China

Jan Holthuis and Li Jiao
Buren

Litigation

1 Court system

What is the structure of the civil court system?

In China, the people's courts are judicial organs exercising judicial power on behalf of the state. The civil court system is, in general, comprised of Supreme People's Court, local people's courts and specialised people's courts at various levels. The local people's courts are divided into three levels, namely the basic people's court, the intermediate people's court and the Higher People's Court. In parallel with the local people's courts system, there are specialised people's courts set up for the trial of specialised cases, which currently include military courts, railway courts, maritime courts, forestry courts, agricultural reclamation courts, financial courts, intellectual property courts and internet courts.

China practises a system of courts characterised by 'four levels and two instances of trials'. 'Four levels' refers to the four levels of courts in hierarchy as introduced above, and 'two instances of trial' means that a civil case should be finally decided after two trials, which, however, is subject to retrial if there is error in the judgment.

The subject matter, nature or size of the claim will decide which level of court such claim shall be brought to for the first instance trial. For example, an intermediate people's court shall have jurisdiction as a court of the first instance over the following types of civil cases:

- major cases involving foreign parties;
- cases with significant impact in the areas over which the courts exercise jurisdiction; and
- cases determined by the Supreme People's Court to come under the jurisdiction of the intermediate people's courts.

A Higher People's Court shall have jurisdiction as a court of the first instance over civil cases with significant impact in the areas over which they exercise jurisdiction.

The Supreme People's Court shall have jurisdiction as the court of the first instance over the following types of civil cases:

- cases with significant impact on the whole country; and
- cases that the Supreme People's Court deems it should try by itself.

2 Judges and juries

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

In China, an inquisitorial system is adopted in the judicial system whereby the judges take dominant roles in the trial and are actively involved in fact finding by questioning the parties, advocates of the parties and witnesses. This is opposed to the adversarial system adopted by most common law countries where the fact-finding process is controlled by the parties and the judge or jury remains neutral and passive throughout the proceeding.

Besides, a jury is not provided under the judicial system of China, and the bench of a case plays both the roles of fact finding and law application. Generally, if a collegiate bench is established to adjudicate a civil claim, it generally consists of purely professional judges. However, for certain claims as follows, people's jurors may be appointed to the collegiate bench to participate in the hearing:

- cases involving group interest;
- cases involving public interest;
- cases concerning the general public; and
- cases having other major potential social impact.

Similar to the jury, a people's juror's main responsibility in the bench is to conduct fact finding in the trial. What is different is that the people's jurors enjoy the same rights as regular judges after assuming their posts and sit in the bench with the regular judges. People's jurors are selected from citizens who are non-legal professionals with certain requirements in age, education and historical record of conduct. Because there is a list of eligible people's jurors already in place in every people's court, the selection process for each case will be conducted by computer on a random basis. Further, for special cases for which people's jurors with specific professional knowledge is required, the people's court may randomly select the jurors from people's jurors with the required professional knowledge.

3 Limitation issues

What are the time limits for bringing civil claims?

According to the General Rules of Civil Law effective as of 1 October 2017, the ordinary limitation period for civil claims is extended from two years to three years; although special rules, either shorter or longer than the said three years, will apply to certain types of disputes.

The limitation periods for some specific types of cases are set out by other laws as follows:

- claims for product liability: two years; and
- claims for disputes arising from an international contract for the sales of goods or a contract for the import and export of technology: four years.

The above limitation periods shall start running from the date when the claimant knows or should have known the facts giving rise to his or her claim and who the accused is. However, in any event, if more than 20 years have passed since the date of the occurrence of facts giving rise to the claim, the court shall not offer any protection. However, there is an exception in product liability claims. The right to claim compensation for damage caused because of defects of products shall be void 10 years after the products are delivered to the first consumers, unless the product's expressly-stated warranty is longer.

The law provides rules to suspend the limitation period in case that within the final six months of the limitation period, the rights to 'demand' cannot be exercised because of any of the statutory obstacles:

- force majeure;
- the person who has no or limited capacity for civil conduct has no statutory agent, or his or her statutory agent dies or loses the capacity for civil conduct or the power of agency;
- neither a successor nor a legacy caretaker has been determined after the commencement of succession;
- the obligee is controlled by the obligor or other persons; and
- other obstacles result in the failure of the obligee to exercise the right of claim.

The limitation period will be resumed after the causes of such suspension are eliminated.

In addition to suspension, the limitation period can be interrupted according to law. The limitation period is interrupted if legal

proceedings are instituted or if a party demands or agrees to the fulfilment of its obligations. The limitation period commences anew from the time of interruption and the limitation period can be interrupted repeatedly.

4 Pre-action behaviour

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

By law, generally, there are no mandatory pre-action requirements imposed before the civil proceeding can be issued, except for the following cases:

- shareholder derivative lawsuit: the shareholder must first request the (board of) supervisors or the board of directors (executive director) to initiate the proceeding unless in case of emergency; and
- labour disputes: a labour dispute shall be first brought before the labour dispute arbitration committee for arbitration before proceeding to the court.

However, there are some pre-action measures available to the party to assist in bringing an action. For example, for the purpose of the smooth investigation during the proceeding, the enforceability of the judgment, and the suspension of damages caused to the party, such party is available to apply for preservation of evidence, preservation of property and relevant injunctions to the court before the action is initiated, depending on the circumstances and in the event of emergency.

5 Starting proceedings

How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

As of 1 May 2015, the case acceptance system is reformed from a case-filing review system into a case-filing registration system. Under the case-filing registration system, the proceeding will commence when the people's court registers and files the complaint by the claimant. The court shall decide whether to file and register the complaint by the claimant on the spot or within seven days at the latest. If the complaint is dismissed by the court, the claimant is entitled to appeal against the court's decision to the higher court within 10 days.

If the court decides to register and file the complaint by the claimant, a notice letter of case acceptance will be served to the claimant. Within five days from the acceptance of the case, the defendant will be given notice of the claim served with a copy of the statement of claim of the claimant.

Huge caseloads have been an issue for judges, especially those in the courts of big cities. However, capacity issues do not impact the courts to list disputes in a timely manner, but exert great pressures on the judges who have to work overtime to schedule hearings and render decisions. Therefore, relieving the pressure on judges is one of the important topics of the judicial reform. Specifically, to ease the capacity issues, it is proposed that the percentages of judges be increased in the courts with greater caseloads, more supporting staff be hired in the courts to assist the judges, improving and encouraging the use of diversified dispute resolutions other than civil litigation by parties, and making full use of the petty lawsuits procedures, summary procedures available for simple cases to improve the judicial efficiency, etc.

6 Timetable

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

A general procedure for a civil claim for the first instance shall be concluded within six months from the commencement of the proceeding, which includes the following stages:

- starting proceeding: the civil proceeding starts when the complaint by the claimant is registered and filed by the court (see question 5);
- notice to the defendant and defence: within five days from the acceptance of the case, the defendant will be given notice of the claim served with a copy of the statement of claim of the claimant; the defendant must file a statement of defence within 15 days from receipt of notice of the claim; and the court shall deliver a copy of the statement of defence to the claimant within five days from the date when it receives the same;
- evidence submission: the period for evidence submission can either be decided by the parties subject to the court approval, or determined by the court (15 days minimum);
- counterclaims (if any): the defendant can file a counterclaim before the end of the period for evidence submission;
- hearing: the court shall notify the parties and other participants in the action three days prior to the hearing. During the court hearing, the procedure is generally divided into the investigation of the facts and the presentation of arguments; and
- issuing judgment: if a judgment is delivered immediately after the hearing, the written judgment shall be served to the parties within 10 days. If a judgment is delivered on a fixed date, the written judgment shall be served to the parties immediately after the delivery.

If there is a need for extension of time under special circumstances, an extension of time of six months may be granted subject to the approval of the president of the court. If there is a need for further extension of time, the approval of the higher-level court is required.

However, the period for trial of foreign-related civil cases by courts shall not be subject to the above-mentioned time limits and restrictions.

Enforcement of judgment: if a party refuses to perform an effective judgment, the other party can apply for the court for enforcement. The time limit to apply for enforcement of a judgment is two years commencing from the last day of the time limit for execution of the judgment specified in the written judgment.

7 Case management

Can the parties control the procedure and the timetable?

The case management structure in the Chinese court system is established from top to bottom. As mentioned in the answer to question 2, inquisitorial procedure is adopted in the Chinese judicial system in which the parties play a relatively minor role.

8 Evidence – documents

Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

There is no compulsory or statutory duty for both parties to preserve evidence pending trial, nor will they be required to share relevant documents. Strategically, in civil litigation, one would benefit immensely from preserving evidence in a comprehensive manner. This is largely dependent upon and is influenced through the allocation of the burden of proof, which often varies from case to case.

9 Evidence – privilege

Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

The concept of 'privilege' does not exist under the law of China, be it of advice from client-counsel relations in private practice or from in-house lawyers.

Any statement of facts obtained during mediation or for mediation purposes, which might have detrimental effects on the other party, should not then be presented as evidence later in the litigation proceedings.

10 Evidence – pretrial

Do parties exchange written evidence from witnesses and experts prior to trial?

Upon courts' acceptance of cases, both parties will be required to produce evidence prior to trial in support of their claims or defence, including written evidence from witnesses and experts. This would be achieved by severing a court notice to both parties, within which a statutory period for submitting evidence would be contained. However, this period could be extended by submitting an application in due course.

A pre-trial meeting may be set up upon application for exchanging evidence. For cases that have voluminous evidence or great complexity, courts also have discretion to set up such meetings.

11 Evidence – trial

How is evidence presented at trial? Do witnesses and experts give oral evidence?

Evidence should be presented at the stage of 'investigation', which is conducted by courts. In principle, original copy of every piece of evidence should be presented and cross-examined, unless these original copies are unavailable for objective reasons, in which case a verified copy may be presented in lieu of the original ones. For each piece of evidence, cross-examination should be directed to and centred around three main aspects (ie, authenticity, legality and relevance).

It is compulsory for witnesses and experts to testify and be cross-examined at trial unless exceptions can be applied. If a pretrial meeting of evidence exchange is set up, witnesses may also testify at the meeting. If experts are unable to attend the trial for legitimate reasons, a written reply should be submitted instead.

12 Interim remedies

What interim remedies are available?

The main interim remedies available for both parties in civil litigation proceedings would be preservation of property, behaviour, evidence and an order of preliminary enforcement.

Preservation of property, once initiated successfully, will often take the form of sealing up, distaining or freezing, whereby any future transfer, removal or alteration of such assets without courts' prior approval will be restrained. This preservation applies to both pre-action and post-action proceedings, which means a party may submit an application before or after a claim is officially brought to courts. In this regard, preservation of property features similar characters and functions to freezing injunctions.

The aim of preservation of behaviour is to order one party to act or not to act in a particular way. Preservation of behaviour would be available before or after the commencement of the proceeding. However, currently preservation of behaviour (injunction) before the commencement of the proceeding would only be possible in intellectual property disputes.

A court adopting preservation measures may order the applicant to provide guarantee, and where the applicant does not provide guarantee, the court shall rule that the application be thrown out.

In addition, a court order may also be obtained for preserving relevant evidence if there is high likelihood that the evidence would be destroyed or it would become difficult to locate its whereabouts. This could be achieved by sealing up, detention, taking photographs, making sound recordings or visual recordings, making reproductions, conducting authentication, forensic inspection, drawing up written statements.

For claims where overdue alimony, maintenance, child support pensions, medical expenses, or employee payments are involved, or in other urgent matters, courts may issue a preliminary enforcement order. This means a preliminary payment would be made from one party to the other before the merit of the case is officially adjudged. Conditions should be met before such order can be granted, considering both the applicants' dependency on life or impacts on business operation, and financial capacity of the party against whom the application is made.

13 Remedies

What substantive remedies are available?

Interest is one of the most common substantive remedies available. This is particularly the case when the outcome of the judgment is of a monetary nature.

Depending on the nature of disputes, other remedies such as damages, declarations, permanent injunctions and specific performance may also be available.

In civil litigation, remedies are mostly compensatory, with punitive damages as an exception. Examples of such exceptions focus mainly on: fraudulent practice in violation of consumers' rights and interests; and carrying out food production activities without relevant trading licences.

14 Enforcement

What means of enforcement are available?

There are a wide variety of measures to enforce a judgment, including:

- to distrain, freeze, transfer or sell judgment debtors' property;
- to withhold judgment debtors' lawful income in a proportionate manner;
- to evict judgment debtors from the house or land so occupied or used; or
- to compel performance or arrange third parties to perform at the expense of the judgment debtors, etc.

When court orders or judgments are disobeyed, courts have the power to order:

- punitive interests or penalty;
- restrain judgment debtors form crossing borders of the country;
- limit high consumption;
- blacklist one on the public credit record; and
- circulate facts of debts evasion on media.

15 Public access

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

Hearings in civil litigation proceedings are accessible for the general public, except for cases where state secrets or issues of privacy are involved, or otherwise stipulated under the law.

For divorce cases and cases concerning trade secrets, hearings may not be held in public if a prior application is filed by a party.

Court documents such as judgments and orders are available to the public via an official website: http://wenshu.court.gov.cn/. Besides which, there are other websites or databases from which judgments and orders can be downloaded.

Other court documents such as witness statements and pleadings are usually not open to the public. Upon due authorisation, qualified Chinese lawyers may have access to these documents following relevant procedural steps. Taking notes or making photocopies of these documents are allowed.

16 Costs

Does the court have power to order costs?

Generally, the court has no power to order costs except for the following two situations: (i) when the parties have agreed in a contract that the lawyer fees generated for the winning party shall be borne by the losing party if any disputes related to the contract occur, the court may order the lawyer fees as such agreed; or (ii) when the law explicitly prescribes that the losing party shall bear (reasonable parts but not all of) the lawyer fees of the winning party. According to the laws and relevant judicial interpretation, among others, the following circumstances or types of cases belong to this situation: personal injury compensation cases, copyright infringement cases, trademark infringement cases, patent infringement cases, unfair competition cases, contract disputes in which the creditor exercises the right of revocation, and legal aid cases.

In China, there is no such rule requiring a claimant to provide security for the defendant's costs in litigation. But if the claimant applies to the court for preservation of the defendant's properties before or during the litigation, the court may order the claimant to provide certain security in accordance with the law.

17 Funding arrangements

Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

In China, there is a risk agency charging method that can be chosen by and between lawyers and clients. The risk agency charging method

means: (i) no win, no fee; and (ii) lawyers charge on a relatively high proportion of the amount awarded when they win a case, but the ceiling amount shall be in no way over 30 per cent of the subject amount involved in a case as specified in the risk agency contract. The risk agency charging method shall not apply to the following cases:

- cases of marriage or inheritance;
- cases regarding asking for social insurance treatment or minimum living treatment;
- cases regarding asking for payments for supporting parents or children, alimonies, pensions for the disabled or families of the deceased, welfare payments, or compensations for work-related injuries; or
- cases regarding asking for payments for employment remunerations, etc.

Third-party financing is not yet sufficiently developed in the litigation area, but is emerging and developing recently in the commercial arbitration area.

The right of action is a kind of procedural right, and the qualification for exercising this right is determined by the qualification contained in the related substantive rights and obligations or specially granted by law. The right of action bears a nature of public law, and is normally non-transferrable. However, the right of action can and shall be transferred along with the transfer of the substantive rights and obligations concerned.

18 Insurance

Is insurance available to cover all or part of a party's legal costs?

Legal cost insurance in China is not as well developed as that in some western countries, and is currently seldom adopted in litigation.

But the mechanism of liability insurance for litigation property preservation is developing fast and is adopted more and more frequently in litigation. In liability insurance for property preservation, the applicant for property preservation purchases liability insurance products from an insurance company whose qualification is recognised by the court, and the insurance company issues a guarantee letter to the court to undertake the liability for the loss caused by the property preservation to the defendant if the preservation proves to be wrong.

19 Class action

May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Under Civil Procedure Law, there is a concept of 'joint action' and of 'representative action'.

If one party or both parties consist of two or more persons, the object of the action is the same or of the same category and the court considers that the case can be tried as a joint action, the case shall be tried as a joint action, subject to the consent of the parties.

The representative action is a kind of joint action. In representative action, one party consists of numerous persons and the action may be brought by a representative elected by such persons. The procedural acts of this representative shall be binding on all members of the party he or she represents. However, the representative's modification or relinquishment of claims, or recognition of the other party's claims or involvement in mediation shall be subject to the consents of the parties he or she represents.

In China, collective actions mostly occur in labour disputes, especially in cases of equal pay for equal work.

20 Appeal

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

In general, Chinese courts follow the two instances of trial system as prescribed by law. Normally the first instance judgment or ruling shall not be final. If a party disagrees with a first instance judgment or ruling made by a local people's court, the party shall have the right to lodge an appeal to the immediate Superior People's Court within a certain period specified by law (15 days for judgment and 10 days for ruling, but 30 days for the parties without presence in China) from the date on which the written judgment or ruling was served.

The second instance judgment or ruling becomes legally effective immediately and shall be final. However, any party that considers a legally effective judgment or ruling to be wrong may apply to the immediate superior court or the original court for retrial. Nevertheless, the application for retrial does not mean that the enforcement of the judgment or ruling is suspended. The court shall conduct a retrial only when the application for retrial by a party falls under any of the circumstances explicitly by law, for instance: (i) there is new evidence that is sufficient to overturn the original judgment or ruling; (ii) an error was found in the application of the law in the original judgment or ruling; or (iii) the original judgment or ruling is not formed on the basis of due process, etc.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

It is not easy to enforce a foreign court judgment in China. A foreign judgment holder can file petition and demand a competent Chinese court to enforce and recognise his or her foreign judgment, but the Chinese court can only recognise and enforce the foreign judgment if: (i) a bilateral enforcement treaty or arrangements exists between China and the country or region where the judgment was made; (ii) a multilateral convention exists that was signed by China (on 12 September 2017, China signed the Hague Convention on Choice of Court Agreements pending approval by the National People's Congress.); or (iii) the country where the foreign judgment was given had enforced judgments of Chinese courts previously, which is the principle of reciprocity.

22 Foreign proceedings

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

Obtaining evidence in China for use in foreign proceedings falls under judicial assistance as prescribed by Civil Procedural Law. It shall be conducted through the channels stipulated in the international treaties concluded or acceded to by China. If no treaty relations exist, it shall be conducted through diplomatic channels. The diplomatic channel means the foreign court concerned can submit a power of attorney to a Chinese court through the embassy of that country in China to request the Chinese court to assist with investigation and collecting evidence in China. Except for the embassy or a consulate in China of a foreign state, no foreign agency or individual may carry out an investigation or collect evidence within the territory of China.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

China's Arbitration Law is not enacted based on UNCITRAL Model Law which, however, has a great influence on the enactment of the former.

China's Arbitration Law deviates from the UNCITRAL Model Law including, but not limited to, the following aspects:

Both the court and the arbitration are entitled to rule on the validity of an arbitration agreement, and the ruling by the court shall be given the priority under China's Arbitration Law.

An ad hoc arbitration is generally not permitted and recognised under China's Arbitration Law. An exception to this is that, on 9 January 2017, the Supreme People's Court issued the Opinion on the Provision of Judicial Protection to the Development of the Free Trade Zone, article 9 of which allows two parties registered in free trade zones to resolve their disputes through ad hoc arbitration, provided that the dispute be resolved in a specific place, under specific arbitration rules, and by specific people.

The arbitral tribunal or arbitration institution has no power to grant the interim measures, the application of which by a party must be forwarded to a competent court through the arbitration institution for determination under China's Arbitration Law.

The scope of arbitrability is narrower under China's Arbitration Law.

Under China's Arbitration Law, both procedural irregularities and limited substantive reasons are grounds based on which a domestic arbitral award may be set aside or refused for enforcement, while only serious procedural irregularities are listed as grounds under the UNCITRAL Model Law on the same regard.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

An effective arbitration agreement shall include the following elements:
- in writing, no matter stipulated in a contract or provided in a separate agreement;
- the expression of the parties' intention to submit for arbitration;
- the matters to be arbitrated; and
- the arbitration commission selected by the parties.

In addition, an arbitration agreement shall be invalid if any of the circumstances occur:
- matters agreed upon for arbitration are beyond the scope of arbitration prescribed by law;
- an arbitration agreement concluded by persons without or with limited capacity for civil acts; and
- one party forces the other party to sign an arbitration agreement by means of duress.

25 Choice of arbitrator

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

Under Chinese Arbitration Law, an arbitral tribunal may comprise three arbitrators or a sole arbitrator. In practice, unless otherwise stipulated by arbitration rules or agreed by the parties, three arbitrators will be appointed generally.

For the arbitral tribunal comprising three arbitrators, each party shall select or authorise the chairman of the arbitration institution to appoint one arbitrator. The third arbitrator (ie, the presiding arbitrator) shall be selected jointly by the parties or be nominated by the chairman of the arbitration institution in accordance with a joint mandate given by the parties.

If the parties fail to appoint an arbitrator within the time limit set under the arbitration rules, the arbitrators will be appointed by the chairman of the arbitration institution.

The parties to the arbitration can apply for the withdrawal of the arbitrator after appointment if such arbitrator is found improper or impartial in accordance with article 24 of the Arbitration Law. However, an application for withdrawal shall be submitted prior to the first hearing with the statement of reasons. In the event that reasons for the withdrawal only became known after the commencement of the first hearing, an application for withdrawal may also be submitted before the conclusion of the last hearing.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

The pool of candidates of each arbitration institution is composed of Chinese and foreign arbitrators.

For Chinese residents who are eligible to be appointed as an arbitrator, they must be fair and honest persons who should satisfy one of the following conditions as stipulated by law:
- have passed the Chinese bar exam and obtained the legal professional qualification, and have engaged in arbitration work for eight years;
- have worked as a lawyer for eight full years;
- have worked as judges for eight years;
- are engaged in legal research or legal teaching with a senior academic title; or
- have legal knowledge and are engaged in professional work relating to economics and trade with a senior academic title or at the equivalent professional level.

For a foreign resident appointed as an arbitrator in the domestic arbitration institutions, the law does not specify the conditions and requirements. However, they must be equipped with a comparable qualification as required for Chinese arbitrators.

In addition, the arbitration institution prepares the panel lists of arbitrators according to their different specialties, which ensures the needs of complex arbitration.

27 Arbitral procedure

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

Under the Arbitration Law of China, Chapter IV, titled Arbitration Procedure, provides the rules on the following procedural matters:
- application and acceptance (conditions should be met by the parties applying for arbitration, documents to be submitted, etc);
- composition of the arbitral tribunal (number of arbitrators, appointment and removal of arbitrators, etc); and
- hearing and arbitral awards (evidence rules, experts, evidence preservation, conciliation).

28 Court intervention

On what grounds can the court intervene during an arbitration?

The court may intervene during arbitration under the following circumstances and grounds:
- Ruling on the validity of the arbitration agreement: at the request of a party, the court may rule on the validity of the arbitration agreement; if both the arbitration institution and the court are requested by the parties to rule on the validity of the arbitration agreement, the court shall give the ruling (article 20 of the Arbitration Law).
- The issuance and enforcement of interim measures: when interim measures such as interim injunction, evidence preservation and property preservation are applied during the arbitration, such application shall be forwarded to the competent courts through the arbitration institution for issuance and later enforcement (articles 28 and 46 of the Arbitration Law; article 81 and 100 of the Civil Procedure Law).
- Setting aside an arbitral award: a party to the arbitration may request the competent intermediate people's court to set aside an arbitration award within six months after receipt of the award, if such party can furnish evidence to prove the existence of any of the circumstances listed in article 58 of the Arbitration Law (for domestic arbitral awards without foreign-related elements) or in article 274 of the Civil Procedure Law (for domestic arbitral awards with foreign-related elements).
- Enforcement of an arbitral award: if one party fails to execute the arbitral award, the other party may apply to a competent court for enforcement (article 62 of Arbitration Law).
- Refusing enforcement of an arbitral award: at the enforcement stage of an arbitral award, a party against whom the enforcement is sought can request the court to refuse the enforcement of an arbitral award, if such party can furnish evidence to prove the existence of any of the circumstances listed in article 237 of the Civil Procedure Law (for domestic arbitral awards without foreign-related elements) or in article 274 of the Civil Procedure Law (for domestic arbitral awards with foreign-related elements), or in Article 5 of 1958 New York Convention (for foreign arbitral awards excluding that are seated in Hong Kong, Macao and Taiwan, which are subject to different arrangements given or concluded).

29 Interim relief

Do arbitrators have powers to grant interim relief?

Interim measures such as interim injunction, evidence preservation and property preservation are allowed prior to and during the arbitration proceedings. However, the arbitrators or the arbitration institution have no power to issue or enforce the interim measures. Prior to the commencement of arbitration proceedings, such application for interim measures shall be directly requested by the parties from the court. in the place where the respondent resides, or where the property or evidence in question is located. However, during the arbitration

Update and trends

Enhanced judicial cooperation between Hong Kong and Mainland China
On 18 January 2019, Hong Kong and mainland reached a milestone by signing the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters between the Courts of the Mainland and of the Hong Kong Special Administrative Region, which seeks to establish a bilateral legal mechanism with greater clarity and certainty for recognition and enforcement of judgments in civil and commercial matters between the two places, and therefore reduces the need for re-litigation of the same disputes in both places and offers better protection to the parties' interests.

On 2 April 2019, the SPC and the Department of Justice of Government of Hong Kong signed the 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 provides a means for parties to a Hong Kong-seated arbitration to seek interim measures from the Mainland Chinese courts, an option that was previously only available for arbitrations seated in Mainland China.

One-stop dispute resolution under the Belt and Road Initiative
Following the Belt and Road Initiative, and to solve the rising international commercial disputes, the SPC established two China international Commercial Courts (CICC) on 29 June 2018, located in Shenzhen and XiAn respectively. By setting up the International Commercial Expert Committee and selecting certain international mediation and arbitration institutions to work alongside the CICC, the CICC promote connectivity of litigation, mediation and arbitration, and will provide parties with a choice for dispute resolution methods within the CICC.

proceedings, such application for interim measures may only be made through the arbitration institution and parties to an arbitration may not directly request for such interim measures from the courts with very limited exceptions under the current practice, which is parties to an arbitration administered by the China International Economic and Trade Arbitration Commission, the Shanghai International Economic and Trade Arbitration Commission, the Shenzhen Court of International Arbitration, the Beijing Arbitration Commission or the China Maritime Arbitration Commission may apply for interim measures directly to the International Commercial Court under the Supreme People's Court during the arbitration proceedings.

30 Award

When and in what form must the award be delivered?

The Arbitration Law does not mandatorily set forth a time limit within which the award must be rendered. It leaves the relevant arbitration rules formulated by the arbitration institutions to deal with this matter.

According to article 54 of Arbitration Law, an award shall be delivered in writing with the following information set forth therein:
- the claims for arbitration;
- the facts of the disputes;
- the grounds upon which an award is given;
- the results of the judgment;
- the allocation of the arbitration fees; and
- the date of the award.

If the parties agree not to include in the award the facts of the dispute and the grounds on which the award is based, such matters may be omitted in the award. In addition, the award shall be signed by the arbitrators and sealed by the arbitration institution. The arbitrator who disagrees with the award has a choice to sign or not to sign on the award.

31 Appeal

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

Under Chinese Arbitration Law, an award is final and binding once it is rendered, which cannot be appealed. However, a party may request the intermedia people's court where the arbitration institution is domiciled to set aside an award under the grounds set forth by law.

Depending on the nature of the award, the grounds based upon which the award is set aside or refused for enforcement vary.

For a domestic arbitral award without foreign-related elements, a court may rule to set aside or to refuse to enforce it if a party can furnish evidence to prove that there exists any of the following circumstances:
- there is no arbitration agreement between the parties;
- matters decided in the award exceed the scope of the arbitration agreement or are not under the jurisdiction of the arbitration institution;
- the composition of the arbitral tribunal or the arbitration procedure is contrary to the legal procedure;
- the evidence on which the award is based is falsified;
- the other party has concealed evidence that is sufficient to affect the impartiality of the award; or
- the arbitrators have demanded or accepted bribes, commit illegalities for personal gains or perverted the law in making the arbitral award.

For a domestic arbitral award with foreign-related elements, a court may set aside or refuse to enforce it if a party can furnish evidence to prove that any of the following circumstances exist:
- the parties have neither stipulated an arbitration clause in their contract nor subsequently reached a written arbitration agreement;
- the party against whom the application of setting aside or enforcement is sought was not requested to appoint an arbitrator or take part in the arbitration proceedings or the person was unable to state his or her opinions for reasons for which he or she is not responsible;
- the composition of the arbitration tribunal or the arbitration procedure was not in conformity with the rules of arbitration;
- matters decided in the award exceed the scope of the arbitration agreement or are beyond the jurisdiction of the arbitration institution; or
- if the people's court determines that the enforcement of the award would be against public interest.

For a foreign arbitration award, a court cannot set it aside but may refuse to enforce it under the grounds set out in Article V of the New York Convention.

In addition, if an arbitration has any of the following circumstances, resulting in failure of enforcement, the court may make a ruling of rejecting the application for enforcement:
- the subject of rights and obligations are not clear;
- the specific amount of payment is not clear or the calculation method is not clear, resulting in the specific amount not being figured out;
- the particular thing to be delivered is not clear or cannot be determined; or
- the standard, target and scope of performance of action are not clear.

Besides which, if the arbitration award determines continuation of the performance of the contract, but does not specify such specific contents as the rights and obligations that are to be continued to be performed, the specific method of performance and the deadline, etc, resulting in the failure of enforcement, the court may also make a ruling of rejecting the application for enforcement.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Domestic awards
If an award is not complied with, the applicant may apply to the intermediate people's court where the respondent is domiciled or where the respondent's property is located (or the basic-level people's court appointed) to enforce it.

If the respondent applies to the competent court to set aside the arbitral award at the same time that the applicant has applied for enforcement, the enforcement proceedings will be suspended. If the court rules to vacate the arbitral award, the enforcement proceedings will be terminated. If the court rejects the application to set aside the award, the enforcement will resume.

The time limit to apply for enforcement is two years from either the:

- last day of the performance period specified in the arbitral award;
- last day of each performance period if the arbitral award requests performance in instalments; or
- effective date of the arbitral award if the award does not specify a period for performance.

In the past six months of the time period available to apply for enforcement, if an application for enforcement cannot be filed because of a force majeure event or other obstacles, the calculation of the time limit will be suspended and will resume after the suspension causes are eliminated.

If the parties reach a settlement, or one party requests the performance of the award or agrees to perform the award, the time limit for applying for enforcement will be started again.

The proposed ruling of any intermediate people's court or any specialised people's court after review not to enforce or set aside the domestic arbitral award shall be reported to the Higher People's Court within its jurisdiction for review; the final ruling shall be made based on the opinions given by the Higher People's Court after it has reviewed the proposed ruling.

Foreign awards (including awards made in Hong Kong, Macau and Taiwan)

China is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the 1958 New York Convention).

Separate arrangements with Hong Kong and Macao (which is treated as a different jurisdiction for the purposes of arbitration) were entered into in 2000 and 2007 respectively, which both adopt the same general principles as the New York Convention (ie, Arrangement Concerning Reciprocal Recognition Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, and Arrangement Concerning Reciprocal Recognition Enforcement of Arbitral Awards between the Mainland and the Macau Special Administrative Region).

The Supreme Court has issued a judicial interpretation about the recognition and enforcement of arbitral awards made in Taiwan.

The non-enforcement of foreign arbitral awards and the setting aside or non-enforcement of domestic arbitral awards with foreign-related elements are both subject to a reporting mechanism established by the Supreme People's Court (SPC) in 1995. According to the reporting mechanism, if there is a proposed ruling by any intermediate people's court or any specialised people's court not to recognise and enforce a foreign arbitral award or setting aside or not to enforce a domestic award with foreign-related elements, such proposed ruling shall be reported to the Higher People's Court within its jurisdiction for review; if the Higher People's Court intends to agree with the proposed ruling after review, it shall report the ruling to the SPC for final review. The final ruling shall be made based on and following the review opinion given by the SPC. As of December 2017, the SPC has unified and applied the same reporting mechanism to domestic arbitral awards without foreign-related elements, which means that setting aside or non-enforcement of a purely domestic award shall be finally decided by SPC.

33 Costs

Can a successful party recover its costs?

According to article 9 of the Arbitration Fee Collection Measures of Arbitration Institutions, fees paid to the arbitration institution shall, in principle, be borne by the losing party. However, if a party only partially wins, the arbitration tribunal shall determine the allocation of fees based on the parties' liabilities and the percentage of the party's success.

The arbitration rules of an arbitration institution also involve the recovery of costs by a successful party. For example, article 52(2) of the 2015 Arbitration Rules of China International Economic and Trade Arbitration Commission provides that the arbitral tribunal has the power to decide in the arbitral award that the losing party shall compensate the winning party for the expenses reasonably incurred by it in pursuing the case.

Alternative dispute resolution

34 Types of ADR

What types of ADR process are commonly used? Is a particular ADR process popular?

The main ADR alternatives to civil litigation in China include negotiation, mediation and conciliation. Mediation is a signature element in China's amicable dispute resolution system, which has been a preferred dispute resolution throughout Chinese history and remains widely used today.

In China, judicial mediation is quite common and is frequently adopted by the courts in the case management system.

BUREN
LEGAL | TAX | NOTARY

Jan Holthuis **j.holthuis@burenlegal.com**
Li Jiao **l.jiao@burenlegal.com**

ZhongYu Plaza, Room 1602
North Gongti Road 6
100027 Beijing
China
Tel: +86 85235780
Fax: +86 10 8523 57 70

ICC-Tower, room 2505B
North Zhongshan Road 3000
200063 Shanghai
China
Tel: +86 6173 03 88
Fax: +86 6173 03 86

www.burenlegal.com

35 Requirements for ADR

Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Parties to litigation or arbitration are not required by law to consider ADR before or during proceedings.

The court or tribunal cannot compel the parties to participate in an ADR process.

Miscellaneous

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Judicial mediation

When a claim is filed to the court, except for bringing it to the full trial of civil proceeding, the parties concerned can request the judges for judicial mediation provided that it is requested under the free will and voluntary of the parties and the facts concerned are clear. Complex civil procedures are lessened if the dispute is solved through judicial mediation, which is more effective. If a mediation agreement is reached by the parties, the court shall prepare a written mediation statement confirming such mediation agreement, which has the same effect and enforceability as a judgment.