



CHINA

INTERNATIONAL LAW DIGEST

Continent – Asia | **Region** – Eastern Asia | **Population** – 1,359,940,000
Size – 9,706,961 km² | **Language** - Chinese | **Monetary Unit** - Chinese Yuan
Geography – Mountains, high plateaus, desert in west, plains and hills in east
Religion – officially atheist but, Taoism and Buddhism are the largest religions in China

A. LIMITATION PERIODS IN GENERAL

Generally speaking, the limitation period is two years (including property damage claims) and it starts from when the claimant knew or, in the circumstances, ought to have known of the facts giving rise to its claim (Article 135 and 137 of the (amended) Civil Procedure Law of the People's Republic of China, which came into force in January 2013).

There are several exceptions to the two-year limitation period, including:

- **Three months** for claims against a government organization.
- **One year** for disputes relating to the:
 - compensation for personal injury;
 - sale of substandard goods without proper notice to that effect;
 - delay or refusal to pay rent; and
 - disputes in relation to the loss of a consignment or damage to property left in the care of others.
- **Three years** for certain environmental damage/pollution disputes (save that for ship oil pollution in no case shall the limitation period exceed six years from the date of occurrence).
- **Four years** for disputes relating to technology import and extract contracts and international sales of goods.

The limitation period can be interrupted by the claimant demanding performance of the obligation or filing a lawsuit, or by the alleged default party's agreement to perform the obligation.

B. FUNDING ACTIONS IN CHINA

Whilst there are no rules on funding, there are – in the main - four legal fee structures (or a combination of them) for commercial disputes:

- Flat rate: a single negotiated fixed fee for the services provided.
- Proportional rate: fees proportional to the disputed amount.
- Hourly rate: fees on the basis of time spent on the matter.
- Contingent fee: a success fee, commonly used in commercial disputes.

C. PRIVILEGE

There is no privilege principle or equivalent concept, as such, under Chinese law.

It appears that there is some protection of the attorney-client relationship because The People's Republic of China (PRC) Lawyers' Law provides for client confidentiality (a lawyer is under a duty to keep any information of his client or other relevant person confidential, if they are unwilling to disclose it). In practice, however, this is rarely tested and it is obscure as to whether a Chinese lawyer can refuse a court's request for disclosure of documents.

The “*without prejudice*” principle is not always recognized and, in practice, the court looks at the surrounding circumstances and decides on the admissibility of evidence labeled under this nomenclature (with various results).

Evidence involving state secrets, commercial secrets or private matters of individuals must be kept confidential (with possible criminal liability for failures). If evidence of this kind must be presented in court, it cannot be discussed in a public court hearing.

D. BRINGING COURT PROCEEDINGS

(i) Pre-Action Conduct

The court does not impose any rules in relation to pre-action conduct save that:

- the court will not accept a case where the parties have previously agreed to submit to arbitration; and
- labor issues must go through a labor tribunal procedure, before being litigated in court.

(ii) Are Court Proceedings Public or Confidential?

Court hearings are usually held in public, unless the case involves state secrets or individual privacy (or if the court's judicial committee decides, of its own discretion, for a hearing to be held in private).

If the case involves commercial/trade secrets, and a party requests it, the court can decide to hold the hearings in private.

(iii) Starting a claim

The claimant starts proceedings by filing a writ. The court decides within seven days whether or not to accept the case. There are specific rules governing whether the case should be accepted:

- The claimant must have direct interest in the case.
- The defendant must be specified.
- There must be specific claims, facts and causes for the case.
- The case must be within the scope of civil lawsuits to be accepted by the court and subject to the jurisdiction of the court to which the lawsuit is filed.

If the court decides not to accept the case, it issues a ruling of non-acceptance (which can be appealed within 10 days).

If the case is accepted, the court serves a copy of writ on the defendant within five days.

Service of process is often complicated. Whilst personal process on a defendant based in China can be difficult (it cannot normally be effected by delivering the summons), service for a defendant overseas has to be officially received and acknowledged (enabling the procedure to be delayed).

Although an amended Civil Procedure Law of the People's Republic of China came into force (on 1 January 2013) under which Articles 87 and 267 provided for courts to permit service of documents by facsimile, email or other measures that receipt of documents can be confirmed, this still requires the served party's consent.

The defendant must challenge jurisdiction or file a defense within 15 days from receipt of the writ, or within 30 days if the defendant has no domicile in China. A defendant can request the court to grant an extension of the filing period.

(iv) Next steps

If there is a third party required to participate, the court will notify the third party to join the proceeding.

Once a judicial panel has been set up, the parties must be notified of the identity of the judge(s) within three days from when it is established.

(vi) The Hearing

The hearing consists of two main stages (which are often broken down into further stages):

- **Court investigation.** The parties present their positions, adduce evidence and witnesses give their testimony. All the evidence, including documentary evidence, physical evidence, witness testimony and expert opinions, is cross-examined.
- **Court debate.** Parties can make further allegations and debate the disputed issues. However, at this stage, the parties do not raise arguments contrary to their opinions in the court investigation.

Witnesses are under a duty to testify in court hearings. At the exchange of evidence between the parties organized by the court or during court investigation, a witness gives oral evidence. This is deemed as testimony made in a hearing. The parties are entitled to cross-examine witnesses of fact and testimonies cannot be admitted as evidence without witness being cross-examined (or a witness statement). In practice, documentary evidence is considered more reliable than oral evidence, and many witnesses choose to submit witness statements instead of testifying in court.

Under the amended Civil Procedure Law, Article 156 provides that written judgments and rulings, which have come into effect, can be referred to (unless the case involved state secrets, trade secrets or personal privacy).

Before making a judgment, the court may conduct mediation by inviting the parties to settle. If a settlement is reached at that stage, the court can still issue a (conciliation) judgment, which is enforceable as an ordinary judgment.

E. THE ROLE OF EXPERTS

(i) Appointment procedure

Experts are usually appointed by a party (occasionally, by both of them). The consent of the court is required for their evidence.

(ii) Their role

An expert witness must provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his/her expertise.

Whilst the law does not permit an exact right to reply to an expert's report, experts can be cross-examined (by both the parties and judges) and opinions can be expressed on the evidence. Further, with the court's approval a party can appoint its own expert to provide his/her expert evidence and challenge the other party's expert evidence.

(iii) Expert's fees

The party appointing the expert pays the expert's fees .

F. INTERIM REMEDIES

(i) Summary or Default Judgment

A party can apply to the court to dismiss the case, before a full trial, if the claim case has not met the following required legal elements:

- The claimant does not have a direct interest in the case;
- The defendant is not clearly identifiable or the appropriate defendant;
- The facts and causes are unclear, there is no specific claim for the case; or
- The case is not within the scope of civil claims subject to the court's jurisdiction.

If the court finds that the case has not met one of the above conditions, it will issue a ruling of dismissal, however, the ruling can be appealed.

In respect of the second ground, having a clearly identifiable defendant, many foreign claimants struggle to meet this requirement (and cases have been dismissed) as a Chinese defendant is often (improperly) identified by a translated name used on a contract.

(ii) Security for Costs

A defendant cannot apply for an order for the claimant to provide security for its costs: the U.S. rule that each party is responsible for paying its own attorney's fees is followed by default, unless specific authority granted by statute or contract permits otherwise.

G. DISCLOSURE

There are no specific rules on pre-trial disclosure under Chinese law although it is the duty of a party to an action to provide evidence in support of his allegations.

Accordingly, the gathering of evidence can be difficult and the responsibility lies with each party. Whilst the parties are not permitted to withhold evidence there is no clear sanction (albeit the court can find against a party who fails to present evidence, if it is proved that the party holds the evidence; or withholds it without justification).

The court can collect and examine evidence if:

- the court finds it necessary; such as the case involves facts that may infringe national/state interest or social public interest; or
- a party requests the court's assistance because the evidence is kept by the authorities (or involves state secrets, commercial secrets or individual privacy).

Although the court's assistance can be sought where a the party is unable to obtain the evidence it needs to prove the case, it is not usual and the court will often refuse to assist.

H. COSTS

(i) Loser pays?

Whilst court fees and party expenses can be recovered from the unsuccessful party (subject to the court deciding whether the amounts are reasonable) (Article 29 of the Rules for Payment of Litigation Fees), the courts rarely award attorney's fees as part of a judgment and these fees are borne by the parties on their own account (one justification for this is because it should ensure costs are lower thereby bringing greater convenience and accessibility for people to litigate and thus making the judiciary closer to the people).

That said, lawyers' fees can be recovered under certain specific statutory provisions or if they are provided for in an agreement between the parties. However, costs are granted at the discretion of the court and the court will make an assessment of the reasonableness of any costs and expenses.

(ii) Interest?

Although interest can be awarded on costs, it is rare.

This digest is not intended to be a definitive guide and is for general information only. It is not intended to contain definitive legal advice and should not be relied on in place of legal advice appropriate to your circumstances. If legal advice in relation to any particular matter that you are handling is required, please contact Robert Kay (rkay@cozen.com) or your usual adviser at Cozen O'Connor.