

## China's Civil Procedure Law: A New Guide for Dispute Resolution in China\*\*

The Civil Procedure Law of the People's Republic of China (the CPL) was promulgated and became effective on April 9, 1991.<sup>1</sup> Shortly thereafter, Chinese government officials stated publicly that with the enactment of the CPL the development of China's civil law system (that is, its laws other than those concerned with criminal law and procedure) has been basically completed.<sup>2</sup> From now on, Chinese and foreign individuals, as well as enterprises, will have the clear guidance of a modern statute for resolving civil disputes in China.

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1. The Civil Procedure Law of the People's Republic of China [hereinafter CPL], which is divided into four parts, twenty-nine chapters and 270 articles, was adopted by the 4th Session of the 7th National People's Congress (the NPC) on Apr. 9, 1991, replacing the Civil Procedure Law of the People's Republic of China (Provisional), which was adopted by the 22nd Session of the Standing Committee of the 5th NPC on Mar. 8, 1982 (the 1982 Provisional Civil Procedure Law).

2. PEOPLE'S DAILY, Apr. 29, 1991, at 4, cols. 4-5 (overseas Chinese lang. ed.). China's civil laws include: the Civil Code, *see infra* note 53; the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, adopted on July 1, 1979, at the 2d Sess. of the 5th NPC, promulgated on July 8, 1979, and amended at the 3d Sess. of the 7th NPC on Apr. 4, 1990; the Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures, adopted at the 1st Sess. of the 7th NPC on Apr. 13, 1988; the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises, adopted at the 4th Sess. of the 6th NPC on Apr. 12, 1986; the Tax Law of the People's Republic of China on Foreign Enterprises, adopted at the 4th Sess. of the 7th NPC on Apr. 9, 1991; the Individual Income Tax Law of the People's Republic of China, adopted and effective on Sept. 10, 1980, at the 3d Sess. of the 5th NPC; the Trademark Law of the People's Republic of China, adopted on Aug. 23, 1982, at the 24th Sess. of the Standing Comm. of the 5th NPC and effective on Mar. 1, 1983; the Patent Law of the People's Republic of China, adopted on Mar. 12, 1984, at the 4th Sess. of the Standing Comm. of the 6th NPC and effective on Apr. 1, 1985; the Copyright Law of the People's Republic of China, adopted and effective on Sept. 7, 1990, at the 15th Sess. of the Standing Comm. of the 7th NPC; the Marriage Law of the People's Republic of China, adopted on Sept. 10, 1980, at the 3d Sess. of the 5th NPC and effective on Jan. 1, 1981; and the Foreign Economic Contract Law of the People's Republic of China, *see infra* note 53. China still has no separate torts, corporation, or securities laws.

The purpose of this article is to examine the CPL and its application, as well as to compare it with certain relevant aspects of U.S. civil procedure law. Part I briefly discusses the position of civil procedure law in Chinese legal history and China's modern legal system. Part II considers the way in which the law will apply to a foreign party in a lawsuit in China. The discussion in parts III-X addresses the issues of mediation and arbitration, jurisdiction, service, pleading, discovery, trial, and appeal and supervision, respectively. Finally, part XI sets forth some observations about certain problems in the CPL that have already surfaced.

## I. Historical and Modern Civil Procedure Law in China

In the more than two thousand years of Chinese legal history, criminal law has always been better developed than civil law,<sup>3</sup> and procedural laws have traditionally been neglected while substantive laws have been emphasized.<sup>4</sup> It is hardly surprising, therefore, that China had no formal civil procedure law until as late as 1910, when Shen Jiaben (1840–1913) drafted the Provisional Da Qing<sup>5</sup> Civil Procedure Law.<sup>6</sup> By contrast, formal, written criminal law in China can be traced back as far as the Qin Dynasty (221 B.C.–206 B.C.).<sup>7</sup> Accordingly, while nearly every government administration in China's history had a well-established criminal law system, few had any system of civil procedure.

Although the Nationalist Government enacted a civil procedural law in 1936,<sup>8</sup> all the laws of the Nationalist regime were abolished when the Communist Party came into power in 1949. A year later on December 31, 1950, China adopted the General Principles of Procedure (Provisional). However, for a number of reasons, this law was never fully promulgated.<sup>9</sup> As a result, the CPL's most direct predecessor dates from the 1982 Provisional Civil Procedure Law, which was the first fully effective civil procedure law in the People's Republic of China. Nine years later China finally enacted a complete statute in the form of the CPL.

The CPL is one of the most significant laws in China.<sup>10</sup> However, China's attention to it is a striking development. The Chinese Government's focus on procedural law, and particularly civil procedure, seems directly attributable to the ongoing process of modern economic reform and its by-product, the so-called "open door policy," which has generated numerous civil disputes. As a result, a civil procedure law has become a necessary adjunct to reform.

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3. ZHAO ZHENJIANG, *THE FORTY YEARS OF THE CHINESE LEGAL SYSTEM—1949–1989*, 346 (1989).

4. *Id.*

5. *The last dynasty in China (1644–1911)*.

6. CHAI FABANG, *A COURSE IN CIVIL PROCEDURE LAW* 37 (1984).

7. ZHANG JINFAN: *CHINESE LEGAL HISTORY* 87-120 (1982).

8. CHAI, *supra* note 6, at 38.

9. ZHAO ZHENJIANG, *supra* note 3, at 346-47.

10. Wang Hanbin, *Explanation of the Amendment to the Provisional Civil Procedure Law of the People's Republic of China*, Address Before the 4th Sess. of the 7th NPC (Apr. 2, 1991) in *PEOPLE'S DAILY*, Apr. 15, 1991, at 2, Col. 1 (overseas Chinese lang. ed.).

## II. Application to Foreign Parties

The CPL applies to all civil actions in China.<sup>11</sup> Furthermore, the CPL's Part VI, "Special Provisions Governing Procedures for Civil Actions Involving Foreign Relationships," specially applies to a foreign individual or enterprise in a lawsuit in China. This particular part applies to all civil actions in China that involve foreign civil relationships (foreign actions).<sup>12</sup> Whenever Part VI does not contain any specific provision that may apply to a foreign action, any other relevant provisions of the CPL are deemed applicable to such an action in China,<sup>13</sup> and a foreign party to the action must comply with the CPL.<sup>14</sup>

An exception to this general rule is where an international treaty provides otherwise; but such a treaty is applicable only when China is a signatory to it.<sup>15</sup> Moreover, the provisions of the international treaty do not apply when China has declared its reservations.<sup>16</sup>

### A. EQUAL PROTECTION UNDER THE LAW

In accordance with the international custom of reciprocal rights, a foreign party in a foreign action in a Chinese court has the same rights and duties as a Chinese party,<sup>17</sup> unless the foreign party's home country restricts the litigation rights of a Chinese party in an action in that country.<sup>18</sup> Moreover, pursuant to the CPL, all parties to a legal action are expressly held to enjoy equal protection under the law.<sup>19</sup> This principle applies equally in a foreign action, since no discrimination against a foreign party will be allowed.<sup>20</sup>

### B. JUDICIAL INDEPENDENCE

Under the CPL, the courts are to exercise judicial independence in trying cases.<sup>21</sup> This principle appears to rule out the suggestion that a court will not follow the law but instead a particular influential person's direction in deciding

11. CPL, *supra* note 1, arts. 3, 4.

12. *Id.* art. 237. Foreign actions are defined broadly to include actions involving foreign parties, disputed assets in a foreign country, or legal relationships occurring in a foreign country. CHAI, *supra*, note 6, at 408. For purposes of this article, "foreign action" will be treated as meaning an action involving at least one foreign party.

13. CPL, *supra* note 1, art. 237.

14. *Id.* art. 4.

15. *Id.* art. 238.

16. *Id.*

17. *Id.* art. 5. Foreigners in China with special immunity (such as diplomatic immunity) may also resort to international law. *Id.* art. 239.

18. *Id.* art. 5.

19. *Id.* art. 8. In the past, however, a state-owned enterprise always won a lawsuit between it and an individual or a private enterprise. CHAI, *supra* note 6, at 77. In addition, a party with political influence was likely to receive a more favorable outcome.

20. CHAI, *supra* note 6, at 77, 414.

21. CPL, *supra* note 1, art. 6 (providing that a court is not "subject to interference by administrative agencies, social organizations or individuals").

a case. This represents a great breakthrough in Chinese legal history, which is replete with examples of court decisions resulting from personal influence. However, it is unclear from the CPL that a court decision will not be influenced by the policy of the Chinese Communist Party (Party), China's dominant political authority, or will not be interfered with by a Party organization.<sup>22</sup>

### C. LANGUAGE

The language used in a Chinese civil court shall be Chinese.<sup>23</sup> A foreign party who does not have knowledge of Chinese may ask the court to provide an interpreter or translator for assistance, and the court usually will honor the request.<sup>24</sup> However, the foreign party bears the expenses for the work of translation and interpretation.<sup>25</sup>

### D. LITIGATION FEES

Litigation fees include the registration fee and litigation costs.<sup>26</sup> The parties to a civil action in China must pay certain registration fees.<sup>27</sup> The registration fees are not specified under the CPL, but they are usually minimal. The litigation costs, costs for authentication, copying, travel, and the like, but not including attorney's fees, are also left unstated under the CPL. However, they are generally paid by the losing party to a lawsuit.<sup>28</sup> If a party has difficulties paying the litigation fees, it may request the court to postpone or reduce the payment, or exempt it altogether.<sup>29</sup>

### E. LEGAL REPRESENTATIVE

Chinese law contains no provision that requires an attorney to be engaged for representation in a legal action in China, and it is accepted legal practice in China for a party to represent itself. But beyond this, a layperson may also serve as a litigation representative.<sup>30</sup> Furthermore, a party may have one or two legal representatives.<sup>31</sup> However, if a foreign party needs an attorney to represent it in

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22. *Id.* See also ZHONGHUA RENMIN GONGHEGUO XIANFA [Constitution] [XIANFA] art. 126 (1982) (People's Republic of China) (adopted and promulgated on Dec. 4, 1982, at the 5th Sess. of the 5th Nat'l People's Cong.). One view is that a court must be subject to the leadership of the Party. Whenever a case appears significant, the court must report it promptly to a Party committee to receive its support. See CHAI, *supra* note 6, at 72.

23. CPL, *supra* note 1, art. 240.

24. *Id.*

25. *Id.*

26. CHAI, *supra* note 6, at 242.

27. CPL, *supra* note 1, art. 107.

28. CHAI, *supra* note 6, at 242.

29. CPL, *supra* note 1, art. 107.

30. *Id.* art. 58.

31. CHAI, *supra* note 6, at 178.

an action in China, the foreign party must employ a Chinese attorney.<sup>32</sup> China has never permitted foreign attorneys to practice law in China, and some Chinese legal scholars still consider such a practice as interference with the Chinese legal system.<sup>33</sup>

In China, any party in any action may employ an attorney for representation as it wishes. However, unlike in the United States, most attorneys are the "legal workers of the state,"<sup>34</sup> or the employees of the government. Law firms are public institutions under the leadership and supervision of state judicial administrative agencies.<sup>35</sup> Therefore, whether a Chinese attorney will be independent from the state in representing a client (Chinese or foreign) in an action against the state is unclear. Moreover, whether a party may sue its attorney for malpractice because of negligence or even intentional misconduct in representation appears to be an open question in China.

A foreign party may also litigate a civil action in a Chinese court even when the party has no residence in China. In such a case, however, the litigant must employ a Chinese attorney (or other Chinese persons) for representation. A power of attorney is usually signed and mailed to the Chinese representative. The power of attorney is ineffective unless it is either notarized by a notarial agency in the litigant's country and authorized by the Chinese embassy or consulate in that country, or evidenced through notarial procedure provided in a bilateral agreement, if any, between China and that country.<sup>36</sup>

### III. Mediation and Arbitration

#### A. MEDIATION

Mediation is deeply rooted in China, and has been the most favored dispute resolution technique among the Chinese for centuries. The traditional Chinese view of law was, to a great extent, influenced by Confucian teachings that a person and his or her society should be guided in observing his or her or society's place by *li* (virtue) rather than by *fa* (law). One Confucian saying in this vein is: "Monarch is monarch, subjects are subjects, father is father, son is son." In

32. CPL, *supra* note 1, art. 241.

33. CHAI, *supra* note 6, at 421-22.

34. Provisional Regulations on Lawyers of the People's Republic of China, art. 1 (adopted by the 15th Sess. of the Standing Committee of the 5th NPC on Aug. 26, 1980), *reprinted in China Laws for Foreign Business: Business Regulations* (CCH) ¶ 19-450(2).

35. *Id.* art. 13. There are five major law firms that are well known to foreign disputants, all of them located in Beijing: (1) the China Global Law Office, run by the China Council for the Promotion of International Trade; (2) the C & C Law Office, sponsored by the China International Trust and Investment Corporation; (3) the Great Wall Law Firm, established by the Ministry of Foreign Economic Relations and Trade; (4) the Hua Lian Economic Law Office, sponsored by the Overseas Chinese Association; and (5) the China Legal Affairs Center, sponsored by the Ministry of Justice. There are also, in most major Chinese cities, certain other law firms, including some private ones, that will represent foreign clients.

36. CPL, *supra* note 1, art. 242.

essence, this has been the state-supported philosophy of peace, harmony, and conciliation prevailing over law for more than two thousand years in China, and it illustrates clearly China's marked orientation toward mediation and compromise.<sup>37</sup>

Under article 6 of the 1982 Provisional Civil Procedure Law a court was required to mediate a dispute in the first instance. The CPL eliminates this requirement of mandatory mediation. Nevertheless, the CPL contains many provisions concerning mediation,<sup>38</sup> and even an appellate court is authorized to take on the mediation of a dispute.<sup>39</sup> However, the CPL makes it clear that mediation is the parties' choice and that the courts cannot force the parties to mediate their dispute against their will at any stage.<sup>40</sup>

Unlike a Chinese party, a foreign party may prefer not to mediate a dispute in China, and the CPL has no provision that requires mediation. Since a court cannot force a Chinese party to mediate a dispute, a court cannot force a foreign party to do so either.<sup>41</sup> If, however, a foreign party wants to resort to mediation, the provisions of the CPL concerning mediation, namely articles 9, 85-91, 155, will be applicable.<sup>42</sup>

## B. ARBITRATION

Arbitration may also be resorted to by a foreign party, where the agreement in question contains an arbitration clause, or the parties agree later to arbitrate the dispute.<sup>43</sup> However, arbitration appears to be available for a foreign party only in disputes arising from foreign economic matters involving trade, transportation and maritime issues,<sup>44</sup> since the CPL mentions only these types of disputes and since in China arbitration exists only for such matters.<sup>45</sup>

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37. Alice E. S. Tay, *The Struggle for Law in China*, 21 U. BRIT. COLUM. L. REV. 561, 561-62 (1987).

38. See CPL, *supra* note 1, arts. 9, 85-91, 155.

39. *Id.* art. 155.

40. *Id.* art. 9, see Wang, *supra* note 10, 2, col. 3.

41. See CPL, *supra* note 1, art. 5.

42. See *id.* art. 237.

43. *Id.* art. 257.

44. *Id.* Sometimes only "foreign economic and trade arbitration and maritime arbitration" are mentioned. However, "foreign economic and trade" include "transportation," and "maritime arbitration" means maritime disputes in foreign actions. See CHAI, *supra* note 6, at 456.

45. Ren Jianxin, *Mediation, Conciliation, Arbitration and Litigation in the People's Republic of China*, 15 INT'L BUS. LAW. 395, 396 (1987).

China's arbitration tribunals are the Foreign Economic and Trade Arbitration Commission (FETAC) and the Maritime Arbitration Commission (MAC), both established within the China Council for the Promotion of International Trade (CCPIT). *Id.* at 397.

Since their establishment, FETAC and MAC have handled and settled many cases. In 1987, FETAC and MAC were handling 102 arbitration cases and 30 arbitration cases respectively. *Id.* at 398. Favorable outcomes have not been limited to either the Chinese or the foreign parties. For instance, in one case a Chinese trading corporation lost in a dispute over the sale of a quantity of minerals to a foreign company, while in another a foreign shipowner lost a dispute over a foreign maritime vessel's shortlanding. *Id.*

By mutual agreement, however, the parties may also resort to an arbitral agency in the home country of the foreign party or an arbitral agency in a third country.<sup>46</sup> Furthermore, Chinese courts may recognize and enforce foreign arbitral awards upon request by the parties.<sup>47</sup>

Once a dispute has been arbitrated by a Chinese arbitral institution, the determination is final and binding, and the parties are not permitted to file a lawsuit concerning the same dispute in any Chinese court unless one party refuses to perform its duty under the arbitral award, in which case the other party may file an enforcement action in a court.<sup>48</sup>

However, an arbitral award will not be enforceable against a party who lost the arbitration if it can prove that: (1) the parties never reached an agreement for arbitration; (2) the losing party was never served with notice of the arbitration or was unable to represent its view during the arbitration, through no fault of its own; (3) there was a defect in the arbitration procedure; or (4) the dispute was not covered by the arbitration clause, or the arbitral institution had no authority to arbitrate the dispute.<sup>49</sup>

Moreover, a Chinese court will not enforce an arbitral award if it finds that the award is in violation of public policy.<sup>50</sup> In the case of an unenforceable arbitral award, the parties may rearbitrate their dispute under their existing agreement, or they may litigate the case in a Chinese court.<sup>51</sup>

#### IV. Jurisdiction

If the parties to a lawsuit in China fail to mediate or arbitrate their dispute, they have to resort to litigation. The issue of forum is, therefore, essential. In compliance with international law, the CPL now expressly permits the parties to a contract involving a foreign party, or to a dispute involving assets with foreign relationships, to include or observe a choice of forum clause in their contract.<sup>52</sup> The parties to such a contract may also have a choice of law clause in the contract.<sup>53</sup> However, with respect to litigation arising from Chinese-foreign equity

46. CPL, *supra* note 1, art. 257. See also Implementing Regulations for the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, art. 110 (promulgated by the State Council on Sept. 20, 1983).

47. CPL, *supra* note 1, art. 269. The principle of reciprocity applies. It appears that the prevailing party alone may request the enforcement of the awards.

48. *Id.* art. 259.

49. *Id.* art. 260.

50. *Id.*

51. *Id.* art. 261.

52. *Id.* art. 244.

53. General Principles of Civil Law of the People's Republic of China art. 145 [hereinafter Civil Code] (adopted Apr. 12, 1986, at the 4th Sess. of the 6th NPC, to take effect on Jan. 1, 1987, *reprinted in China Laws for Foreign Business: Business Regulation (CCH)* ¶ 19-150 (145); Foreign Economic Contract Law of the People's Republic of China art. 5 [hereinafter PECL] (adopted at the 10th Sess. of the Standing Comm. of the 6th NPC, promulgated on March 21, 1985 and effective as of July 1, 1985), *reprinted in China Laws for Foreign Business: Business Regulation (CCH)* ¶ 5-550 (5).

joint ventures, Chinese-foreign contractual joint ventures, and Chinese-foreign cooperative exploration and development of natural resources performed in China, Chinese courts have mandatory jurisdiction and Chinese laws are applicable.<sup>54</sup>

From article 244 of the CPL it appears that the parties may make their choice of forum agreement after a dispute has occurred. However, the forum chosen must be "substantially related"<sup>55</sup> to the dispute.<sup>56</sup> If the parties choose a Chinese court to exercise jurisdiction over the dispute, such a choice cannot be in violation of articles 18–20, and 34 of the CPL regarding jurisdiction of Chinese courts by level.<sup>57</sup> Moreover, the choice of forum clause must be in writing and is only available to the parties to a dispute arising from a contract or property involving foreign relationships.<sup>58</sup>

In the absence of a choice of forum by the parties in a foreign action, for contractual disputes and other property rights disputes, the following Chinese courts may have jurisdiction if the events occur in China: (1) the court where the contract was signed or performed; (2) the court where the objects of the litigation exist; (3) the court where the property of a foreign defendant can be garnished; or (4) the court where any torts occurred.<sup>59</sup> By implication, the Chinese court where the foreign defendant resides also has jurisdiction.<sup>60</sup> A Chinese court may also exercise jurisdiction over a foreign party where such party fails to object to the court's jurisdiction.<sup>61</sup>

Venue does not appear to be an issue in a legal proceeding in China and is not addressed under the CPL. Nevertheless, when a dispute as to jurisdiction arises between two courts, either one of which may be an appropriate forum, the disputing courts should first try to resolve the dispute through consultation.<sup>62</sup> If

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In the absence of such a choice of law by the parties, the law of the country which has the closest connection with the contract shall apply. Civil Code, *supra*; FECL, *supra*. As in the United States, an international treaty ratified by the Chinese Government prevails over Chinese civil law, provided that the treaty is not in violation of China's public interest. Civil Code, *supra* arts. 142, 150. Where activities are conducted within China, Chinese law applies. Civil Code, *supra* art. 8.

For particular choice of law provisions, see Civil Code, *supra* arts. 143, 144, 146-149 and Opinion (for trial use) of the Supreme People's Court on Questions Concerning the Implementation of the General Principles of Civil Law of the People's Republic of China, arts. 178-195 [hereinafter Opinion of the Supreme Court] (discussed and adopted by the Judicial Comm. of the Supreme Court of China on Jan. 26, 1988).

54. CPL, *supra* note 1, art. 246; FECL, *supra* note 53.

55. There is no standard for the phrase. However, it is obvious that the "substantially related" requirement is distinguishable from the American "minimum contact" theory of jurisdiction.

56. CPL, *supra* note 1, art. 244.

57. See *id.* and also the discussion in the following paragraphs concerning the various levels of Chinese courts.

58. *Id.* CHAI, *supra* note 6, at 112.

59. CPL, *supra* note 1, art. 243.

60. *Id.*

61. *Id.* art. 245.

62. *Id.* art. 37.



the consultation fails, a higher level court with authority over both of the disputants will have to be called upon to designate the forum.<sup>63</sup>

In China, unlike in the United States, no federal-state distinction exists, but rather only one court system. Consequently, there is no issue of subject matter jurisdiction in China. Each major Chinese city,<sup>64</sup> except Beijing, Shanghai, and Tianjing, which are municipal cities of the same level as a province,<sup>65</sup> has two levels of courts: a basic level court and an intermediate level court. The provincial high court supervises both of these lower level courts.<sup>66</sup> As in the United States, above the provincial high court, one centralized Supreme Court in Beijing supervises all the courts in China.

Generally, a foreign action should be filed in a basic level court.<sup>67</sup> An action may also be commenced in an intermediate court when it is considered "significant," when it might have great influence in the region of the intermediate court, or where the Supreme Court authorizes the intermediate court to exercise original jurisdiction.<sup>68</sup> Each provincial or municipal high court may also exercise original jurisdiction if a case may have great influence in its province or municipality.<sup>69</sup>

The Supreme Court has exercised original jurisdiction only once in modern Chinese history, for the trial of the so-called "Gang of Four and the Lin Biao Counter-Revolutionary Clique" in 1980. Nevertheless, it may do so again where a case is perceived to have great influence in the whole country, or where the Court believes conditions to be otherwise appropriate for it to exercise original jurisdiction.<sup>70</sup>

## V. Service

As with a U.S. trial court, a Chinese court may not exercise jurisdiction unless a statute authorizes it and the service requirements are satisfied.

Accordingly, where a foreign party resides in China, or a foreign party wants to serve notice on another party in China, service of process may be made personally upon the person, or, in the person's absence, upon an adult family member, upon the legal representative, or upon the chief of the enterprise.<sup>71</sup>

If a party has no residence in China, service may be made: (1) through the procedure of a bilateral or an international agreement to which China is a party; (2) through diplomatic channels; (3) to a party of Chinese nationality, through

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63. *Id.*

64. In China, a city administratively governs the surrounding counties.

65. China has twenty-seven provinces and autonomous regions (which are equivalent to the provinces).

66. Again, Beijing, Shanghai, and Tianjing, each being equivalent to a province, all have high courts.

67. CPL, *supra* note 1, art. 18.

68. *Id.* art. 19.

69. *Id.* art. 20.

70. *Id.* art. 21.

71. *Id.* art. 78; *see also id.* arts. 77, 79-84 (detailing the requirements for service of process).

China's embassy or consulate in the country where the party is present; (4) through a party's representative; (5) through the agency of a party in China; (6) through the mail, if the law of the country where a party resides permits such delivery (process will be presumed received six months after the day of dispatch,<sup>72</sup>); or (7) through public notice if it is impossible to effect service in any of the aforementioned methods.<sup>73</sup> Service by publication is considered to have been effected after six months from the date of publication.<sup>74</sup>

The time requirement for service may be fixed by law or by the courts.<sup>75</sup> Such requirements do not include travel time, and the time of service is the time of dispatch.<sup>76</sup>

#### A. STATUTE OF LIMITATIONS

The CPL is unclear on the appropriate statute of limitations. The Civil Code, however, states that, generally, the statute of limitations for bringing an action in a Chinese court seeking protection of a civil right is two years.<sup>77</sup> The period is specifically limited to one year for an action: (1) seeking damages for bodily injury; (2) based on a sale without notice of products of substandard quality; (3) based on delay or default in payment of rent; or (4) based on loss of or damage to property held in bailment.<sup>78</sup>

The statute of limitations starts to run from the time an infringement of rights or tortious act was known or should have been known.<sup>79</sup> For example, for bodily injury, the statute starts to run from the date the injury is suffered or discovered.<sup>80</sup>

The defense of the statute of limitations may be waived voluntarily by the defendant,<sup>81</sup> and the period of limitation may also be suspended due to force majeure that occurs during the last six months of the period of limitation.<sup>82</sup>

### VI. Pleading

A plaintiff must have "direct interests" in a lawsuit to litigate in a Chinese court.<sup>83</sup> In addition, the defendant must be identifiable (this impliedly rules out any fictitious or "Doe" defendants). Claims, requests, and facts must be specific and concrete (this seems closer to the requirements in a U.S. "code jurisdiction")

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72. *Id.* art. 247.

73. *Id.*

74. *Id.*

75. *Id.* art. 75.

76. *Id.*

77. Civil Code, *supra* note 53, art. 135.

78. *Id.* art. 136.

79. *Id.* art. 137.

80. Opinion of the Supreme Court, *supra* note 53, art. 168.

81. Civil Code, *supra* note 53, art. 138.

82. *Id.* art. 139.

83. CPL, *supra* note 1, art. 108. The CPL has no specific definition of the words "direct interests," and it is unclear what difference there may be between a "substantial interest" and a "direct interest."

than a "notice jurisdiction"). Furthermore, the court must have jurisdiction over the dispute.<sup>84</sup>

A complaint may be written, or oral if the plaintiff has difficulties in writing,<sup>85</sup> since a number of illiterate persons remain in China and a representative is not mandatorily required in an action by such a person. This ability under the CPL to make an oral complaint is thus quite helpful to people who are unable to write or hire an attorney. The complaint should state: (1) the parties—the plaintiff must have direct interests and the defendant must be identifiable;<sup>86</sup> (2) the relief requested, and the statement of facts and reasons; and (3) evidence and the sources of the evidence.<sup>87</sup> Provisional remedies, such as prejudgment and attachment of defendant's property, are also authorized.<sup>88</sup> The request is generally made before filing a complaint. However, requesting such preservation along with the complaint is possible.<sup>89</sup>

The court reviews the complaint, including investigation of the facts, and determines whether it will accept the case within seven days after receiving the complaint.<sup>90</sup> As in most civil law countries, the court serves a copy of the complaint upon the defendant within five days after accepting the case.<sup>91</sup> The defendant must file an answer to the complaint within fifteen days after receiving the copy.<sup>92</sup> Similarly, the Chinese court must serve a copy of the answer upon the plaintiff within five days after receiving the answer from the defendant.<sup>93</sup> Under the CPL, the plaintiff may abandon the lawsuit or amend the complaint, and the defendant may make counterclaims.<sup>94</sup> Apparently, however, a counterclaim should arise from the same transaction as the complaint.<sup>95</sup>

Whether a plaintiff may join unrelated claims against a single defendant in one action is unclear under the CPL. In practice, however, a plaintiff may do so.<sup>96</sup>

Class actions and the joinder of parties are permissible where the objectives of the litigation are the same or of the same type.<sup>97</sup> However, such actions must be authorized by the court after the consent of all the parties.<sup>98</sup>

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84. *Id.* art. 108.

85. *Id.* art. 109. When a plaintiff makes an oral complaint, the court will put it down in written form, which the court will serve upon the defendant. *See id.*

86. *Id.* art. 108.

87. *Id.* art. 110.

88. *Id.* arts. 92, 251.

89. For details concerning the preservation of property, see *id.* arts. 92-96, 251-256.

90. *Id.* art. 112. However, whether the Court's investigation of the facts is independent is not clear. *Id.*

91. *Id.* art. 113.

92. *Id.*

93. *Id.*

94. *Id.* art. 52.

95. CHAI, *supra* note 6, at 194-95.

96. *Id.* at 196-98.

97. CPL, *supra* note 1, art. 53. For example, a claim against *C* for damages to the property co-owned by *A* and *B* would be considered to be of the same objective, and an action by a lessor *X* against lessees, *Y* and *Z*, with different leases, would be considered the same type of objective. CHAI, *supra* note 6, at 161-63.

98. CPL, *supra* note 1, art. 53.

The litigation conduct of one party in a class action or of several joint parties may bind all other parties of the same side, who have the same rights and obligations, where the other parties have recognized the conduct.<sup>99</sup> A class action may be conducted by a representative party selected by the class, and the party's litigation conduct automatically binds all the parties of the class. This rule does not apply to situations involving: (1) changes of representative party; (2) abandonment of the lawsuit; (3) recognition of the other side's prayer for relief; or (4) settlement of the action.<sup>100</sup>

A third party may also move to intervene in a legal action pursuant to the CPL.<sup>101</sup> The CPL permits third party intervention as long as the third party has a legal interest in the pending action. A direct interest is not required.<sup>102</sup>

## VII. Discovery

Similar to a U.S. civil litigant, a party to a civil lawsuit in China has the duty to provide evidence to support its allegations or assertions.<sup>103</sup> However, no technical discovery rules such as deposition, interrogatory, production of document, and so forth exist as in the United States, and it does not appear that one party has the right to demand the other side produce evidence. Furthermore, who bears the burden of proof is not always clear. Moreover, even if the burden of proof is imposed on a party, this burden is not as strict as that in the United States. The court will conduct independent discovery of evidence where the litigant or its representative could not do so because of "objective reasons," or where the court believes that further evidence is necessary for the trial.<sup>104</sup>

However, no legal standard or guidance under the CPL descriptive of the "objective reasons" that might impede a litigant's provision of evidence, or for "necessary" evidence that might lead the court to conduct discovery, exists. The court has a duty to conduct independent discovery in any event, which is not limited by the scope of the facts and evidence presented by the parties.<sup>105</sup>

The Chinese court is authorized to conduct the discovery of evidence from individuals and enterprises.<sup>106</sup> The CPL, however, does not provide any specified method for conducting the discovery. This implies that a court may have discretion in discovering evidence, and no standard for review of the exercise of this discretion exists.<sup>107</sup> Moreover, due to the absence of any type of exclusion-

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99. *Id.*

100. *Id.* art. 54.

101. *Id.* art. 56.

102. CHAI, *supra* note 6, at 166-69.

103. CPL, *supra* note 1, art. 64.

104. *Id.*

105. CHAI, *supra* note 6, at 216; *see also* WU YUISU, EVIDENCE LAW at 91 (1983).

106. CPL, *supra* note 1, art. 65.

107. *Id.* art. 64 provides that a court should conduct discovery through "legally established procedures." However, it is not clear what these procedures are.

ary rule in China, a court may also use any evidence it has discovered so long as minimal authentication requirements are satisfied.<sup>108</sup>

### VIII. Trial

At trial, a case is usually before a collegiate bench consisting of judges and jurors, or judges only.<sup>109</sup> The membership of the bench, whether mixed or not, must be an odd number.<sup>110</sup> A trial court should decide a domestic action within six months after its filing.<sup>111</sup> Due to the more complex nature of a foreign-related action, the six-month requirement does not apply.<sup>112</sup> As discussed earlier, a court of any level may act as a trial court.

When a bench of judges or when a mixed bench is appropriate is unclear. Nor does the CPL provide for the percentages of judges and jurors when a mixed bench is deemed necessary. Where jurors participate in the bench, they are given the same rights and duties as the judges in trying the case,<sup>113</sup> and the decision should be reached by a majority vote.<sup>114</sup> In practice, the jurors are passive and usually keep quiet during the proceeding.<sup>115</sup> Thus, it is probably dubious that they play any meaningful role in reaching the decision.

The decision of the court must be recorded in writing and signed by the members of the bench, and any dissenting decisions should also be accurately recorded in writing.<sup>116</sup>

Members of the bench should be impartial and they are personally liable for their own intentional misconduct in trying the case.<sup>117</sup> Court officials, whether judges, jurors, clerks, interpreters, authenticators or investigators, must withdraw from involvement on the court in a case where: (1) they are a party to the lawsuit, or a close relative of a party or the party's representative; (2) they have an interest in the case; or (3) they have any other relationship to the parties to the lawsuit that may have an impact on their impartiality.<sup>118</sup> A party may make a request for such a withdrawal at the beginning of the trial, or before the decision of the court if the reasons for withdrawal were not apparent until that time.<sup>119</sup>

108. *Id.* arts. 68-74.

109. *Id.* art. 40. Like most civil law countries, China does not have a jury system. Usually the court selects the individual judges and jurors.

110. *Id.*

111. *Id.* art. 135.

112. *Id.* art. 250. The CPL does not even require a court to decide a case within a reasonable time where a foreign action is involved.

113. *Id.* art. 40.

114. *Id.* art. 43.

115. ZHAO, *supra* note 3, at 356-57.

116. CPL, *supra* note 1, art. 43.

117. *Id.* art. 44.

118. *Id.* art. 45.

119. *Id.* arts. 45, 46.

A civil trial should be conducted openly, except for cases involving state secrets, privacy issues, or where a closed trial is stipulated by law.<sup>120</sup> In a case of divorce or a case involving trade secrets, upon a request from one party, the trial will be closed and the public will be excluded.<sup>121</sup>

The order of proceeding in a civil trial begins first with the bench examining the evidence, which includes a statement by each party and a presentation of witnesses and evidence.<sup>122</sup> Each party is permitted to present new evidence (which has not been previously produced) at trial, and, upon the bench's permission, a party may question the witnesses or any evidence presented by the other party.<sup>123</sup>

The proceeding next involves a process of debate, in the order of: (1) the complaint by the plaintiff and its litigation representative; (2) the answer by the defendant and its litigation representative; (3) the complaint or answer of a third party, if any, and its litigation representative; (4) mutual debate; and (5) the closing argument of each party.<sup>124</sup> The bench makes its decision following the close of the debate.<sup>125</sup> Where a party fails to appear before the court without a good reason, the bench may hand down a default judgment.<sup>126</sup> Also, all court decisions are to be published.<sup>127</sup> However, this does not mean that all opinions underlying the decisions will be published.

The CPL does not clearly provide for the issue of the burden of proof, a key issue in American litigation. The involvement of the court in discovery makes this issue even more complicated, although it is commonly recognized as one of the distinctions between civil and common law systems.<sup>128</sup> In practice, the burden of proof also appears confusing, since no uniform standard for its application exists in the trial courts.<sup>129</sup>

## IX. Appeal

A party to a lawsuit that has been tried by a trial court may appeal to the court of the next level within fifteen days after receiving the trial court's decision.<sup>130</sup> As discussed above, the trial court might be a basic level court, or an intermediate court, or even a provincial high court. Therefore, unlike the clear line marking the trial courts and appellate courts in the United States, deciding which

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120. *Id.* art. 120.

121. *Id.*

122. *Id.* art. 124.

123. *Id.* art. 125.

124. *Id.* art. 127.

125. *Id.* art. 128.

126. *Id.* arts. 129-131.

127. *Id.* art. 134.

128. Wu, *supra* note 105, at 94.

129. ZHAO, *supra* note 3, at 363.

130. CPL, *supra* note 1, art. 147.

tribunal in China is the trial court and which is the appellate court is sometimes difficult. Nevertheless, a decision by an appellate court will be final, subject to certain limited rights of further appeal.<sup>131</sup>

Unlike a U.S. appellate court, an appellate court in China reviews both relevant facts and law.<sup>132</sup> This review is also conducted by a collegiate bench, but the panel consists only of judges.<sup>133</sup> The bench should make a decision within three months after the filing of the appeal.<sup>134</sup> However, the three-month requirement does not apply to a foreign-related action.<sup>135</sup>

A party who has no residence in China may also appeal a trial court's decision to the next level court within thirty days after receiving a copy of the trial decision, instead of fifteen days as required under article 147.<sup>136</sup> This thirty-day period may be extended by the court where the appellant can provide reasons why he or she could not make the appeal within thirty days.<sup>137</sup>

A judgment of a Chinese court and a judgment of a foreign court may be enforced reciprocally under the judicial assistance doctrine, if a bilateral or international agreement exists to which China is a signatory.<sup>138</sup>

## X. Supervision

A proceeding, either in a trial court or an appellate court, may be supervised in a number of ways. The president of the court, at whatever level,<sup>139</sup> should submit the decision of the court, though already legally effective, to its judicial committee<sup>140</sup> for review if the president of the court finds the decision was in error.<sup>141</sup> Also without a request from the parties, a higher level court may supervise and review an effective decision of a lower level court of its region, and the Supreme Court may review the decisions of all other courts, provided the reviewing court truthfully believes that the decision of the lower level court was in error.<sup>142</sup>

A party may also request a new trial after a decision becomes effective.<sup>143</sup> A retrial is permitted where: (1) new evidence appears sufficient to overrule the

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131. *Id.* art. 158; *see also* Organic Law of the People's Court of the People's Republic of China, art. 12 [hereinafter Court Law], (adopted on July 1, 1979, at the 2nd Sess. of the 5th NPC, amended on Sept. 2, 1983, at the 2nd Sess. of the Standing Comm. of the 6th NPC).

132. CPL, *supra* note 1, art. 151.

133. *Id.* art. 152.

134. *Id.* art. 159.

135. *Id.* art. 250.

136. *Id.* art. 249.

137. *Id.*

138. *Id.* arts. 262-269.

139. *See* Court Law, *supra* note 131, arts. 19, 24, 27 and 31.

140. A judicial committee in each court is responsible for the most important and complicated cases. *See id.* art. 11.

141. CPL, *supra* note 1, art. 177.

142. *Id.*; *see also* CHAI, *supra* note 6, at 368-69.

143. *Id.* art. 178.

original decision; or (2) the evidence for the original decision was insufficient; or (3) the application of law for the original decision was erroneous; or (4) the court was in error procedurally, and such error was not harmless; or (5) a member of the bench committed intentional misconduct that affected his or her impartiality.<sup>144</sup> However, no retrial for an effective dissolution of marriage decision is permitted.<sup>145</sup>

The request for retrial must be made within two years after the original decision became effective.<sup>146</sup> If the request is granted, the retrial will be conducted by a new collegiate bench.<sup>147</sup>

The CPL further provides that an effective decision is subject to the supervision of a higher level procurator.<sup>148</sup> The procurators are state organs for legal supervision.<sup>149</sup> A procurator may protest an effective decision of a lower level court where it finds, or is referred to by a lower level procurator, any of the following: (1) the evidence for the original decision was insufficient; (2) the application of law for the original decision was erroneous; (3) the court was in error procedurally, which error was not harmless; or (4) a member of the bench committed intentional misconduct.<sup>150</sup> Upon the protest of a higher procurator, a court should retry the case,<sup>151</sup> and the court should notify the procurator to send the latter's representative to attend the new trial.<sup>152</sup>

## XI. Observations with Respect to the CPL

The CPL represents a comprehensive improvement over the 1982 Provisional Civil Procedure Law, which was also a milestone in modern Chinese legal history. Significantly, the drafters of the CPL appear to have taken heed of many suggestions and constructive criticisms concerning the 1982 law in crafting the CPL.<sup>153</sup> However, no law is ever perfect, and a good law can probably remain good only if conditions are static. At this juncture, it seems useful to dwell on several points concerning the CPL with which U.S. practitioners might have difficulty.

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144. *Id.* art. 179.

145. *Id.* art. 181.

146. *Id.* art. 182.

147. *Id.* art. 184.

148. *Id.* art. 185. The function of a procurator in a criminal action is like that of the public prosecutor in the United States.

149. See XIANFA [Constitution] art. 129 (1982). There is a procurator for each court of the same level. For detailed information, see The People's Procurators Organization Law of the People's Republic of China (adopted on July 1, 1979, at the 2nd Sess. of the 5th NPC, and amended on Sept. 2, 1983, at the 2nd Sess. of the Standing Comm. of the 6th NPC.)

150. CPL, *supra* note 1, art. 185.

151. *Id.* art. 186.

152. *Id.* art. 188.

153. See ZHAO, *supra* note 3, at 355-64 (many of this author's views are reflected in the CPL, including the recommendations that there be no mandatory mediation and that there be supervision by the procurators).



First, the CPL requires a foreign party to a dispute to hire a Chinese attorney if an attorney is necessary. At first blush, nothing seems wrong with this requirement, particularly since it appears to be protective of the foreign party's interests. However, a Chinese attorney is normally a state officer paid by the state, and thus, an instant conflict of interest exists where the state is a party to the dispute. Moreover, most Chinese enterprises are state-owned and state-operated. Thus, it appears doubtful that Chinese attorneys can ever be zealous in their representation of nonstate parties in actions against state-owned parties—although lawsuits between state-owned enterprises are common.

Second, the Communist Party's role in a legal action is unclear. The CPL states that a court enjoys judicial independence, not subject to any interference from "executives, social organizations and individuals."<sup>154</sup> However, the CPL is silent as to whether the Party may direct a court in performing its judicial duty. Clearly, the Party is the ruling party in China, and all the people in China are expressly under its leadership.<sup>155</sup> The CPL's silence is interesting in this regard. At one time the question of which would prevail was publicly debated in China—the Party's policy or the written law—but no solution was ever reached.<sup>156</sup>

Third, in a number of instances the CPL is deficient in key standards and definitions. For example, the CPL has no specific standard for the exercise of trial court jurisdiction. Apparently a court of any level may have jurisdiction because the CPL has no definition or guidance on which cases are of significant influence and which are not.<sup>157</sup> Moreover, since Chinese high courts are generally in the same cities as Chinese intermediate courts, and a case of significant influence in the city might also have significant influence in the province or municipality, confusion may arise as to which court should hear an important case.

Under the CPL, a collegial bench, consisting of either judges and jurors or consisting of judges alone, conducts the trial. Yet the law has no standard for determining when a bench of judges and jurors, or judges only, is needed. Since the jurors are typically passive in the trial proceeding, a trial (in effect) by a single judge or by a panel of judges may make a substantial difference.

The CPL contains no standard for a valid complaint. The CPL simply requires that a complaint should contain: (1) identification of the parties; (2) the prayer and claim, including the facts and reasons; and (3) evidence and the sources of the evidence.<sup>158</sup> The plaintiff must have a "direct interest" in the lawsuit. However, the CPL does not provide a definition of "direct interest." Further-

154. CPL, *supra* note 1, art. 6.

155. XIANFA [Constitution] preamble (1982).

156. *Cf.* CHAI, *supra* note 6, at 72 (stating that a court must submit to the leadership of the Party in significant or complicated cases); *with* LIU SHENGPING ET AL., INTRODUCTION TO JURISPRUDENCE 87-92 (1983) (stating that the Party's policy cannot replace the law).

157. *See* CPL, *supra* note 1, arts. 18-20.

158. *Id.* art. 110.

more, if a defendant is unidentifiable, the plaintiff cannot file a lawsuit against other defendants whose alleged misconduct is dependent on that of the unidentifiable defendant.<sup>159</sup> This would appear likely to prevent many valid claims from being filed simply because certain defendants are not identifiable at the time of filing of the complaint.

A plaintiff may amend a complaint,<sup>160</sup> naming new defendants and raising new claims during the trial. A party is also entitled to have a new trial where new evidence is sufficient to overrule the original decision.<sup>161</sup> A new defendant might constitute such new evidence. The short-term result, however, would be to delay the trial.

No standard for the admission of evidence exists, and since the courts also have a duty to discover the evidence, theoretically, it is possible that any claim can ultimately be validated. Litigants may take advantage of this possibility to prompt a flood of lawsuits, with the possibility of many being frivolous in nature.

Chinese law has no standard for the burden of proof, either. Certainly each party should be held to prove what it has alleged. However, the question remains: Who should prove what first, and how?

The answers to such crucial questions are not clear from the CPL. Although it may be desirable for a court to conduct discovery of evidence, there is the possibility that the court's duty of discovery will relieve a party of its burden of proof. A court has no standard for "objective reasons," and a court is obligated to present the evidence it discovers even where a party could decide as a matter of strategy not to present it.

The CPL's allowance for open trials is a significant legal development in China. The exception to this rule, where state secrets are involved, is not subject to any standard, however. Further, in China the meaning of "state secrets" is likely to be broadly interpreted. Due to lack of a standard definition of the term, the courts have wide discretion to conduct a trial behind closed doors, despite the general open trial rule of the CPL.

Fourth, while class actions and the joinder of parties under the CPL are desirable, such activities are all permissible without restriction. Although necessary parties must join the action upon the court's notice,<sup>162</sup> no mechanisms for compulsory joinder of either claim or parties are contained in the CPL. This may allow for the filing of multiple suits and the crowding of court dockets that have already started to swell.

Fifth, although a court's decision, including any dissenting decision, is required to be recorded in writing, the CPL does not require that the opinions be

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159. *See id.* art. 108.

160. *Id.* art. 52.

161. *Id.* art. 179.

162. *Id.* art. 119.

published. Absent any published opinion, open trial and recorded decisions alone cannot tell the public and potential litigants how and why a particular trial outcome is reached.

Sixth, the CPL permits only one appeal to a higher court. Most cases start from a basic level court or an intermediate court. This means that an appeal is more likely to come to, and end up with, either an intermediate court or the high court of the same region. Since the court's opinion is generally unpublished, and since there exists in China the problem of conducting business by relationship (*guanxi*)—the implication is to go through “back doors”—even though officially condemned, injustice may occur from an appellate court's failure to review a case thoroughly because of the impact of local relationships. Therefore, permitting second-level, impartial appeals to the Supreme Court in certain cases would be desirable.

Finally, Chinese civil procedure law does not recognize the doctrine of res judicata or collateral estoppel, and the CPL permits a new trial under many circumstances. This more than likely will produce more cases than efficiency and practicality would allow.

Of course permitting a party to claim its substantive legal rights at any time, and to enjoy the protection of the supervisory procedures that safeguard justice is desirable. But the desirability of having such rights enforced must allow for the civil legal system not to become swamped and unmanageable. Hence, the CPL should provide for some workable balance of the two elements of procedure and substance.

## **XII. Conclusion**

To finally have its own modern civil procedure law is a great accomplishment in China where *li* traditionally prevailed over *fa* and “law” was considered to refer solely to criminal law. Indeed, according to the Chinese official assertion, since the promulgation of the CPL, China's civil law system is now basically in place.<sup>163</sup> With the detailed guidance of the various civil laws, their implementing regulations and numerous local regulations, a foreign individual or enterprise appears to have readily at hand better guidance on how to act and do business in China. With the passage of the CPL, a foreign party now has the framework to protect or defend itself in a legal action in China. This is significant both in terms of its impact on foreigners and on the economic reform in China and the accompanying open-door policy. It demonstrates that China is daily growing more and more law-oriented, moving inexorably away from its traditional void in civil procedural law for dispute resolution and into the modern legal world.

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163. See *supra* note 2.

