10 Remedies

What substantive remedies are available?

Financial remedies (including damages) and injunctions may be sought, as well as miscellaneous remedies of lesser commercial significance (such as orders to apologise). However:

- while in principle the basic rules governing damage for loss of profit and consequential damage are similar to the rules applied in common law jurisdictions, in practice the high standard of proof applied has often resulted in much lower awards than would be seen abroad in comparable cases; and
- injunctions are often not possible to enforce effectively.

Damages for breach of contract are compensatory in nature, and punitive damages are not awarded for breach of contract. Interest is payable on contractual claims (usually calculated on the basis of the contractual interest rate or on the average interest rates payable on deposit accounts).

11 Enforcement

What means of enforcement are available?

The key mechanism is the seizure of assets. There are wide powers on paper, though successful execution of these is variable, depending on location and other circumstances. Improving this state of affairs is a key feature of the ongoing reform plan (for

example, the Supreme People's Court issued two sets of rules in 2007 designed to improve the transparency and efficiency of enforcement).

Imprisonment for what would in many other countries be regarded as a serious flouting of the court's authority (eg, perjury or refusing to obey an injunction) is still rare in commercial cases in China.

12 Public access to court records

Are court hearings held in public? Are courts documents available to the public?

Court hearings are held in public unless the proceedings are related to state secrets or issues of personal individual privacy. The court may also, in its discretion, allow an application for a closed hearing in a case concerning commercial secrets or divorce. Generally speaking, court documents are not available to the public. The courts may publish judgments: practice varies regionally but the general trend is for more judgments to be made available on the internet.

13 Inter partes costs

Does the court have power to order costs?

The unsuccessful party is usually ordered to pay the successful party's court fees, but it is very rare for Chinese courts to order an unsuccessful party to pay a successful party's lawyers' fees unless the parties contracted expressly for this. There is no security for costs regime.

14 Fee arrangements

Are 'no win, no fee' agreements or other types of contingency fee arrangements available to parties? May parties bring proceedings using third party funding? If so, may the third party take a share of any proceeds of the claim?

Contingency fee arrangements are permitted in commercial litigation and arbitration cases. The contingency fee may be calculated by reference to, for example, the damages awarded, the sum successfully collected by the claimant or the amount successfully defended, but may not be more than 30 per cent of that amount.

Third party funding and sharing of litigation proceeds are not prohibited under Chinese law.

15 Appeal

On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

There is a right of appeal to the court one level above in the hierarchy (ie, basic to intermediate, intermediate to higher, higher to supreme). There is an automatic stay of execution upon the filing of an appeal. The appeal is a re-hearing: there are no precise limitations on grounds of appeal. There is no right of further appeal after the second instance decision. In practice, however, there is a parallel procedure available for challenging judgments by way of 'trial supervision' on widely-drawn grounds (including insufficiency of evidence, error of law or deficiency of process). This mechanism is commenced either by applying directly to court or by applying to the relevant regional people's procuratorate (often through political channels), which has power to lodge a protest against a judgment. In practice only a small proportion of cases are successfully reviewed but the existence of this procedure has led

to some question marks being raised internationally over the finality of Chinese judgments.

16 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

In practice, China only recognises foreign judgments pursuant to specific treaties with the foreign jurisdiction in question. At the time of writing (March 2007), such treaties are in force with approximately 30 countries, but not with some of China's largest trading partners, such as the US, UK and Japan. The specific treaty should be reviewed to check its scope and exceptions on a jurisdiction-by-jurisdiction basis.

There are similar arrangements with Macau and Taiwan. A further arrangement was signed with Hong Kong in July 2006 but is not yet in force and will only apply in commercial cases in which the parties have included an exclusive Hong Kong or mainland jurisdiction clauses; even, then, enforcement will be subject to major exceptions.

China participated in the negotiation of the 2005 multilateral Hague Convention on jurisdiction and judgments but its scope is narrow (similar to the Hong Kong arrangement mentioned above) and it remain to be seen, in any event, whether China will sign and ratify it.

17 Foreign proceedings

Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

The Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters 1970 came into force in China in 1997. An inbound letter of request needs to be filed with the Ministry of Justice of the PRC, which will pass the request to the relevant authorities (for example, the relevant court).

There are also arrangements for service of legal documents between the mainland, Hong Kong and Macau, and for obtaining evidence between the mainland and Macau.

China has also entered bilateral judicial assistance agreements with 30 countries on various civil, commercial and criminal matters.

Arbitration

18 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

No. There are substantial differences, reflecting a general lower level of party autonomy than that seen elsewhere. The most important points are:

- Chinese law requires 'domestic' arbitrations (which comprise most disputes between two Chinese companies, even if one or both are wholly foreign-owned) to have their seat in mainland China; only 'foreign-related' arbitrations may, in the eyes of Chinese courts, have their seat elsewhere.
- Chinese law does not recognise ad hoc arbitration if the seat of the arbitration is in mainland China, so an arbitration agreement providing for arbitration in mainland China will be invalid unless it nominates an arbitration institution to conduct the arbitration.
 - The parties' choice of institution is also limited for arbitrations with a seat in mainland China: there is some statutory ambiguity on the point, but a commonly held view is that non-foreign-related arbitrations (including

most cases between foreign companies' Chinese subsidiaries and Chinese counterparties) must be administered by a Chinese arbitral commission (such as CIETAC), and there remains a degree of legal uncertainty as to the validity of an arbitration agreement in a foreign related dispute which provides for arbitration in mainland China under the auspices of a foreign arbitral institution (such as the ICC).

- The presiding arbitrator (or sole arbitrator) must be appointed by the chairman of the arbitral commission (see question 20).

19 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

The basic requirements are that the agreement must be in writing (a concept which the Supreme People's Court has ruled, in 2006, should be interpreted broadly, so as to encompass, for example, exchanges of email) and must adequately identify the subject matter.

20 Choice of arbitrator

If the arbitration agreement and any relevant rules are silent, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

The default rule in CIETAC, the Beijing Arbitration Commission and the Shanghai Arbitration Commission is three arbitrators subject to some minor exceptions.

In a three arbitrator case, each party appoints one arbitrator and the arbitration commission chairman appoints the presiding arbitrator (usually a Chinese national, even in a foreign-related case, unless the parties have required in their contract that the presiding arbitrator be of neutral nationality). The commission chairman also appoints sole arbitrators. The vesting of this appointment power in the commission chairman is provided for in the Arbitration Law and is usually regarded as a mandatory rule of law from which the parties may not depart.

Challenges to the appointment of an arbitrator are possible if they are based on demonstrations of personal relationship, conflict of interest or improper conduct. The most effective forum for bringing such challenges in practice is usually by applying to the commission chairman rather than to a court.

21 Procedure

Does the domestic law contain substantive requirements for the procedure to be followed?

Not of any real significance, and the parties have great scope to agree variations. For example, CIETAC has been prepared to conduct arbitrations under ICC rules where the parties have agreed this. In practice, the more significant factor affecting procedure tends to be the identity of the arbitrators, who have great discretion on virtually all matters of practical importance. Typically arbitrators from a domestic background will emphasise documentary rather than witness evidence.

22 Court intervention

On what grounds can the court intervene during an arbitration?

In practice, intervention is usually limited to the matters mentioned in question 23.

Update and trends

For litigation, a five-year reform plan focusing on improving enforcement, judicial competence and judicial independence from local governments was approved by the March 2006 National People's Congress meeting. There are also efforts underway to reduce judicial corruption, which are reported

to include the preparation of anti-corruption rules by the People's Supreme Court.

For arbitration, the legislation is scheduled for review in 2008. It remains to be seen whether this will address the aspects of Chinese arbitration law highlighted in question 18.

23 Interim relief

Do arbitrators have powers to grant interim or conservatory relief?

No. An application for protection of evidence or preservation of assets (including freezing injunctions) must be submitted to the arbitration commission, which will refer it (without recommendation or comment) to the competent local court. There is no scope for applications for other forms of interim relief, such as security for costs or interim injunctions. There are different views as to whether the power to decide what to do with evidence which a court has ordered to be preserved lies with the court or the arbitral tribunal.

24 Award

When and in what form must the award be delivered?

The CIETAC rules require the tribunal to issue its award within four months in domestic cases and six months in foreign-related cases, both measured from when the tribunal is constituted. The arbitration rules for the Beijing Arbitration Commission and the Shanghai Arbitration Commission have similar provisions. However, in practice the commissions readily grant extensions to tribunals. There are no published statistics as to case duration.

Awards must be made in writing and must specify the claim, the facts of the decision, the reasons for the decision, the tribunal's ruling as to costs, and the date of the award (although the parties may agree that the facts of the dispute and the reasons for the decision should not be specified in the arbitration award). Awards should be signed by the arbitrators and sealed by the arbitration commission.

25 Appeal

On what grounds can an award be appealed to the court?

In purely domestic arbitrations, there are relatively broad grounds of appeal, including potential for review of the merits, whereas appeals against awards of domestic commissions in foreign-related cases (see question 18 above) must be based on criteria similar to the grounds for legitimately resisting enforcement pursuant to the New York Convention.

26 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Foreign (including Hong Kong) arbitration awards in cases which were validly arbitrated outside mainland China in the eyes of the Chinese courts (see question 18 above) are enforceable in China under the New York Convention (or an equivalent arrangement with Hong Kong).

A special procedure applies, designed to reduce the scope for local judicial protectionism, whereby local courts must obtain the Supreme People's Court approval before refusing enforcement. This procedure also applies to foreign-related Chinese arbitration awards, which may only be refused enforcement on grounds similar to the New York Convention criteria.

Domestic Chinese arbitration awards are enforceable like domestic judgments subject to certain exceptions broadly equivalent to the grounds of appeal mentioned in question 25.

Whilst problems may still be encountered in practice in seizing assets depending on the local situation, enforcement of foreign and foreign-related domestic arbitral awards is, generally speaking, more straightforward than enforcing foreign or domestic judgments or purely domestic arbitral awards.

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27 Costs

Can a successful party recover its costs?

Yes, Chinese arbitration tribunals may order an unsuccessful party to pay some or all of the costs incurred by the successful party, including administrative fees, arbitrators' fees and lawyers' fees (including, sometimes, a success-based element). In practice, the awards made for lawyers' fees depend heavily on the composition of the tribunal in question. The reasonableness of such costs is assessed on a 'broad brush' basis.

Alternative dispute resolution

28 Obligatory ADR

Is there a requirement for the parties to litigation or arbitration to consider alternative dispute resolution before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process? What types of ADR process are commonly used? Is a particular ADR process popular?

Not in theory, but in practice courts or arbitration tribunals will often push parties to settle, and even seek to mediate a settlement.

Miscellaneous

29 Are there any specific features of the dispute resolution system not addressed in any of the previous questions?

The Chinese legal profession is open only to Chinese citizens who have passed the PRC judicial examination and satisfied the other admission criteria. Such individuals may practise fully as lawyers unless they work for a non-Chinese organisation, in which case their right to practise is suspended.

Non-Chinese law firms in China are allowed currently by Ministry of Justice regulations to advise on non-Chinese law and to provide information on the impact of the Chinese legal environment, but not to give "opinions" on Chinese law or to appear as counsel in the Chinese courts.