

China

King & Wood

Litigation

1 What is the structure of the legal profession?

The legal profession (including lawyers, judges and public procurators) is based on a state-licence system. All lawyers holding a certificate of practice have general rights of audience in Court and may advise clients on major aspects of law. Judges and public procurators are appointed from citizens of the People's Republic of China (PRC) aged 23 or above who have the requisite experience and legal knowledge. Since 2001, all persons to be appointed as judges and procurators for the first time are selected from among those who have passed the national uniform judicial examination. They will be also be subject to subsequent review.

2 What is the structure of the Court system?

Jurisdiction is divided level and territory. The four levels of Courts are the Basic People's Court, the Intermediate People's Court, the Higher People's Court (all three Courts are established in each administrative region) and the national Supreme People's Court.

Generally, the amount claimed in a civil suit determines which level of Court will have jurisdiction. The relevant amounts vary between regions. However, cases involving the interests of foreign parties fall within the jurisdiction of the Intermediate People's Court designated by the Higher People's Court according to its rules. Cases involving patent rights fall within the jurisdiction of whichever Court (including the Basic People's Court) is designated by the Higher People's Court. Specialist tribunals, such as the Admiralty Tribunal and the Railway Transportation Tribunal, deal with matters described in their respective titles. Generally again, the localities or the addresses of defendants, or the place for performance of contracts in dispute, determines the region in which a claim should be brought.

Judgments of Courts of first instance may be appealed to the next higher level of Court. Decisions by Courts of second instance are final. However, People's Procuracies have a general right to oversee Court proceedings and are entitled to lodge protests against Court decisions. For instance, a People's Procuracy (at provincial level) has the power to lodge a protest against a Court decision made by an Intermediate People's Court.

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

China has a civil law system and judges are generally not bound by previous decisions of the Courts, although the Supreme People's Court is entitled to make binding determinations of law. Judges apply laws and investigate matters of fact wherever they consider it necessary (though in practice they rarely exercise their investigation powers), while the competing parties have the obligation to present evidence and extend submissions.

There are no juries in civil actions. Trials are often heard by a panel of three judges (although a single judge is also permitted).

The Court's Adjudication Committee, appointed by the relevant local or national People's Congress, consisting of the chief judge and senior judges of the Court, supervises major cases.

4 What are the time limits for bringing civil claims?

Civil claims must generally be brought within two years of the date when the plaintiff knew, or should have known, their rights had been infringed, but there is an overall time limit of 20 years from the date of infringement. If, within that period, one party asserts a claim for, or the other party agrees to fulfil, the relevant obligation, a new two-year time limit starts to run as of that date. In special circumstances (eg, *force majeure*), the time limit for claims shall be suspended or extended. In cases such as bodily injuries, sales of substandard goods without proper notice, rental disputes and disputes concerning loss or destruction of consignment, the time limit is one year. The time limit for disputes arising from contracts for the international sale and purchase of goods or the import/export of technology is four years.

5 How are civil proceedings commenced, and what is the typical procedure which is then followed?

A civil action is usually commenced by the plaintiff filing a claim document (usually with documentary evidence) at the Court. The Court checks that the case meets formal criteria for legitimacy and then serves a copy on the defendant, who may prepare and submit a defence and counterclaim (if appropriate). A copy must be served on the plaintiff. After that, parties will conduct pre-trial exchange of evidence as per the evidence rules set forth by the Supreme People's Court on 1 April 2001.

Generally, after the exchange of pleadings and exchange of evidence, the Court will fix a trial date and notify the parties accordingly.

6 What is the extent of pre-trial exchange of evidence, and how is evidence presented at trial?

There are detailed rules in respect of exchange of evidence before trial. Under the evidence rules issued on 1 April 2001, parties have the burden of proof to provide evidence in support of their claims or defence. The Court, which used to collect evidence on behalf of parties, has changed its role and limited its own power in respect of evidence collection.

To avoid surprise, Courts encourage parties to provide or exchange evidence before hearing or within the prescribed time limit.

All evidence is subject to cross-examination by the competing parties at the hearing, and only the evidence that is proven true and genuine to the satisfaction of the Court can be relied on as a basis for judgment.

7 To what extent are the parties able to control the procedure and the timetable? How quick is the process?

In theory, it takes no more than six months from the day of the Court's acceptance of the case to reach a judgment in the first instance. Final judgments in the second instance may take an additional three months. Where the claims meet specific conditions (for example when the facts are simple and clear and there is no real defence), the first instance may be conducted in summary procedure and take no more than three months. However, in practice, it is usual for cases, particularly complicated cases to take longer.

For cases where foreign parties are involved, there is no time limit prescribed by law. In practice, it varies from case to case. Cases involving foreign parties may take a shorter or longer period of time to be completed.

8 What interim remedies are available to preserve the parties' interests pending judgment?

The Court has power to grant an order for property preservation to freeze a party's assets where there is evidence that the assets may be removed or concealed. This may be done prior to filing a claim, on the condition that the applicant:

- (i) provides security for the redemption of false freezing or failure to commence subsequent proceedings; and
- (ii) files the case within 15 days of the date of the injunction taking effect.

The order for property preservation can also be granted during the trial upon the application of a party or on the initiative of the Court. The party under injunction may provide appropriate security to the Court and apply to release the order. Where appropriate, orders may also be made to search for and seize pertinent evidence, either upon the application of a party or on the initiative of the Court.

In very limited circumstances, the Court may, during trial but prior to judgment, order advance execution on the application of the claimant in cases involving urgent circumstances that satisfy certain rigid requirements. Advance execution usually orders the defendant to stop infringement, eliminate vicious influence and advance the payment due, etc.

9 What substantive remedies are available?

The principal remedy is a monetary judgment of damages to compensate for the losses suffered. Non-compensatory (“punitive” or “exemplary”) damages are rarely awarded, unless the Court considers it necessary in the name of justice and fairness.

In addition, the Court may order cessation of infringements, removal of obstacles, elimination of dangers, return of property, restitution, replacement, specific performance, compensation for losses and anticipated profits, payment of breach of contract damages, elimination of ill effects, rehabilitation of reputation and an apology. Such awards may be granted individually or collectively, depending on the nature of the case.

10 What means of enforcement are available?

There is no procedure for direct enforcement that does not involve the Court. A creditor must initiate the enforcement procedure by filing an application with the Court of first instance. Generally, the Court will issue an order to urge the debtor to honour the judgment. If the debtor fails to comply within the time limit, Court officials will take various actions, including:

- (i) seizing the debtor’s funds held by banks and other financial institutions and transferring the funds to the creditor;
- (ii) seizing or controlling the debtor’s goods and property (moveable, non-moveable, or intellectual), and disposing of them at public sales and paying the proceeds to the creditor;
- (iii) disposal of the debtor’s shares through public or private sale and paying the consideration to the creditor;
- (iv) ordering specific performance;
- (v) requiring a third party owing a debt to the debtor to fulfil the obligations to the creditor instead;
- (vi) empowering the creditor or a third party to do some act which the debtor should have done but failed to do, and requiring the debtor to bear the cost of the act; and
- (vii) ordering the debtor to conduct a certain act at their own cost.

This list is not exhaustive.

11 Does the Court have power to order costs? Are foreign claimants required to provide security for costs?

The claimant must pay litigation costs (ie, Court costs) when filing the case, the calculation of which is fixed by the Supreme People’s Court. The same provisions apply *mutatis mutandis* in the case of a counterclaim. Judgments usually order the losing party to reimburse the winner’s litigation costs, although they may occasionally be apportioned between the parties.

Although practice varies from locality to locality, the tendency is that many PRC Courts would order the losing party to reimburse the winner’s attorneys’ fees or other incidental legal fees if the contract between the parties has specified this. Otherwise, the Court has discretion on whether to award these costs to the winning party.

There is no requirement for a foreign party to provide security for costs when filing a claim with a PRC Court.

12 On what grounds can the parties appeal, and what restrictions apply? Is there a right of further appeal? To what extent is enforcement suspended pending an appeal?

Generally, the judgment of the first instance takes effect 15 days (or 10 days in the case of a ruling) after service. This period is extended to 30 days in the case of parties residing outside China. Any party dissatisfied with the judgment is entitled to appeal to the directly higher Court within this period. If an appeal is initiated, the judgment or ruling will not become effective or enforceable until it is sustained by the final judgment reached in the second instance. If no party appeals, the judgment will take effect and can be enforced when the 15 (or 10 or 30) days elapse.

The appeal Court has wide powers to re-open any issues of fact or law arising in the case. It is not restricted by the issues raised in the appeal. The appeal Court may reject the appeal and uphold the judgment at first instance, amend the judgment at first instance where it concludes that the law or facts were incorrectly applied, or remand the case to the Court of first instance for retrial.

The decision of the second instance Court is final and not subject to further appeal.

13 To what extent can domestic and/or foreign state entities claim immunity from civil proceedings?

Domestic state entities are not entitled to civil immunity. Although China recognises a doctrine of state immunity, such immunity is restricted to acts of a governmental nature. Immunity is not applicable when a foreign state entity performs acts of a commercial nature.

14 What procedures exist for recognition and enforcement of foreign judgments?

In theory, for recognition and enforcement of a legally effective foreign judgment or order, a foreign judgment creditor shall apply directly to the Intermediate People's Court with jurisdiction over the defendant. Alternatively, the foreign Court could also request recognition and enforcement by a People's Court in the PRC:

- (i) in accordance with the provisions of judicial reciprocal recognition agreements or international treaties concluded or acceded to by the PRC; or
- (ii) based on the principle of reciprocity.

The competent Chinese Court will examine the application and may recognise and enforce the foreign judgment, provided that it is a final judgment and does not violate the fundamental principles of Chinese law, the sovereignty of Chinese government, the security of society, the public interests of the country, the principles of reciprocity and any relevant treaties that the Chinese government has entered into.

In practice, however, there is no reported case on foreign Court judgment being recognised or enforced by PRC Court, except a few cases involving matrimonial matters.

15 Is it permissible for lawyers to charge contingency or condition fees, or other fee arrangements based on the result of litigation/arbitration?

Under the regulations covering attorney fees at the provincial level, the standards of attorney fees are different from one province to another. However, it is permitted in all provinces for lawyers to enter into an agreement to charge contingency or conditional fees, or other fee arrangements based on the result of litigation/arbitration, provided that the contingency or conditional fees do not surpass the regulated standard.

Arbitration

16 Is the arbitration law based on the UNCITRAL Model law?

China has not directly adopted the Model Law, but it was used as a guide in the drafting of the Arbitration Law of the People's Republic of China. The fundamental principles of the Model Law are reflected in the Arbitration Law and can be found in the rules of the arbitration commissions in China. Nevertheless, there are still some provisions under the Arbitration Law that are essentially different from those in the Model Law.

17 What are the main national arbitration institutions?

The China International Economic and Trade Arbitration Commission (CIETAC) (www.cietac.org.cn) and the China Maritime Arbitration Commission (CMAC) (www.cmac.org.cn) are the two main national arbitration institutions in the PRC. In addition, over 200 local arbitration commissions are being set up to conduct arbitrations involving both Chinese and foreign parties.

Uncertainty exists as to whether the Arbitration Law permits arbitrations administered by foreign institutions (eg, ICC) to proceed in China.

18 Are there any restrictions on who may represent the parties to arbitration?

The Arbitration Law provides that a party may appoint counsel or any other representative to carry out the arbitration on its behalf. The CIETAC rules allow both Chinese and foreign citizens to represent the parties. However, if a foreign lawyer is appointed as the representative to argue a case in arbitration proceedings before a Chinese arbitration institution and if the governing law of the case is PRC law, the foreign lawyer is restricted from comments on PRC law, and will have to instruct a PRC qualified lawyer to opine on PRC legal issues.

19 What are the formal requirements for an enforceable arbitration agreement?

A valid arbitration agreement must:

- (i) be in writing;
- (ii) contain an expression of intention to apply for arbitration;
- (iii) identify the matters submitted to arbitration (which should not exceed the range of arbitrable matters specified by the Arbitration Law); and
- (iv) specify a designated arbitration institution to arbitrate the dispute.

20 Can the Court refuse to stay litigation if there is a valid arbitration clause?

The People's Court shall not accept a case if the parties have concluded a valid arbitration agreement. However, failure to object to the Court's jurisdiction before the time limit for submitting a defense, which is 15 days (30 days for parties without a domicile in China) after receiving the claim from the Court, is regarded as a waiver of the arbitration agreement and the Court may continue the proceedings.

If a party challenges the validity of an arbitration agreement before the Court, the Court's final ruling will be binding on both parties.

21 If the arbitration agreement and any relevant rules are silent, how many arbitrators will be appointed, and who is the appointing authority?

Subject to arbitration rules of specific arbitration commissions (in China, each arbitration commission has its own set of arbitration rules), if the parties fail to agree on the number of arbitrators, a tribunal of three shall be formed. If the parties fail to select the arbitrator(s), the chairman of the arbitration commission shall be the appointing authority.

22 Are restrictions placed on the right to challenge the appointment of an arbitrator?

The parties have the right to seek the withdrawal of an arbitrator if the arbitrator:

- (i) is one of the parties involved; a close relative of one of the parties involved; a representative of one of the parties in the case, or has some other relationship which may affect their impartiality;
- (ii) has a personal interest in the case; or
- (iii) has privately met or accepted some benefit from a party or its representative.

Article 29 of the CIETAC rules stipulates that a party may make a request in writing for the removal of an appointed arbitrator if the party can raise justifiable doubts as to the arbitrator's impartiality or independence.

A challenge against an arbitrator must be submitted in writing to the Arbitration Commission no later than the first oral hearing, unless the grounds for the challenge occur or become known after that hearing. The decision as to whether an arbitrator should withdraw shall be made by the chairman of the Commission, or collectively by the Arbitration Commission if the chairman serves as an arbitrator.

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

Yes. PRC law contains substantive procedural requirements which the parties have only very limited power to vary. Emphasis is placed on written submissions, which must be supported by the evidence on which they rely.

24 On what grounds can the Court intervene during arbitration?

Generally, PRC Courts do not intervene in arbitration proceedings. The Court may rule on issues submitted to it with respect to the arbitration tribunal's jurisdiction, and it may grant a property preservation order upon application of the parties delivered to it via the Arbitration Commission (see below).

25 Do arbitrators have powers to grant interim or conservatory relief?

No. An application for interim measures of protection of property or evidence (called property preservation orders) shall be submitted to the competent People's Court.

26 When and in what form must the award be delivered?

Under the CIETAC rules, the tribunal should render its award within six months of the date when the arbitration tribunal was formed, subject to extension by the Director of the Arbitration Commission upon request of the arbitration tribunal. The award shall state the claims, the result of the arbitral award, the allocation of the arbitration cost and the date and place the award is made. The facts of the dispute and the reasons for the decision may also be stated unless the parties agree otherwise. The award shall be signed by the arbitrators and sealed by the Arbitration Commission.

27 On what grounds can an award be appealed to the Court?

The Arbitration Law specifies the grounds for the setting aside of an arbitration award by the People's Court. These grounds differ for strictly domestic awards and awards involving foreign elements. Generally, the competent People's Court may review both procedural matters and some substantive matters in the case of a domestic award, whereas a foreign-related award may only be set aside if:

- (i) there is no valid arbitration agreement;
- (ii) the respondent was not notified to appoint an arbitrator or to take part in the arbitration proceedings, or was unable to state his opinions due to reasons for which he is not responsible;
- (iii) the formation of the tribunal or the procedure was not in conformity with the rules; or
- (iv) the matters decided in the award exceeded the scope of the arbitration agreement or the authority of the arbitration institution.

A Court proposing to set aside a foreign-related award must first report that intention to a superior Court for verification.

28 What procedures exist for enforcement of foreign and domestic awards?

Domestic awards may be enforced in the same way as a final judgment of the Court, but the losing party may apply to the Court for setting aside of an arbitration award or for refusal of enforcement of an arbitral award. For foreign-related (including CIETAC) awards, the grounds for refusal of enforcement are limited to procedural matters only. A pre-reporting mechanism exists within the Court system, ie, if the Court at a lower level decides not to enforce an arbitral award, it must report to the Court at higher level for a decision.

China is a party to the Convention on Recognition and Enforcement of Foreign Arbitral Award ("New York Convention") subject to the commercial and reciprocity reservation. The competent Court will confirm a foreign award made in another contracting state unless it finds that one of the grounds set out in Article V of the New York Convention exists. The Court may also deny recognition or enforcement of a foreign award because of a lack of arbitration jurisdiction under Chinese law or because it is contrary to the public policy of China. Any Court proposing to refuse recognition and enforcement of a New York Convention award must first report that intention to the Court at a higher level for decision. If the Court at the higher level decides not to enforce that award, it then is required to report to the Supreme People's Court for verification.

29 Can a successful party recover its costs?

A successful party may recover any costs that were reasonably incurred in connection with the case from the unsuccessful party. In deciding whether the costs are reasonably incurred, the tribunal shall consider such factors as the arbitral award, the degree of complexity of the case, the workload of the winning party and/or his attorney, and the amount in dispute.

Alternative dispute resolution

30 Are the parties to litigation or arbitration required to consider or submit to any alternative dispute resolution before or during proceedings?

No, although with the consent of the parties it is very common for conciliation to be part of the litigation or arbitration process. The involvement of the judge or arbitrator in the conciliation does not affect their ability to sit on the tribunal.

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