

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

*This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

CHINA

Responses submitted by:

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1. Would your jurisdiction be described as a common law or civil code jurisdiction?

China is described as a civil code jurisdiction.

2. What method of adjudication is used (adversarial, inquisitorial, other or hybrid)?

China adopts a hybrid method of adjudication. The plaintiff's and defendant's counsel present a case before a judge. Counsel can also cross-examine the opposing party's witnesses. The judge is actively involved in the proceeding and may participate in the fact finding inquiry.

3. What are the qualifications of the adjudicator (judge – elected, appointed; jury; other)?

In China, the judge must be of Chinese nationality, be over the age of 23 years old and be in good health. The judge also must uphold the Constitution of the PRC. In addition, the judge must possess the knowledge of the law. In addition, in China, a person who has been subjected to criminal punishment for the commission of a crime or has been discharged from public employment cannot hold the position of a judge.

China has no jury system. However, in a civil case of the first instance, a people's court can form a collegiate bench consisting of both judges and jurors to try the case.

4. Are there any procedures available for specialized courts (i.e. commercial court, employment, environmental)?

No. there are no special procedures for specialized courts.

In China, specialized courts include the military court and the maritime court. For example, the maritime court has, in the first place, jurisdiction over all maritime and maritime commercial disputes between domestic enterprises.

On 6 November, the Beijing Intellectual Property Court was established in Beijing. This is the first intellectual property court in China. It has jurisdiction over disputes relating to patent, new varieties of plants, layout designs of integrated

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circuits, technical secrets, computer software civil and administrative disputes, copyrights, trademarks, etc.

5. Is arbitration an option and when? If so, what rules are typically used?

Yes, arbitration is an option if parties reach a written agreement containing an arbitration clause which conforms to Chinese law or if the parties otherwise agree to submit their dispute to arbitration. The rules depend upon the provider of the arbitration (e.g., CIETAC will observe its own arbitration rules).

6. Will the Courts enforce an arbitration agreement to preclude other forms of litigation?

Yes.

7. For Court proceedings, is mediation mandatory, either before or after filing of a claim or complaint?

In China, mediation is not a mandatory procedure. However, with respect to the following civil cases, the court will require the parties undertake mediation before the hearing: (1) marriage and domestic disputes and succession disputes; (2) disputes over labor contracts; (3) disputes over damages that result from traffic or work injury accidents and in which the rights and obligations are relatively clear; (4) disputes over residential land use rights and adjacent relationship; (5) disputes over partnership agreements; (6) disputes in which the amount in dispute is a relatively small amount.

8. What is the process for pre-hearing fact discovery (if any)?

There is no process for pre-hearing fact discovery.

Where a case involves a significant amount of evidence, the court will organize a meeting before the hearing for both parties to exchange their evidence. However, there is no discovery.

(a) Are there provisions for mandatory document disclosures?

No.

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(b) Is there provision for oral examinations of the parties or others?

No.

(c) Are there limits on the length of oral examinations?

No.

(d) Are witness statements or summaries to be provided before the hearing?

No.

9. What is the process for pre-hearing expert disclosure (if any)?

Not applicable.

(a) Are expert reports or written summaries required to be exchanged?

Not Applicable.

(b) Are the parties entitled to conduct a pre-hearing oral examination of opposing experts?

Not Applicable.

(c) Are there provisions requiring experts to meet and narrow issues before the hearing?

Not Applicable.

10. Are there other notable discovery rules?

No.

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11. Is there a prehearing conference (for trial management, settlement or other purposes)? Who conducts it? How long before the hearing?

Judges have discretion on this issue. If a judge decides to have a prehearing conference, the judge will preside over it and instruct both parties. There is no specific time period before the hearing for a prehearing conference.

12. Can a prehearing motion for judgment be brought? If so, what is the threshold test for judgment?

No.

13. Is there a process for obtaining pre-hearing rulings with respect to evidence admissibility including admissibility of expert testimony? What is the process and when does it occur?

No.

14. What is the standard for admissibility of expert evidence?

Under the PRC law, there is no comparable concept regarding the standard of admissibility of expert evidence. Any party may obtain the court's permission to notify an expert witness to participate in proceeding, and the expert opinion is served as a reference for the court.

15. Does the Court have the power to appoint its own experts? Under what circumstances and what type?

Yes, the court has the power to appoint its own experts for a specific issue in the case.

A party may apply to court to appoint an expert in relation to a specific issue in a case. Firstly, the court may ask both parties to reach a consensus on the expert candidate. Where both parties fail to reach a consensus, the court will appoint one on behalf of them. In some cases, if it is necessary, the court may appoint a qualified expert in relation to a specific issue even without either party's application.

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16. Does your jurisdiction protect privilege? If so, what privileges are protected from disclosure (attorney client / legal advice; documents prepared in anticipation of litigation; settlement discussions; other)?

No.

17. If privilege is not protected, are there other protections from disclosure (i.e. privacy) that could prevent disclosure of otherwise privileged information, and what is the basis for those protections?

Chinese law provides that only evidence relating to the following issues may be kept confidential and is not required for cross examination:

- matters involving state secrets;
- business secrets;
- private matters of individuals; or
- evidence that specific laws or regulations require to be kept confidential.

On the application of a party, a court may obtain such evidence but cannot disclose that evidence to the party making the application. Therefore, there are no documents that a party could resist production to the court on the basis of privilege.

If legal advice prepared by a party's in-house or external lawyers is considered as relevant evidence in the lawsuit, it will not be considered confidential or privileged material. However, such advice would not be considered relevant to the issues in dispute. As a result, it is generally not disclosed to the court.

18. Who determines privilege disputes, or disputes with respect to other forms of protection described in 17 above?

Courts, judicial regulatory authorities and lawyer's associations are all authorized to determine privilege based on various rules.

19. Briefly describe the trial process?

(a) Are there opening submissions, in what form and of what length?

No

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(b) What is the order of presentation of witnesses?

Usually the plaintiff's witnesses first present their testimony and then the defendant's witnesses.

(c) Who conducts examination and in what order?

Both parties conduct examination of the witnesses. The party calling the witness conducts a direct examination and then the opposing party conducts a cross-examination. A re-examination is then permitted to rebut inferences raised in cross-examination. Before the witness is dismissed, the judge will have the option to examine (e.g., supplemental questions) the witness.

(d) What is the process for closing submissions?

The judge shall order parties' final statement in the order of plaintiff, defendant and third party (if any).

20. Please identify any other notable trial procedures.

None.

21. Who bears the burden of proof of liability? Causation? Damages? What is the standard of proof for each?

The general rule is that the party that makes an allegation has the burden of proof. However, this obligation is shifted to the other party in certain cases, such as those involving environmental pollution, traffic accidents, medical accidents, and product liability, etc.

PRC law adopts an objective truth standard as the standard of proof, which requires the proof to be true and sufficient. Since this standard is difficult to apply, the PRC Supreme Court issued a judicial explanation, which allows courts to adopt a probability standard for civil case.

22. What heads of damage are recoverable (compensatory, pre-judgment interest, punitive damages, other)?

Compensatory damages and pre-judgment interest are recoverable in all civil cases. Punitive damages are only granted in certain civil cases (e.g. a consumer is entitled to three times the amount of actual damages if the goods or service provider was operating fraudulently).

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23. If punitive damages are available, what is the threshold for recovery, and range of awards?

There is no unified threshold for recovery, but according to the existing rules, punitive damages are usually granted in cases that involve consumer or business operators engaging in fraudulent behavior; and the range of awards is usually no more than 3 times the actual damage.

24. Are there time limits for bringing claims? Responding to claims? Please describe.

For the majority of civil cases, the statute of limitations for civil claims is two years from the date when a party knows, or should have known, that their rights or interests have been affected. For some special civil cases (such as action for damages for personal injuries, disputes over product qualities, disputes over non-payment or delay in payment of rent, etc.), the statute of limitation is one year. The limitation for disputes arising from international sales of goods is four years.

The court serves the complaint on the defendant and orders the defendant to file its defence within 15 days (or 30 days if the defendant is without domicile in China). If the defendant fails to file a defence, the Court may continue the proceedings.

25. What are the requirements to establish jurisdiction over foreign defendant in your court? Can a foreign defendant request that the court decline jurisdiction on the basis that there is a more convenient forum?

In general, jurisdiction over a foreign defendant is established in cases where the foreign defendant's place of habitual residence is in China. If a foreigner's habitual residence is not in China, jurisdiction over a foreign defendant can be established in following situations: (1) the litigation against a foreigner is regarding a personal relationship; (2) the place of performance of the contract is in China; (3) under an insurance contract, the subject matter insured is located in China; (4) in negotiable instrument disputes, the place of payment of the negotiable instrument is within China; (4) other situations specified in the PRC law.

Under the PRC laws, a foreign defendant cannot decline PRC court's jurisdiction on the basis that there is a more convenient forum.

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26. Are there procedures for a defendant to bring other potentially responsible parties into the proceeding? Briefly describe.

Yes. In civil proceedings, a defendant can apply to the court to add a party which should be part of the proceedings. In addition, the defendant can supply information to the court who thereafter can determine whether to bring the third party into the ongoing proceedings.

27. Are legal costs recoverable by either party? If so, under what circumstances, and how is the amount calculated? (i.e. is it a loser pays costs system).

Yes.

Court fees are paid by plaintiff in advance and finally undertaken by the losing party. Where both parties are partially successful, a judge will apportion the costs between both parties according to their respective faults. Unless the parties have expressly agreed in the contract or agreement, the attorney fees incurred by each party shall be borne by themselves.

28. Are contingency fees allowed?

In criminal and administrative proceedings, national compensation cases, group litigation cases, contingency fees are not allowed. In civil cases, a law firm can provide contingency fees to their clients. Of course, there are exceptions to this situation. For example, contingency fees cannot be applied to marriage, wills and testate cases, cases regarding social insurance or basic cost of living allowances, cases regarding labor remuneration and cases regarding alimony payments and maintenance.

29. Is third party funding of claims permitted? Under what circumstances?

No, this is not allowed in China.

30. Are class or multi-party actions allowed? Under what circumstances? For what types of claims?

Yes.

Where a large number of persons or companies share the same cause of action, they may elect a representative to act on their behalf in the proceedings. The representative's actions bind them. However, certain actions require consent of all members of the class, such as the modification or waiver of claims, recognition and acceptance of the opposing parties'

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claims or reaching settlement with the opposing party.

31. Can claims be commenced by a consumers association or other representative organization? Under what circumstances?

Yes. For environmental pollution, infringement upon the lawful rights and interests of vast consumers or otherwise damages on the public interest, an authority or relevant organization (e.g., consumer association) may institute an action in a court.

32. On average, how long does it take to get to trial/final hearing, and what factors can affect that?

In the first instance, from the date the case is placed on docket to the date when the judgment is issued, the time limit for the trial is six months. In other words, the court of first instance must complete the case within six months.

However, many cases involve “inspection/appraisal procedures”, which is where an expert or an institution is appointed by the parties or the court to provide an independent opinion on some specific issues to the court. The time spent on the inspection/appraisal is not included in the six month time limit. If a court holds a mediation during proceedings, the time spent on the mediation is also not included in the six month time limit.

Furthermore, judges are allowed to extend the six month deadline in domestic cases if they consider the case is a complicated one. Although, such an extension is subject to the approval from the chief of the court.

In addition, the six month deadline does not apply where cases involve foreign related elements. Foreign related elements refers to the circumstances where: (1) one party involved in the case is a foreign entity or a natural person; or (2) the facts leading to the establishment, change or termination of the commercial relationship between the parties happened outside Chinese territory; or (3) the subject matter involved in the dispute is located outside Chinese territory.

33. Is an appeal process available (distinguish between final and interlocutory/procedural orders as needed)? Who hears the appeal? How are they appointed? What are their qualifications?

Yes. If either party is unsatisfied with a judgment or a ruling, that party is entitled to file an appeal.

The appeal will be adjudicated by appeal judges appointed by the appeal court. The Chinese court system applies a “two-tier final adjudication system”, in which a party can appeal only once. The qualifications of the appeal judges are the same as the judges of the first instance.

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34. Are hearing rooms available for electronic trials or appeals (i.e. where documents and transcripts are presented on computer monitors; witnesses can testify by video conference)?

Yes. In civil cases, a witness may testify by written testimony, video conference or any other means as permitted by a court if the witness is unable to appear in court for health reasons, remote residence and travel difficulty.

35. What is the practice regarding the use of graphics, computer animation, power point and the like, in trials? In appeals?

In China, the use of graphics, computer animation and power point during trials and appeals is not prohibited. The use of electronic devices is common. During the presentation, attorneys for each side often use graphics, computer animation and/or power point to assist in their advocacy.

36. Will the lawyer at trial be the same as the one responsible for pre-trial procedures? Is there a solicitor / barrister distinction?

In China, since the pleading stage and discovery stage are not clearly separated, the lawyers in the trial and pre-trial procedures will be the same. There is no solicitor / barrister distinction in China.

37. What are the contributory negligence laws in your jurisdiction? Is there a comparative fault assessment, joint and several or proportionate liability among tortfeasors? Does a plaintiff's negligence reduce or eliminate liability of defendants named in the litigation?

China law provides that the liability of the tortfeasor may be mitigated if the victim is also at fault for the damage, and the tortfeasor shall not be liable for any damage caused by the intentional act of the victim.

If two or more persons jointly commit a tortious act which results in damage to others, they shall bear joint and several liability. The amount of compensation shall be determined according to their respective liabilities. If the degree of their respective liabilities cannot be determined, the liability for compensation shall be borne equally.

38. Is service of a complaint issued outside your country permitted in your country by "informal" means, or must the Hague Convention be followed?

No, it is not permitted by informal means.

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39. Do your laws prohibit export of relevant documents from your jurisdiction for the purposes of litigation outside your jurisdiction? (Consider privacy rules)

PRC laws do not prohibit the export of relevant documents for the purpose of litigation outside the PRC, unless the export of documents violates PRC laws. In addition, the export of relevant documents should be in accordance with an international treaty concluded or acceded to by the PRC or under the principle of reciprocity.

40. Please point out any litigation Best Practices employed by Courts in your jurisdiction but not yet referenced in the survey.

None.

41. Are there any significant areas in which you believe the playing field between plaintiff and defendant is not level that you think need to be addressed?

No.

42. Are there legislative efforts under way that address any of the litigation practices in your country?

The new Environmental Protection law grants the right to NGOs which engage in environmental protection to initiate lawsuits against polluters.