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# Litigation

Second Edition

China: Law & Practice  
Han Kun

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## Law and Practice

Contributed by Han Kun

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Stockholm and Hong Kong. The firm's dispute resolution lawyers fully understand clients' business objectives and are able to assist in achieving those objectives by drawing on a wealth of professional experience and legal resources through comprehensive solutions consisting of litigation and arbitration, alternative dispute resolution, dispute feasibility studies, and legal risk management, among others.

### Author



**Liyu (Denning) Jin** is a dispute resolution lawyer based in Shanghai and a partner of Han Kun Law Offices. Since 1994, Liyu's practice has focused on complex commercial and financial litigation, international and domestic commercial arbitration, patent litigation, and IP-related antitrust litigation. Since 2008, Liyu has served as an arbitrator of the China International Economic and Trade Arbitration Commission, the Shanghai International Economic and Trade Arbitration Commission, the Hong Kong International Arbitration Centre and the Hangzhou Arbitration Commission. Liyu has been widely published on the subjects of arbitration and litigation.

## 1. General

### 1.1 General Characteristics of Legal System

China has followed the civil law system, featuring statutory law as its most important source of law. In recent years judicial decisions have gained more significance in the Chinese legal system, with the promulgation of guiding cases by the Supreme People's Court (SPC). Nevertheless, judicial decisions still fall short of being a formal source of law in China, in contrast to the principle of *stare decisis* in common law jurisdictions. Courts in China usually do not generalise a universally applicable doctrine in particular judgments.

Courts in China tend to follow the inquisitorial model of litigation whereby the judges retain full control of the proceedings. Judges play an active role in fact-finding and are free to investigate into any facts that they deem important to the case at hand, even if not presented by the parties. However, there still exists an element of the adversarial model in that a party must bear the burden of proving their case through the production of evidence and such evidence is subject to the cross-examination by the other party to the case.

The legal proceedings are to be conducted orally with formal hearings, except where in the case of appeal, the parties have not produced any new facts, evidence or ground and the court of second instance deems a hearing to be unnecessary. Certain proceedings, such as procedure of supervision and procedure for public notice urging right-holders of negotiable notes to declare their rights, due to their non-trial nature, are to be conducted through the review of written submissions, but not formal hearings.

### 1.2 Court System

In China, the court is divided into four tiers. From the top to the bottom there are the SPC, the higher people's court, the intermediate people's court and the basic people's court. The SPC, which is the highest judicial organ of China, is seated in Beijing and has six circuit courts in Shenzhen, Shenyang, Nanjing, Zhengzhou, Chongqing and Xi'an, respectively. The SPC has also established two International Commercial Courts in Shenzhen and Xi'an to hear international commercial cases. The higher people's court, intermediate people's court and basic people's court are located at the local level.

Courts in China are not divided into trial courts or appellate courts, except for the basic people's court, which may only act as the trial court. All the other courts may fulfil the task of either a trial court or an appellate court, depending on the circumstances. Cases of first instance usually start from the basic people's court, except for those with significant amounts in dispute or major impact within the jurisdiction, which shall be heard by courts of a higher level. Higher-level courts constitute appellate courts for lower courts, unless the decision is made by the SPC. China adopts the two-tier trial system whereby a decision made by a court of second

instance becomes final. Nevertheless, the retrial system, being part of the supervisory procedure, allows courts to revisit an already-binding but erroneous decision.

Courts in China are not generally organised by subject matter jurisdiction. However, China does possess specialised courts, such as military court, maritime court, railway transport court, and recently, financial court, intellectual property court and free trade zone court. More explicit divisions of labour exist within the people's court, which consists of the case docketing division, divisions for substantive adjudication (such as civil division, commercial division, criminal division and administrative division), the trial supervision division and enforcement division.

### 1.3 Court Filings and Proceedings

All hearings are required to be made public except for those involving state secrets or privacy. For divorce cases or cases involving trade secrets, the court may conduct non-public hearings upon a party's request. All judgements and orders, regardless of whether the hearing is conducted publicly or not, must be delivered in public. In this respect, the SPC has also promulgated rules on the publication of adjudicative decisions on the Internet. Nevertheless, the court will not publish decisions involving state secret, juvenile delinquency, divorce, custody or guardianship of minors or where the case is concluded via mediation. Court filings submitted by the parties are not within the scope of publication.

### 1.4 Legal Representation in Court

Parties may engage in agents in conducting legal proceedings. The Civil Procedural Law stipulates the types of candidates who are eligible to be appointed agents, including lawyers, legal service providers at the basic level, close relatives or employee of a party, and citizens recommended by the community, working unit of the party or relevant social organisations in which the party is involved. A patent agent recommended by the All-China Patent Agents Association may also serve as an agent in patent cases. Foreign lawyers cannot act as counsel before Chinese courts.

## 2. Litigation Funding

### 2.1 Third-Party Litigation Funding

There are no rules prohibiting third-party funding under PRC law. In practice, certain third party-funders have been established to provide funding for parties in arbitration and litigation proceedings.

### 2.2 Third-Party Funding: Lawsuits

PRC law does not stipulate particular types of cases where third-party funding is applicable. In practice, certain regions in China have allowed plaintiffs in environmental public interest cases to have access to public interest litigation fund to cover their litigation costs.

## 2.3 Third-Party Funding for Plaintiff and Defendant

PRC law does not stipulate the specific party to a case who may have access to third-party funding. In theory, it is available to both the plaintiff and the defendant.

## 2.4 Minimum and Maximum Amounts of Third-Party Funding

PRC law does not stipulate any amount that a third-party funder may fund, still less any maximum or minimum thereof. In theory, the third-party funder is free to determine the amount that it is willing to fund.

## 2.5 Types of Costs Considered under Third-Party Funding

PRC law does not stipulate the scope of costs that a third-party funder may fund. In the case of environmental public interest litigation, public interest litigation fund may be used to cover attorney fees or fees for evidence collection, authentication and assessment.

## 2.6 Contingency fees

A client is free to adopt contingency fee arrangements with their lawyers in civil cases concerning property relationship, but contingency fees are prohibited in criminal, administrative, state compensation cases and group litigation cases. Moreover, contingency fees are also not allowed in cases involving marriage and inheritance, the demand for social security benefits and minimum living standard benefits, alimony, maintenance fee between family members, compensation for work-related injury, etc. The maximum amount of attorney fees to be collected on the contingency basis shall not exceed 30% of the amount of the subject matter in dispute.

## 2.7 Time Limit for Obtaining Third-Party Funding

PRC law has not stipulated any time limits to obtain third-party funding.

## 3. Initiating a Lawsuit

### 3.1 Rules on Pre-action Conduct

Under the PRC law, there are no particular prerequisites that a party needs to satisfy before filing a case to the court. Mediation prior to litigation is not mandatory, even though some courts tend to encourage parties to conduct pre-trial mediation. In labour disputes, however, the parties shall first resort to arbitration before the relevant labour arbitration commission before filing the case to the court. The PRC law also provides that the people's procuratorate may also bring a civil public interest litigation, but only if there is no proper plaintiff or the proper plaintiff refuses to bring a claim.

A potential defendant is not required to respond to a pre-action letter.

### 3.2 Statutes of Limitations

According to the General Rules of Civil Law, the general time limit for bring a civil case to the court is three years, starting from the date on which the right holder knows or ought to have known that their rights have been infringed and the obligor, except where the law provides otherwise. Nevertheless, the right shall not be protected in any event after 20 years from the date of the infringement. The statute of limitation does not apply to the following types of cases:

- to request for cease infringement, remove obstacles and eliminate danger;
- to request for return of immovable or movable property; and
- to demand for alimony, maintenance fee between family members or support fee.

In addition to the general three-year rule, certain special statutes of limitation are provided for under particular pieces of legislations. For example, the statute of limitations for the claim of life insurance monies is five years; the statute of limitations for claims under contracts for international sales of goods or contracts for importation and exportation of technology is four years; in certain legally prescribed circumstances, a shareholder opposing a resolution adopted by the shareholders' meeting may request the company to purchase its shares, and the statute of limitations for shareholders' request for purchase is 90 days from the adoption of the resolution of shareholders' meeting if no purchase agreement can be reached within 60 days from the adoption of the resolution.

Statutes of limitations can be suspended or interrupted. Statute of limitations can be suspended if, for example, the claim cannot be exercised due to force majeure or other circumstances during the final six months of the statute of limitation. Statute of limitations can be interrupted if the right holder requests performance from the other party, in which case the statute of limitation shall start anew.

### 3.3 Jurisdictional Requirements for a Defendant

There are no particular jurisdictional requirements that apply to the defendant. The court will examine whether jurisdiction has been established over the case, that is, whether the case satisfies the geographical jurisdiction and hierarchical jurisdiction. Generally, the court at the defendant's domicile shall have jurisdiction. Where the domicile and habitual residence of the defendant are different, the court located at the defendant's habitual residence shall have jurisdiction. The standards for determining jurisdiction are uniform before all courts in China.

### 3.4 Initial Complaint

To commence a civil action, the plaintiff needs to file a statement of claims, supporting evidence and identification information for both the plaintiff and the defendant to a

competent court. After a case has been filed, the plaintiff still has the opportunity to amend their claims and the description of the underlying facts before the conclusion of court debate. However, judicial practice suggests that a party may be estopped from supplementing facts contradictory to the statement of claims.

### 3.5 Rules of Service

Within five days after the case is accepted, the court will serve to the defendant copies of the statement of claim and a notice requesting the defendant to respond to the case. The service will be done by the court rather than the plaintiff, but the plaintiff is responsible for providing the defendant's address of service.

A party outside the territory of China can also be sued before PRC courts. The key is not whether the defendant is domiciled in China but whether the particular Chinese court concerned has jurisdiction over the case. A Chinese court has jurisdiction if, by applying the jurisdictional rules, the site of the court is somewhat connected to the dispute at hand. For example, Article 265 of the Civil Procedural Law provides that any contract dispute or other property rights dispute cases filed against a defendant with no domicile in China can be heard by the court at the place of execution of the contract, the place of performance of contract, the place of the subject matter of the dispute, the place of the properties that can be seized, the place of the occurrence of the tortious act or the place of the representative office.

Service to defendants not domiciled in China can take the following forms:

- service pursuant to the methods stipulated in a treaty between China and the country of the party being served;
- service through diplomatic channels;
- service via Chinese embassy or consulate, if the party being served is of Chinese nationality;
- service to the agent authorised by the party being served;
- service to the representative organ being served or the branch or business agent entitled to receive service in China of the party being served;
- service by mail, if the law of the country of the party being served allows such a method of service;
- service via methods such as facsimile or emails, of which the receipt by the party being served can be verified; and
- where service cannot be done through the above methods, the documents shall be served by public announcement. Service shall be deemed completed upon the expiry of three months from the date of the announcement.

### 3.6 Failure to Respond

Failure by the defendant to respond to a lawsuit, eg, failure to file a statement of defence, to submit evidence or non-appearance in the hearing, will not prevent the progression

of the proceedings. In such a case, the court will render a default judgement.

### 3.7 Representative or Collective Actions

Class action is not a term of art in PRC law. The Civil Procedural Law provides for collective action, which refers to a lawsuit where one party or both parties consist of more than one litigant and the subject matter of the dispute is the same or of the same type.

If the parties to a collective action choose to elect representative, this may give rise to a representative action. There are two types of representative actions. First, where one of the parties consist of multiple but an uncertain number of litigants, the court may issue a public announcement to invite right holders to register with the court within a stipulated period of time. The court's judgment shall be binding on all litigants who have registered with the court. However, if an unregistered person files a case within the statute of limitations and the court determines that the claim can be sustained, the judgment shall directly apply to that person. Second, if the number of litigants constituting one party is certain, the persons may elect representatives to act on their behalf during the proceedings. The conduct of the representatives shall be binding on the litigants they represent, but for change of representative, waiver or confirmation of claims or settlement, consent by the litigants is required.

### 3.8 Requirements for Cost Estimate

There is no requirement to provide clients with a cost estimate of the potential litigation. But in practice, clients will always ask for an estimate from lawyers, or conclude a fixed-fee or contingent-fee engagement with lawyers.

## 4. Rules on Pre-action Conduct

### 4.1 Interim Applications/Motions

In China, there are three types of interim motions. First, evidence preservation. Where the evidence may be lost or it may be difficult to obtain the evidence in the future, a litigant may apply to the court for preservation of evidence during the proceedings or, in case of urgency, put in such an application prior to the filing of the lawsuit or arbitration. Second, property preservation. Where the enforcement of the court's judgment may be made difficult due to a party's conduct or other causes, a litigant may apply to the court for such property preservation measures as seizure, detainment or freezing of assets. Third, conduct preservation. In the same circumstances as property preservation, a litigant may also apply to the court to compel a party to conduct or refrain from conducting certain acts. In practice, conduct preservation is rarely granted except in intellectual property cases. In 2001, the SPC also issued a judicial interpretation which provides for the procedures specifically for the application of conduct preservation in patent infringement cases. For the

above three scenarios, the court may also take preservation measures out of its own initiative, without any application from the parties.

## 4.2 Early Judgment Applications

There is no particular procedure to strike out claims prior to the hearing. What is available to the defendant is the objection to court's jurisdiction by arguing, for example, that the case should be heard by an arbitral tribunal rather than a court, in which circumstance the case should be dismissed. The defendant may also object to the jurisdiction of the particular court that has seized of the case. If the objection is sustained, the case will not be dismissed but will be transferred to the competent court for adjudication.

## 4.3 Dispositive Motions

In common law jurisdictions, dispositive motions refer to motions for brief judgment, that is, requesting for a court order that disposes one or more claims in favour of the moving party without the need for further court proceedings. The most common dispositive motions are motion to dismiss and motion for summary judgment.

There exists no exact counterpart to dispositive motions in China. There is no means for a party to avoid a court proceeding once it is instituted by the plaintiff. However, the court may refuse to accept the filing of a case or dismiss a case if, after the case has been accepted, the court discovered that the conditions for filing a claim have not been satisfied. According to Article 119 of the Civil Procedural Law, such conditions include that:

- the plaintiff shall be a citizen, legal person or organisation that has a direct interest in the case;
- there is identifiable defendant(s);
- specific claims and facts and reasons are provided; and
- the case falls within the scope of the civil lawsuits to be accepted by the court and the jurisdiction of the accepting court.

## 4.4 Requirements for Interested Parties to join a Lawsuit

The PRC law provides that in certain circumstances, a party may join a lawsuit as a plaintiff. For example, in a lawsuit over inheritance filed by some of the successors, the court shall notify the other successors to participate in the lawsuit as co-plaintiffs. Moreover, in the public interest lawsuit, other agencies and the relevant organisations which may file a lawsuit pursuant to the law may apply to the court, before commencement of hearing, to participate in the lawsuit. Where the court approves their applications to participate in the lawsuit, they shall be listed as co-plaintiffs.

A party may also join a lawsuit as a defendant. Such circumstances include:

- where a litigant asserts that the labour secondment organisation shall be liable for the damage done to others due to performance of official duties, the labour secondment organisation shall be the co-defendant;
- in the case of a lawsuit over a guarantee contract dispute, where the creditor asserts its rights against both the guarantor and the guarantee, the court shall list the guarantor and the guarantee as co-defendants;
- where a person who has no capacity for civil conduct or a person who has limited capacity for civil conduct causes others to suffer damages, their guardian shall be the co-defendants; and
- where a plaintiff claims joint and several liability against the principal and the agent, the latter parties shall be co-defendants.

Chinese law further provides that a third party may also be added to the proceeding, consisting of two different scenarios. First, a third party with an independent right of claim towards the subject matter of the dispute between the plaintiff and the defendant may bring a claim against the plaintiff and the defendant before the competent court. Second, a third party which does not have an independent right of claim but possesses a legal interest in the outcome of the dispute between the plaintiff and the defendant may join the case through application or the court's notification. If the court determines that the third party shall bear civil liability, such third party shall have the rights enjoyed by the parties to the case, for example, to appeal the case to a higher-level court.

Where a litigant in a joint action fails to participate in the proceedings, the court shall notify the litigant to participate in the proceedings.

## 4.5 Applications for Security for Defendant's Costs

There is no such mechanism that requires the plaintiff to pay security for defendant's costs.

## 4.6 Costs of Interim Applications/Motions

The moving party for the application of interim measures shall pay to the court an application fee, which ultimately will be borne by the losing party to the case, subject to the court's determination. The moving party shall also provide security at their own cost.

## 4.7 Application/Motion Timeframe

If a litigant files an application for preservation measures prior to filing the case, the court shall issue an order within 48 hours after the receipt of the application (receipt is hereby referred to the fact that the court has decided to take the application). If the court upholds the application for interim measure, such an order shall be implemented immediately. However, if the applicant fails to institute a lawsuit or arbitration within 30 days after the implementation of the preservation measure, the court shall dismiss such a measure.

If a litigant files an application for preservation measures during the course of the proceedings, the court is bound to issue an order within 48 hours only if the circumstance is urgent; no general time frame has been stipulated in normal circumstances. However, for property preservation specifically, the SPC has issued a judicial interpretation which provides that the court shall issue an order within five days after the acceptance of the application. Once a preservation measure has been issued, it shall be implemented immediately.

## 5. Discovery

### 5.1 Discovery and Civil Cases

Chinese law does not provide for discovery as practiced in common law jurisdictions. The court cannot compel a party to produce evidence that is relevant to the case. That being said, a party has the burden of proving its claims, and otherwise it incurs any adverse consequence caused therefrom. Article 75 of the Several Provisions of the Supreme People's Court on Evidence for Civil Actions (2008) (SPC Evidence Rules) provides that where evidence exists proving that one party is withholding evidence without justification and the other party claims that such evidence is adverse to the withholding party, an inference may be drawn against the withholding party. However, the court is generally cautious to draw such an inference.

### 5.2 Discovery and Third Parties

The Civil Procedural Law provides that where a party is unable to collect evidence on their own due to objective reasons, it may apply to the court to investigate and collect the evidence. The court may issue to the applicant an investigative order with which to collect evidence from third parties. The court may also collect evidence from third-parties individuals or organisations directly, and such third parties shall co-operate.

### 5.3 Discovery in This Jurisdiction

As highlighted, Chinese law does not provide for discovery.

### 5.4 Alternatives to Discovery Mechanisms

Any evidence produced by the parties or collected by the court shall be presented and examined during the hearing. A party shall have the right to present its opinion regarding the authenticity, legality, relevance and probative value of the evidence presented by the other party. After the examination, the evidence will be admitted into the record and may be used to determine the facts of the case. The legality element is that no evidence obtained in breach of the legal rights and interests of others or by any illegal means may be admitted as the basis for determining facts.

### 5.5 Legal Privilege

There is no such concept of legal privilege under PRC law, but the Law of Lawyers provides for the obligation of con-

fidentiality of lawyers. A lawyer shall keep confidential any state secret or trade secret obtained in the course of their practice and shall not disclose any privacy of the client. A lawyer shall also keep confidential any information obtained in the course of legal practice that the client does not want disclosed. The exception to such confidential information covers the facts and information the client or any other person's criminal intent or conduct of jeopardising national security, public safety or others' personal safety.

In-house counsels used to be excluded from the scope of practicing lawyers in China. With the newly enacted rules by the Ministry of Justice which takes effect in 1 January 2019, in-house counsels for state-owned enterprises now enjoy the same rights as a practicing lawyer, such as meeting clients, reviewing case files, collecting evidence and debate in court proceedings, albeit in-house counsels are only entitled to represent the corporation that they work for. Technically, in-house counsels, who are issued practice licenses and administered by the relevant bar associations, should also be subject to the same confidential obligations as general practicing lawyers, however, this issue has not been clearly settled in the rules governing in-house counsels.

### 5.6 Rules Disallowing Disclosure of a Document

In China, there is no rules allowing a party to not disclose a particular document. Even for evidence involving state secrets, trade secrets and personal privacy, the parties still need to present it to the court, but may request the court to take measures to prevent the confidential information from being disclosed during the examination by for example, only giving the opposing counsel the opportunity to review the evidence in the courtroom.

## 6. Injunctive Relief

### 6.1 Circumstances of Injunctive Relief

There is no injunction in PRC law, but the law does provide for certain reliefs that are functionally similar to injunction. Such reliefs may be divided into two categories, permanent or interim. Such permanent reliefs include cessation of infringement; exclusion of hindrance; elimination of risks; specific performance. The above reliefs can be applied individually or in conjunction. Certain legislations also provide for permanent reliefs for specific fields of law, such as copyright law, trademark law and patent law.

Interim reliefs include interim property preservation and conduct preservation. Such reliefs can be initiated by a party to the case through application or imposed by the court out of its own initiative.

Under urgent circumstances, a party may also apply to the court for pre-litigation preservation, including property preservation and conduct preservation. The application

must be supported by the provision of security by the applicant, otherwise the application will be dismissed.

## 6.2 Arrangements for Obtaining Urgent Injunctive Relief

For both interim and pre-litigation reliefs, if the circumstance is urgent, the court shall issue an order within 48 hours after receiving the application. If the court grants the relief, such an order will be implemented immediately.

## 6.3 Availability of Injunctive Relief on an Ex Parte Basis

In deciding on interim or pre-litigation reliefs, there is no legal requirement to inform the other party or hold any hearing. The other party will immediately be notified if their property is seized, detained or frozen. The party against whom the relief is imposed may apply for the court to review the injunction order, but meanwhile the implementation of the relief will not be stayed.

## 6.4 Liability for Damages for the Applicant

Article 105 of the Civil Procedural Law provides that if an application for preservation is in error, the applicant shall compensate the respondent for losses incurred from the preservation. However, the applicant will not be liable if the preservation measure is discharged by the respondent's provision of security.

As with security by the applicant, for interim relief the court may, at its own discretion, request the applicant to provide security. If the court so requests but the applicant fails to provide any security, the court shall dismiss the application. For pre-litigation relief, the applicant must provide security.

## 6.5 Respondent's Worldwide Assets and Injunctive Relief

Chinese law has made no clear stipulation on whether a relief can be targeted against the respondent's assets located outside China. Even if a Chinese court has issued such an order, it is difficult to be enforced in other jurisdictions. A better way to target overseas assets is to apply for injunction to the court where the assets are located. For example, in the newly promulgated Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region, which takes effect on 1 October 2019, a party to arbitration proceedings administered by certain Hong Kong arbitration institutions may apply to PRC mainland courts for interim measures in aid of the arbitration proceedings. In addition to direct application for injunction in the location of the assets, an applicant may of course obtain a judgment from PRC court and seek recognition and enforcement in the place where the assets are located.

## 6.6 Third Parties and Injunctive Relief

A PRC court cannot impose reliefs directly against third parties who are not parties to the case.

## 6.7 Consequences of a Respondent's Non-compliance

If a party conceals, transfers, sells or destroys property that has been seized or detained, or transfers property that has been frozen, that party is subject to a fine, detention or even criminal liability, depending the seriousness of the circumstances.

# 7. Trials and Hearings

## 7.1 Trial Proceedings

In China, trials are conducted by way of oral hearings. A civil court hearing generally consists of the following stages:

- pre-hearing preparation;
- announcement of rights and obligations of the parties;
- opening statements;
- court investigation (presentation and examination of evidence and/or witness/expert testimony); and
- court debate and closing arguments.

After the above sequence, the court may also raise the potential of mediation and seek the parties' views on this. If either party fails to give consent, the court will proceed to adjourn the hearing. The court then moves to internal deliberation and will render the judgment in due course.

## 7.2 Case Management Hearings

For case management hearings, upon the expiry of period of evidence production but before the hearing on merits, the court may hold such pre-trial hearings to exchange evidence and identify the issues in dispute between the parties. There may be several hearings on evidence exchange before the formal trial, and during the trial the parties may invoke or supplement the statements made during the evidence exchange hearings.

For the review of interim applications such as property preservation and conduct preservation, the court usually does not hold hearings. Hearings are sometimes utilised in reviewing objections to jurisdiction and conduct preservation in intellectual property cases. In the objection to enforcement proceedings, hearings are sometimes conducted.

## 7.3 Jury Trials in Civil Cases

There is no jury system in China. However, for first-instance cases, non-judges may sit as member of the collegial panel. Such non-judge members, which are also called jurors, enjoy the same rights and obligations in adjudicating the case as judges. The pool of jurors for each court is filled through individual application or recommendation by the working

units, organisations formed by local communities or people's groups. Jurors for each particular case are determined by random selection from the pool.

#### 7.4 Rules That Govern Admission of Evidence

Admission of evidence is governed by the Civil Procedural Law, Interpretations of the Supreme People's Court on Application of the Civil Procedural Law (Judicial Interpretation of Civil Procedural Law) and SPC Evidence Rules. These documents stipulate the categories of evidence, burden of proof, assessment of probative value of evidence and time limit for evidence production, etc.

To be admissible, evidence must be presented in court and be examined by the other party to the case. The court will review the authenticity, legality, relevance and the probative force of the evidence. Ultimately, the admissibility of the evidence is to be determined by the court based on the overall circumstances of each piece of evidence and such reasoning will be explained by the court in the judgment. Photocopies of evidence will be checked against the originals to confirm its authenticity. Illegal evidence, that is, evidence obtained by infringing the legal interests of others or illegal means shall not be admissible. For witnesses, they must testify before the court and be examined and cross-examined by both parties to the case.

#### 7.5 Expert Testimony

Chinese law does not specifically provide for "expert testimony", but there are three ways in which an expert may participate in civil proceedings. First, the Civil Procedural Law recognises appraisal opinion as a form of evidence, which is usually issued by experts. A party may apply to the court for appraisal on specialised issues or the court may decide to conduct such an appraisal out of its own initiative. The parties may jointly appoint an appraiser, failing which the court shall make an appointment. The appraiser shall testify before the court if a party objects to their appraisal opinion or the court deems it necessary. Second, Article 79 of the Civil Procedural Law provides that a party may apply to the court for persons with special expertise to appear before the court to give opinions on the opinion of the appraiser or other specialised issues. This is often referred to as the expert auxiliary system. Third, certain IP courts are equipped with technical investigation officers.

#### 7.6 Extent to Which Hearings are Open to the Public

Hearings are open to the public, except for those related to state secret or privacy. For cases involving divorce or trade secrets, the court may decide to hold non-public hearing if one party so requests. The transcripts of the hearing are not open to the public.

#### 7.7 Level of Intervention by a Judge

China practices the inquisitorial model of litigation whereby the judges heavily intervene in the trial. The judge retains full control of the proceedings and the parties can only speak before the court if the judge so permits.

If a civil case is heard under the summary procedure, the court shall announce the judgment right after the hearing, except where the court deems it improper to do so. A written judgment shall still be delivered after the oral announcement. Summary procedure applies to cases where the facts and the rights and obligations between the parties are clear and no major dispute is involved. In other circumstances, the court usually delivers judgments at a date later than the hearing.

#### 7.8 General Timeframes for Proceedings

When the plaintiff has filed a case, the court shall, within seven days, either accept the case or issue an order not accepting the case. When a case has been accepted, if normal procedure applies, the court is bound to conclude the case within six months from the date of acceptance of the case. An extension of six months may be granted by the president of the court under special circumstances. If longer extension is necessary, it is subject to approval by the higher-level court. If summary procedure applies to the case, the court needs to conclude the case within three months from the date of the acceptance of the case. The above timeframes do not apply to civil cases involving foreign elements.

After the court accepts the case, it shall serve copies of case documents to the defendant within five days, including statement of claims, plaintiff's evidence, notice for filing statement of defence and notice of evidence production.

The defendant will have 15 days from the service of the documents to submit a statement of defence. If defendant objects to the jurisdiction of court, such an objection must also be raised within the 15-day period. The time limit for production of evidence is set by the court, usually being 30 days from the date of service of the notice of evidence production, which may be extended at the court's discretion upon a party's application. Supplementary claims, counter-claims and third-party claims should be raised before closure of court debate. After the collegial panel has been formed to hear the case, the parties will be notified within three days. The court will also notify the parties of the date of the formal hearing.

## 8. Settlement

### 8.1 Court Approval

The parties are free to reach settlement agreements, which does not require the court's approval. Usually the plaintiff will then apply to the court to withdraw the case.

The parties may also resort to mediation moderated by the court. If the parties reach a mediation agreement in this process, such an agreement needs to be reviewed and approved by the court. If the court so approves, it will issue a mediation document confirming in accordance with the mediation agreement. The mediation document enters into legal effect upon receipt by both parties to the lawsuit.

## 8.2 Settlement of Lawsuits and Confidentiality

The parties may keep the settlement confidential. For mediation moderated by the court, the court shall keep such mediation non-public if a party so requests. Mediation documents will not be made public, except for those arising out of civil public interest litigation.

## 8.3 Enforcement of Settlement Agreements

Settlement agreements cannot be directly enforced before the court. To enforce such settlement agreements, the party needs to bring a breach of contract claim to the competent court and obtain an enforceable judgment. For mediation moderated by the court, the mediation document issued by the court is enforceable as a judgment.

## 8.4 Setting Aside Settlement Agreements

A settlement agreement constitutes a binding contract between the parties and can only be revoked if the circumstances under the PRC Contract Law for revocation are satisfied, such as serious misunderstanding, clear unfairness, fraud or coercion.

For mediation documents issued by the court, if there is evidence to prove that the mediation was conducted in violation of the principle of voluntary participation or the content of the mediation agreement is against the law, a party may petition for retrial and setting aside the mediation document.

# 9. Damages and Judgment

## 9.1 Awards Available to Successful Litigant

The successful party may receive monetary compensation, liquidated damages and non-monetary reliefs, such as specific performance or cease of certain conduct. Another form of remedy available is the declaratory relief, where the court makes a determination as to the rights and obligations of the parties without awarding any substantive relief, for example, declaring that there is no breach of contract. The court may further award a form of remedy that modifies the legal relationship between the parties, for example, termination of contract.

## 9.2 Rules Regarding Damages

Under the PRC law, damages are generally awarded with a view to compensating the losses suffered by the aggrieved party and based on the principle of foreseeability. Therefore,

they do not possess a punitive function. However, in limited statutory circumstances, punitive damages may be awarded. First, Article 47 of the Tort Liability Law provides that where defective products are manufactured or sold despite knowledge of the product defects and have caused death or serious health problems of others, the aggrieved party shall have the right to request for punitive damages. Second, business operators providing goods or services which commit fraud shall be subject to increased compensation for the losses suffered by the consumer, at three times the amount of the price of goods or services. Third, in case of production or sale of food not complying with food safety standards, a consumer is entitled to claim damages at ten times the purchase price or three times the losses suffered.

Chinese law does not set maximum limit for damages, except for the PRC Maritime Law, which specifically stipulates the maximum amount of damages for personal injuries or damage to cargo.

## 9.3 Pre and Post-Judgment Interest

Interest is usually calculated up to the date of the actual payment. If a party fails to make the payment within the time limit specified in the judgment, the party shall pay an additional punitive interest.

## 9.4 Enforcement Mechanisms of a Domestic Judgment

The successful party to a case may apply to the court to commence the enforcement of the judgment. The court will issue a notice to the party against whom enforcement is sought and order him to render performance within a specified period of time. If the party fails to perform the obligations in accordance with the notice, the court may take enforcement measures such as seizing, freezing, transferring or selling the property of the respondent. The court may also withhold or withdraw the respondent's income, which is then transferred to the applicant. Where the respondent refuses to perform the acts stipulated in the judgment, the court may carry out mandatory enforcement or entrust relevant organisation or any other person to perform the required act, and the respondent shall bear the expenses thereof. Where the respondent fails to perform the obligations under the judgment, the court may also notify relevant authorities to restrict them from exiting China, announcement of the details of the non-performance in credit system records or through public media. The court may also issue orders restricting the respondent's spending activities to what is necessary to maintain a reasonable living standard. If the respondent deliberately evades enforcement, they may be subject to judicial detention or even criminal liability.

## 9.5 Enforcement of a Judgment from a Foreign Country

To start the enforcement procedure for foreign judgments, a party to a foreign judgment may apply to the competent

court in China for recognition. The relevant PRC court seized of the application shall review the foreign judgment according to the international treaty that China is a party or the principle of reciprocity. If the foreign judgment does not violate the basic principles of law, national sovereignty, security or public interest of China, the court shall recognise its validity and issue an order for enforcement if necessary.

## 10. Appeal

### 10.1 Levels of Appeal or Review to a Litigation

Judgments rendered by a court of first instance, except for those rendered by the SPC, may be appealed once to the next-higher-level court. However, orders issued by the court are generally not appealable, except for orders on objection to jurisdiction, non-acceptance of case and dismissal of case.

### 10.2 Rules Concerning Appeals of Judgments

Parties to a first-instance judgment has the legal right to appeal, which is not subject to review or approval by either the court of first instance or the higher court.

### 10.3 Procedure for Taking an Appeal

A party may file the appeal within 15 days after service of the first-instance judgment, or within ten days after service of the first-instance order. A party not domiciled in China shall file the appeal within 30 days after service of the first-instance judgment. An appeal may be filed through the court of first instance or directly to the court of second instance.

The appeal procedure is commenced when a party files the appeal. A party may appeal on ground of facts, ground of law or grounds of procedure.

### 10.4 Issues Considered by the Appeal Court at an Appeal

A court of second instance will review both issues of facts and law. The appeal will generally be heard in open court hearing. However, upon examination of a case file, investigation and questioning of the parties, if no new facts, evidence or reasons have been advanced, and the collegial panel deemed a hearing to be unnecessary, the appeal may be heard without a hearing.

If the original plaintiff raises new independent claims or the original defendant files counterclaim in the second instance proceedings, the court of second instance will try to mediate such additional claims with the parties' consent. If the mediation fails, the parties should file a separate case in the lower court to assert these claims. Parties to the appeal may raise new evidence that are discovered after the first-instance trial and new legal arguments, provided such points are relevant to the appeal.

### 10.5 Court-Imposed Conditions on Granting an Appeal

In China, the right to appeal is an absolute right granted by the law and is not subject to any court approval.

### 10.6 Powers of the Appellate Court After an Appeal Hearing

The court of second instance has the power to render decisions disposing of the judgments or orders by the court of first instance. First, if the determination of facts and application of law in the judgment or order of first instance are correct, the appeal should be dismissed. Second, if there is error in the determination of facts or application of law in the original judgment or order, the court of second instance shall make amendment, revocation or modification accordingly. Third, if the facts ascertained by the court of first instance are unclear, the judgment shall be revoked and the case remanded, or directly amended by the court of second instance. Fourth, if there is a serious procedural violation in the case of first instance, the judgment shall be revoked and the case remanded.

## 11. Costs

### 11.1 Responsibility for Paying the Costs of Litigation

In China, the losing party shall bear the court fee. The court will also apportion the court fee between the parties if the plaintiff lands only a partial victory. For expenses incurred in the proceedings, such as appraisal fee and public notarisational fee, if the party raises such fees in the claims, the court will make a determination thereof in the judgment. Attorney fees are generally not recoverable from the losing party, with the exception of IP cases.

### 11.2 Factors Considered When Awarding Costs

As stated in **11.1 Responsibility for Paying the Costs of Litigation**, it is the losing party that bears the court fees, but the attorney's fees are not recoverable by the winning party. The expenses incurred for the purpose of the proceedings are awarded at the discretion of the court.

### 11.3 Interest Awarded on Costs

Although there are no clear rules on the interest on costs, it is generally believed that such costs do not give rise to interests.

## 12. Alternative Dispute Resolution

### 12.1 Views of Alternative Dispute Resolution Within the Country

In China, there are several modes of alternative dispute resolution (ADR), including arbitration, court-administered mediation and people's mediation

- Arbitration: parties may choose to submit their dispute to arbitration rather than the court. All contractual and other property-related disputes can be arbitrated, except for those involving marriage, adoption, guardianship, maintenance between family members and inheritance, or administrative disputes that should be dealt with by administrative authorities.
- Mediation by court: see **8.1 Court Approval**.
- People's mediation: China has established people's mediation committees at the grassroots level which facilitate the voluntary conclusion of mediation agreements between the parties through persuasion and advice. Mediation agreements produced out of the people's mediation shall be legally binding upon the parties, and a party may bring a claim to the court if the other party fails to abide by the agreement. The parties may also submit the mediation agreement to the court for judicial confirmation, after which the mediation agreement becomes enforceable before the court. Specialised people's mediation committees are established to mediate medical disputes and road accident disputes.
- Commercial mediation: commercial mediation is also a popular means of settling commercial disputes in China, with a number of commercial mediation centres operating across the country. The most influential ones are the China Council for the Promotion of International Trade Mediation Centre (CCPIT Mediation Centre) and Shanghai Commercial Mediation Centre, both of which provide mediation services on commercial and maritime disputes for both Chinese and foreign parties.

## 12.2 ADR Within the Legal System

China has specific laws and rules that address different models of ADR, including arbitration, court mediation and people's mediation. Arbitration and people's mediation do not form part of the court procedures. As with mediation, there is no pre-action requirement for mediation before one can file a case before the court. However, a court prefers to inquire about the possibility of mediation during the litigation process and would be more than willing to facilitate the settlement of dispute through mediation.

## 12.3 ADR Institutions

China boasts over 250 arbitration institutions to which parties may submit their dispute for resolution. The most renowned among them are China International Economic and Trade Arbitration Commission (CIETAC), Shanghai International Arbitration Centre (SHIAC), Shenzhen Court of International Arbitration (SCIA) and Beijing Arbitration Commission (BAC).

In order to better promote ADR in China, in recent years Chinese courts have established litigation-mediation connection centres all over the country, which aim to combine litigation and mediation to better settle disputes. The court will review the case at the filing stage to determine if it is

more suitable for mediation. If the case is better to be handled through mediation, the court will, upon the plaintiff's consent, assign the case to a mediation institution for mediation.

## 13. Arbitration

### 13.1 Laws Regarding the Conduct of Arbitration

The PRC Arbitration Law and its judicial interpretations provide the basic rules concerning arbitration in China: arbitration institutions, arbitration agreements, arbitration procedure, the set-aside of arbitral awards, enforcement of arbitral awards and special rules governing foreign-related arbitration. In addition, the SPC has recently (in 2017 and 2018) promulgated three important judicial interpretations:

- Rules on Issues relating to the Reporting and Review of Cases Involving Judicial Review of Arbitration;
- Rules on Several Issues relating to the Hearing of Cases Involving Judicial Review of Arbitration; and
- Rules on Several Issues concerning the Handling of Cases of Enforcement of Arbitral Awards by the People's Courts.

### 13.2 Subject Matters not Referred to Arbitration

All contractual and other property-related disputes can be arbitrated, except for those involving marriage, adoption, guardianship, maintenance between family members and inheritance, or administrative disputes that should be dealt with by administrative authorities.

### 13.3 Circumstances to Challenge an Arbitral Award

A party challenging an arbitral award in China may either apply for set-aside or non-enforcement of the award. A party may apply to the competent court where the arbitration institution is located to set aside the arbitral award on the following grounds:

- there was no arbitration agreement;
- the subject matter addressed in the award is not within the scope of the arbitration agreement or the arbitration commission has no right to arbitrate the subject matter;
- the constitution of the arbitral tribunal or arbitration procedure are in violation of statutory procedure;
- the evidence upon which the award is based was forged;
- the other party has withheld evidence that is sufficient to affect the fairness of the award; or
- arbitrators have accepted or solicited bribes, resorted to deception for personal gain or perverted the course of justice in the award. The court will also set aside the award if it determines that the award is against public interest.

If a party applies to the court for enforcement of an arbitral award, the other party may request for non-enforcement of the award to the same court on the same grounds as above.

### 13.4 Procedure for Enforcing Domestic and Foreign Arbitration

For both domestic and foreign arbitral awards, a party may apply to the competent court in the place where the respondent resides or the property to be enforced is located for enforcement. A party seeking enforcement shall submit an application for enforcement of arbitral awards, together with the award, proof of service of the award and the arbitration agreement.

The court shall review the application, and absent any circumstances of non-enforcement, the court will move to enforce the arbitral award. The grounds for non-enforcement are different for domestic and foreign arbitral awards. For domestic arbitral awards, the grounds for non-enforcement has been set out in **13.3 Circumstances to Challenge an Arbitral Award**.

#### Han Kun

33/F, HKRI Center Two  
HKRI Taikoo Hui  
288 Shimen Road (No. 1)  
Jing'an District  
Shanghai 200041, PRC



漢坤律師事務所  
HAN KUN LAW OFFICES

Tel: +86 21 6080 0968  
Fax: +86 21 6080 0999  
Email: denning.jin@hankunlaw.com  
Web: www.hankunlaw.com

For foreign arbitral awards, the court will review the award in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). According to Article V of the New York Convention, the court may refuse recognition and enforcement of a foreign arbitral award if the respondent proves that:

- the parties are incapacitated or the arbitration agreement is invalid;
- the respondent was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was unable to present their case;
- the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the law of the country where arbitration took place; or
- the award has not yet become binding on the parties or has been set aside or suspended.

The court may also refuse to recognise and enforce an arbitral award if the dispute is not capable of settlement by arbitration or the award would be contrary to public policy of the law of the country of the law. Absent any of the above circumstances, the court will grant recognition and enforcement of the foreign arbitral award.