

CIVIL JUSTICE IN CHINA

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This article presents a basic and comprehensive introduction of Chinese civil justice. It gives a complete picture of Chinese civil justice, including the brief history, the court and judge system, the outline of the procedure, and the internationalization. Through the introduction, one can find that Chinese civil procedure law is a mixture of Soviet procedural concept, Chinese local culture, and western procedural concept and rules. It is still a developing procedure and experiences a process from resisting western procedural concept to gradually accepting and learning from it. It used to be a supra-inquisitorial trial model with overwhelming focus on conciliation, but is now transforming to a party disposition trial model with preference to conciliation under the premise of voluntariness. With the globalization of economy, the international cooperation of China, especially with the BRICS countries, will also become more and more important.

Keywords: China law; civil procedure; court system; civil justice; conciliation.

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Introduction

This article aims at making a basic introduction of Chinese civil justice under the comparative view, giving special emphasis to the unique features of Chinese procedural system under the influence of Chinese traditional culture, the socialist ideology and the procedural system of the Soviet Union the Western Countries. Generally, the development of Chinese civil justice of New China (after 1969) can be divided into 4 stages: (1) 1949–1982 when there wasn't a written Civil Procedure Law; (2) 1982–1991 while the "Test" Civil Procedure Law operated; (3) 1991–2012 as the first formal Civil Procedure Law of China operated, together with general judicial reforms aimed to adjust the roles of judges vs. parties; and (4) post 2012 as the enactment of the 2012 amendment of the Civil Procedure Law and the 2015 "Interpretation" of the law issued by the Supreme Court, together with general judicial system reforms aimed to adjust the roles of judges vs. administrative leaders and court staff.

1. Brief History

When the People's Republic of China ("PRC") was founded on Oct. 1, 1949, in order to draw a clear demarcation between the new socialist country and the old capitalist

society, it overthrew everything that belonged to the Kuomintang's government, including the republican legal system which oriented from the civil law system but had not fully integrated into the general legal practice or merged into the Chinese legal culture.¹ Before 1954 when the Constitution and the Organic Law of Courts were enacted, the judicial system of China had long been used as the tool to fight against the new government's enemies, including the political ones and the criminal ones. For civil disputes in which no "enemies" stood out, they would most be resolved by the neighborhood community (which is an autonomic organization led by the Chinese Communist Party), the respectable individuals nearby or the party cadres in the neighborhood. Even for those civil cases that made their way into the courts, which comprised mainly of the property disputes arising out of the Agrarian Reform (土地改革), the divorce disputes and the personal injury disputes, they would also be conciliated rather than adjudicated by the judge.² Formal trials were quite rare and adjudication was generally neglected by the judges as a procedural option.³ The "no civil trial" situation became even worse during the Cultural Revolution, when legal nihilism prevailed.

The absolute superiority of conciliation for civil disputes lasted until 1982, when the Civil Procedure Law of People Republic of China (for Trial Implementation) ("1982 CPL") was finally enacted. Although the Law still emphasized the conciliation, it required the judge to enter judgment in time if parties failed to reach consensus in mediation (Art. 6). Due to the fact that the legislation of the 1982 CPL referred much to the Criminal Procedure Law (which was enacted in 1979), the judge of the civil proceeding held as much authority as the criminal judge and played an extraordinary active role in the adjudication process, leaving extremely limited room for party disposition. This led to the supra-inquisitorial trial mode of Chinese civil procedure in which the court took control of everything, including initiatively searching for evidence with no limitations and making investigation beyond the parties' claim.

In 1991, a new Civil Procedure Law was released as the first and so far the only civil procedure code of China ("1991 CPL"), replacing the 1982 code. The new code largely strengthened the protection of the parties' litigation rights and the limitation of the court's authority. It explicitly provided the principle of party disposition (Art. 13), vested parties the right to appeal against the court's decision on unreasonably shutting out lawsuits and abusing jurisdiction (Art. 140), and limiting the appellate court's

¹ Yulin Fu & Zhixun Cao, *The Position of Judges in Civil Litigation in Transitional China-Judicial Mediation and Case Management in Towards a Chinese Civil Code* (L. Chen & C.H. van Rhee, eds., Leiden; Boston: Martinus Nijhoff Publishers, 2012).

² Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 *California Law Review* 1201-1202 (1966).

³ Judicial Review, *The Trial of Civil Cases Should be Emphasized*, in 6 *Reference Materials on the Courts' Litigation Procedure in the PRC* (Renmin University Trial Section, ed., Beijing: People University Internal Reference, 1957).

examination authority within the parties' appellate claim (Art. 151). The 1991 CPL also weakened the priority of conciliation by stressing the voluntariness and legitimacy of the conciliation (Art. 9). Along with the enactment of the 1991 CPL was the judicial reform initiated by the Supreme People's Court ("SPC") and widely participated by the scholars. It started from the transition of the trial mode, introducing western procedural concepts into Chinese civil justice, such as the party presentation, the party disposition, the adversary system and the burden of proof. The reform experience was concluded in judicial interpretations⁴ such as the *Several Provisions of the SPC on the Issues Concerning the Civil and Economic Trial mode Reform* issued in 1998 and the *Some Provisions of the SPC on Evidence in Civil Procedures* issued in 2001.

Entering the 21st Century, with the massive explosion of lawsuits and petitions concerning with lawsuits, the judicial reform turned back to the conciliation as an important means for the courts to dispose the litigation cases. During the first decade, the SPC issued a series of judicial interpretations to broaden the application of the conciliation. The *Some Provisions of the SPC on Trying Civil Cases Involving the People's Conciliation Agreements* promulgated in 2002 emphasized the evidential effect of the conciliation agreement presided by the People's Conciliation Committees. The *Several Provisions of the SPC on the Application of Simplified Procedures in the Trial of Civil Cases* promulgated in 2003 created the prerequisite mediation for certain categories of cases (Art. 14). The *Provisions of the SPC about Several Issues Concerning the Civil Mediation Work of the People's Court* issued in 2004 regulated some methods to further intensify the conciliation. Moreover, in accordance with the supreme policy of the CCP to build up a harmonious society under the *CCP Decision Concerning Major Questions in the Building of a Socialist Harmonious Society* passed in 2006, in 2007 the SPC announced the *Some Opinions of the SPC about Providing Judicial Protection for the Construction of a Socialist Harmonious Society* and the *Several Opinions of the SPC on Further Displaying the Positive Roles of Litigation Mediation in the Building of a Socialist Harmonious Society* to stress the importance of conciliation.

Meanwhile, the legislators were concerned with the disordered application of the adjudication supervision procedure (AKA the Chinese reopening procedure) and the high failure rate of enforcement in judicial practice, and amended the 1991 CPL in 2007. The amendment further specified the statutory triggers of trial reopening (Art. 179) and extended the time limit of the application of the trial reopening under

⁴ In China, the Supreme People's Court has the right to make judicial interpretation for the law. Its effect is commonly binding to the courts of all country. It can be divided into the normative interpretation and the individual interpretation. The normative interpretations are abstract, general normative legal instruments stipulated in the name of "Interpretation on XXX," "Provision on XXX," or "Opinion on XXX." The individual interpretations, on the other hand, are short legal opinions made under the request of lower courts to guide the trial for individual cases. Such interpretations are called "Reply." The normative judicial interpretation is usually made to unifying judicial practice and specifying, clarifying or supplementing the flawed statutes which is often questioned as exceeding the judicial function of the court and replacing the function of the legislature.

special circumstances (Art. 184). For enforcement, the 2007 amendment added a series of regulations to ensure its realization, such as the immediate enforcement without noticing the debtor in advance (Art. 216, para. 2), the debtor's duty of property report (Art. 217), and the enforcement objection suit (Art. 202). Keeping up with the amendment, the SPC correspondingly issued the *Interpretation of the SPC on Several Issues Concerning the Application of the Adjudication Supervision Procedure of the Civil Procedure Law* and the *Interpretation of the SPC of Several Issues concerning the Enforcement Procedures in the Application of the Civil Procedure Law* in 2008, guiding the judicial practice of adjudication supervision and enforcement.

The 2007 amendment, however, was insufficient to satisfy the demands of the practice since the 1991 CPL had fallen far behind with the development of China. The request for a comprehensive amendment became stronger and stronger and was finally realized on 31st August, 2012, when the Standing Committee of the National People's Congress (National People's Congress: "NPC"; Standing Committee of NPC: "NPCSC") passed the new amendment for the 1991 CPL. The 2012 amendment has so far been the latest and most comprehensive amendment for the 1991 CPL. It absorbed some of the regulations provided in the judicial interpretations as the regulations of judicial reforms, such as the parties' optional right to choose the simplified procedure by consent under the *Several Provisions of the SPC on the Application of Simplified Procedures in the Trial of Civil Cases*. And the introduction of the public interest litigation and the small claim litigation make the proceedings more diverse. The main tendency is still to restrict the judges' discretion, increase procedural transparency and maintain the principle of party presentation and disposition.

The 2012 CPL has 4 parts, 27 chapters and 284 articles. Except for the supplement of new chapters, the main structure of the current CPL remains the same with the 1982 CPL. The first part is the General Principle part, which contain 11 chapters: Purposes, Scope of Regulation and Basic Principles; Jurisdiction; Trial Organization; Recusal of Adjudicating Personnel; Litigation Participants; Evidence; Time Periods and Service; Conciliation; Perpetuation and Advance Enforcement; Compulsory Measures against Obstruction of Civil Actions; Litigation Expenses. The second part is the Trial Procedure part, including: Ordinary Procedure of First Instance; Simplified Procedure; Procedure of Second Instance; Special Procedure; Procedure of Adjudication Supervision; Procedure for Hastening Debt Recovery; Procedure of Public Summon. The third part is the Enforcement Procedure, including: General Provisions; Application and Referral of Enforcement; Enforcement Measures; Suspension and Termination of Enforcement. The last part is the Special Provisions of the Civil Procedures Involving Foreign Elements, including: General Principles; Jurisdiction; Service and Time Periods; Arbitration; Judicial Assistance.

Closely following the comprehensive amendment of the CPL, the SPC issued the *Interpretation of the SPC on the Application of the Civil Procedure Law* ("ICPL") to guide the application of the revised code. This interpretation replaces the former

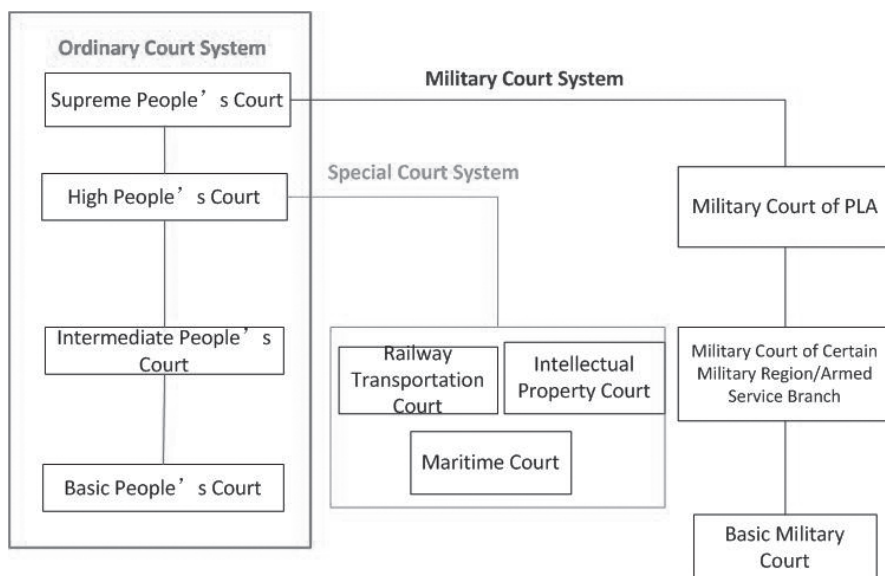
interpretation for the 1991 CPL issued in 1992 (*The Opinions on Several Issues concerning the Application of the Civil Procedure Law*) as the new solely judicial interpretation for the whole CPL rather than partial provisions. It absorbs some of the regulations from the scattered judicial interpretations issued before, revises some other regulations which is no longer consistent with the amended code, and provides more detailed regulations for new types of litigations introduced by the 2012 amendment. A notable thing is that, the ICPL only has the effect to repeal *The Opinions on Several Issues concerning the Application of the Civil Procedure Law*. For other judicial interpretations issued before, only the articles that have discrepancies with this interpretation shall be repealed.

2. Courts and Judges

The Constitution of PRC was passed in 1982 and latest amended in 2004. The provisions about the court system include: the provision of announcing the people's courts as the judicial organs of the state (Art. 123), that of establishing the basic structure of court system (Art. 124), that of requiring public trial (Art. 125), and that of announcing judicial independence (Art. 126). Under the provisions of the SPC, it functions as the highest judicial organ and supervises the adjudication work of all lower courts (Art. 127). It is responsible to the NPC and NPCSC, while local people's courts at various levels are responsible to the corresponding people's congress and its standing committee which created them (Art. 128). The tenure of the President of the SPC is the same as that of the NPC members. The President shall serve no more than two consecutive tenures (Art. 124). The election and the removal of the President of the SPC should be made by the NPC (Art. 62), while the appointment or removal of the vice president, judicial committee and trying judges of the SPC, and the presidents of the military courts should be made, at the recommendation of the President of the SPC, by the NPCSC (Art. 67).

More detailed regulations on courts and judges in China are mostly provided in the *Organic Law of the People's Courts* passed in 1972 and latest amended in 2006, and the *Judges Law of the People's Republic of China* passed in 1995 and latest amended in 2001. According to the Organic Law, Chinese court system consists of ordinary courts, special courts and military courts (as shown in the figure below).⁵ As the core structure of the court system, ordinary courts compose of four levels: the basic people's courts, the intermediate people's courts, the high people's courts and the Supreme People's Court. They are respectively placed in county-level administrative regions, municipal administrative regions, provincial administrative regions and the capital Beijing. Each level of courts has jurisdiction of criminal cases, civil cases and administrative cases as the court of first instance.

⁵ The figure see Yulin Fu, *Functions of the Supreme People's Court in Transition*, 3(2) Peking University Law Journal 301 (2015).



The special courts in China are intermediate courts specialized for certain types of case. Their establishment is generally authorized by the Supreme People's Court in accordance with civil procedure law. So far the special courts are maritime courts, intellectual property courts and railway transportation courts. These special courts are not established in every administrative region, instead, they have trans-regional jurisdiction over cases. Their decisions shall be appealed to the high court in the province where the special court is located. As an ordinary court, the high court usually assigns cases from special courts to adjudication divisions which are responsible for civil cases.

The military courts are separated from ordinary courts and have their own court system. The military court system has its own basic court (basic military court), intermediate court (military court of certain military region or armed service branch), and high court (military court of PLA).

In China, the judges of different court levels are not regulated separately under different doctrines for election, appointment, evaluation and removal. According to the Judge's Law, except the military courts, whose judges shall all be decided by the NPC and NPCSC, the presidents of other courts are all decided by the people's congress at the same administrative region level, and other judges are decided by the corresponding standing committee under the recommendation of the presidents (Art. 11). There are no regulations about who has the right to nominate judge candidates and how to nominate them. The qualifications that the judge of all courts need are the same, which are the Chinese nationality, the age of over 23, the abidance by Chinese Constitution, the fine political and professional quality, the good conduct and the good health (Art. 9). The assessment and examination of the

judge is made by the court which the judge belongs to (Art. 21). The court will form a commission for examination and assessment of judges (Art. 48), the chairman of which shall be assumed by the president of the court it belongs to (Art. 49).

The judge compositions of various levels of courts are also basically the same. According to the Organic Law of People's Courts, a basic people's court is composed of a president, several vice-presidents and judges (Art. 19). Other levels of the court, including the SPC, are all composed of a president, several vice-presidents, chief judges and associate chief judges of divisions, and judges (Arts. 24, 27, 31). None of the level of court is regulated a precise number of judges.

3. Scope of Civil Procedure

According to the CPL, the civil disputes in China are specified as disputes on rights and obligations arising from property, personal injury or family matters between equal parties (Art. 3). The limitation of the scope of disputes and the emphasis on the equality of parties are used to distinguish the disputes from "administrative disputes." Such differentiation results from the dualism of public and private law as well as the individual existence of administrative procedure law.

4. Structure of Civil Procedure

The structure of civil procedure in China adopts the "four-level and two-instance" system. The "four-level" system means that there are four levels of courts in China, which are the basic people's courts, the intermediate people's courts, the high people's court and the SPC. The "two-instance" system means that the first instance judgment and certain rulings, which are the ruling on refusing to accept the lawsuit, the ruling on dismissing the lawsuit, and the ruling on jurisdiction objections, can be appealed, while the decision made by second instance court is final and cannot be appealed. It is the higher court next to the first instance court that has the appellate jurisdiction as the court of second instance. The two-instance system, however, has an exception, which is the adjudication supervision procedure or the reopening of proceedings as remedy for effective decisions. In practice, the adjudication supervision procedure is quit commonly applied to quash the finality of the second instance decision. After experiencing a drastic lowering of the level of court of first instance, nowadays most courts of first instance are basic courts and intermediate courts, while most reopening trials and some appeals are made by high courts and the SPC.

5. Fundamental Principles

The fundamental principles of the civil procedure are all regulated in the CPL. They are the principle of equal litigation rights (Art. 8), the principle of full argument

(Art. 12), the principle of party disposition (Art. 13, para. 2), the principle of court's conciliation (Art. 9), the principle of good faith (Art. 13), the principle of receiving supervision from the procuratorate (Art. 14), and the principle of direct hearing.

The principle of equal litigation rights is considered as an embodiment of Art. 33 of the Constitution, which provides that "citizens are all equal in front of the law." Art. 8 of the CPL claims that "all parties of the civil litigation shall have equal litigation rights. The people's courts shall, when adjudicating civil cases, guarantee and facilitate all parties to exercise their litigation rights, and apply the law equally to all parties."

The principle of full argument in China is different from the doctrine of adversary trial. It only ensures the parties' right to make argument in trial (Art. 12), but does not request the court's fact finding to be bound by the parties' claims and evidence presented during the argument.

The principle of party disposition regulated in para. 2, Art. 13 allows the parties to dispose their civil rights and litigation rights within the scope subject to law.

The principle of court's conciliation is a unique principle of Chinese civil procedure. It shows the important role of the conciliation in the litigation. Art. 9 asks the court to conduct conciliation according to the principles of voluntariness and lawfulness. To avoid endless conciliation and litigation delay, the article requires the court to render judgment immediately if no mediation agreements can be reached. Under this principle, the conciliation is implemented throughout the whole civil proceeding from the filing of lawsuit to the enforcement phase, from the first instance procedure to the adjudication supervision procedure. Unlike adjudication, the conciliation can exceed the parties' claim and reach agreement beyond the tried disputes.

The principle of good faith is a new principle introduced by the 2012 amendment of 1991 CPL to restrain the excessive growth of false statement, fabrication of evidence, collusive lawsuit and malicious lawsuit. The concrete application of this principle, however, remains to be studied and explored in practice.

The principle of receiving supervision from the procuratorate stresses the procuratorate's role as the supervising organ for the court. Before the 2012 amendment, the CPL's provision of this principle was "the people's procuratorate has the authority to implement judicial supervision towards the civil adjudication activities," limiting the supervision within adjudication. The 2012 amendment changed it into "the people's procuratorate has the authority to implement judicial supervision towards the civil proceeding," intending to include the enforcement into the procuratorate's supervision too. There are three aspects of the procuratorate's supervision on civil proceedings. Firstly, the procuratorate shall supervise the judge's illegal actions such as embezzlement, bribe-taking, and malpractice. Finding these actions, the parties or other relative persons can impeach the judge to the procuratorate. The procuratorate can also take actions *sua sponte*. Secondly, the procuratorate has the authority to ask the court to correct effective decisions through a protest or a procuratorial suggestion. Receiving a protest, the court shall initiate the adjudication supervision

procedure in time. The procuratorate will participate in the proceeding to support its protesting reason and supervise the litigation process. The procuratorial suggestion, however, is only a suggestion without any forcible effect. Lastly, the procuratorate shall supervise the enforcement. So far, there have not been any detailed regulations on how the procuratorate shall supervise the enforcement. The *Rules for the Supervision over Civil Proceedings by the People's Procuratorates (for Trial Implementation)* issued by the Supreme People's Procuratorate in 2013 only mentions that the procuratorate shall issue procuratorial suggestions on enforcement problems.

The principle of direct hearing is not explicitly regulated in the CPL. It is, however, scatteredly presented concrete provisions on trial. For example, Art. 68 provides that evidence shall be presented and cross-examined by the parties in court; Art. 72 provides that any entity or individual that knows something about the case has the obligation to testify at court; Art. 139, para. 2 provides that with the permission of the court, the parties may cross-examine witnesses, expert witnesses, and inspectors at court. In practice, however, the principle of direct hearing is not implemented very well. In China, each court has a judicial committee. According to the Law on the Organization of the People's Courts, it is a committee formed by the president of the court and other experienced judges that practices democratic centralism when fulfilling the task of summing up judicial experience and discussing complicated cases or other judicial issues (Art. 11). When a judge considers a case complicated, he can turn to the judicial committee for help. In theory, the judicial committee should only serve as a supervisor or guider of trial. It can only "discuss" the cases instead of "deciding" them. There is no legal obligation for the adjudicators to follow its advice. In practice, however, the judicial committee's decision must be obeyed. The legal reality is that the judicial committee is often the substantial adjudicator behind the judges who preside over the trial and leave their names on the judgment. Therefore, the existence of the judicial committee often breaks the principle of direct hearing. In addition, in China, the witness are often absent from the court due to the traditional hatred of "snitch" and the lack of regulations on forcing the witness to court and protecting them from being hurt after court, making the trial more of a reading of documentary evidence. The fact that the parties' argument does not influence the judge's decision also makes the principle of direct hearing unimportant for the adjudication.

6. Access to Justice

In China, the plaintiff used to have the problem of getting the court to accept the suit filing. The court would make a substantive examination on the suit filing, asking the plaintiff to prepare overmuch materials and evidence to support his suit filing. When the plaintiff failed, the court could refuse to accept the suit filing. Such refusal did not need to be made in any written form. To decrease the case load, the courts would use the excuse of supplementing pleading to delay case docketing, or make

an oral ruling on refusing to accept the suit filing to shut the cases out of the court. Some courts arbitrarily refused to take “difficult” cases which were unclear, sensitive, high-profiled, easy to be interfered by local government, or easy to trigger petitions. These illegal practices made the case docketing really difficult. To solve this problem, the 2012 amendment of the Civil Procedure Law specially adds a sentence to Art. 123, emphasizing that “the people’s court shall safeguard the parties’ right to institute litigation by virtue of law.” The amendment also changes the words describing the court’s acceptance of the suits from “shall accept the lawsuits” to “must accept the lawsuits,” enhancing the court’s duty of ensuring litigation rights. In addition, in 2014, the Fourth Plenary Session of the Eighteenth Central Committee of the Communist Party of China announced that, the docketing of court shall be changed from the “docketing examination system” to the “docketing registration system,” meaning that the procedure of examining the suit filing should be as simple as registration. In response to this, the SPC issued the *Provisions of the SPC on Several Issues concerning the Registration and Docketing of Cases by People’s Courts* in 2015. It provides that all pleadings shall be accepted with a written document indicating the date of the receipt (Art. 2). After receiving the pleading, if the court cannot make a decision on docketing immediately, it may have at least 7 days⁶ to examine the filing conditions prescribed in CPL and decide whether to docket the case (Art. 8). Even if the court decides to refuse to docket the case, it shall still issue a written ruling to the plaintiff. According to the director of the docketing division of the SPC, one year after the reform of case docketing, up to 95% of the case were docketed immediately upon receiving the pleading. The problem of delaying or refusing to docket the case is basically solved.

The civil legal aid system in China is not quite developed. So far, there has not been a statute on legal aid. The only systematic regulation on legal aid is the *Regulation on Legal Aid* enacted by the State Council in 2003. The *Criminal Procedure Law* and the *Lawyer’s Law* do have special provisions on legal aid, but the *Criminal Procedure Law* is only applied in the criminal procedure, and the *Lawyer’s Law* only has one article generally regulating the lawyer’s duty to perform the legal aid in accordance with the state regulations (Art. 42). According to the *Regulation on Legal Aid*, in the civil procedure, only the plaintiff who claims for state compensation, social insurance treatment, minimum life alimony treatment, survivor’s pensions or relief funds, maintenance for supporting parents, grandparents or children, payment of labor remunerations, and civil interests arising from the brave act of righteousness can apply for legal aid when he needs an agent ad litem and fails to entrust one due to economic difficulties (Art. 10). The standard of “economic difficulty” is set down by the government of the provincial level and usually can only be reached by the

⁶ For the lawsuit filed by a person to revoke a judgment in which he is not a party concerned but his interests are violated, the time will be extended to 30 days; for the lawsuit filed by a person to object an enforcement in which he is not a party concerned but his interests are violated, the time will be extended to 15 days.

poorest people. The legal aid institution is established by the judicial administrative department of the government of the provincial level.

7. Variety of Procedures

There are two major types of procedures regulated in the “adjudication procedure” part of the CPL: the contentious procedures and the non-contentious procedures. The contentious procedures are the ones in which the parties need to confront with each other in court to help the judge make the decision, including the ordinary procedure of first instance, the simplified procedure of first instance, the appellate procedure, and the adjudication supervision procedure. The non-contentious procedures are the ones in which there are no disputes between two specific parties and there is no need for the court to hold a trial for making decision. The CPL contains three chapters providing the non-contentious procedures of China. These three chapters are Chapter 15 “Special Procedures,” Chapter 17 “Procedure for Hastening Debt Recovery” and Chapter 18 “Procedure for Public Summons.” Among them, the Special Procedures include the procedure for cases concerning the voter qualification for the member of the people’s congress; the procedure for declarations of missing or dead person; the procedure for cognizing natural persons’ capacities in civil conducts as no capacity or limited capacity; the procedure for cognizing property as ownerless; the procedure for confirming mediation (conciliation) agreements; the procedure for realizing security interests over asset.

In the contentious procedure, if the defendant refuses to come to court for trial without reasonable reasons, the court will enter a default judgment. It should be noted, however, that such default judgment will not be induced by the defendant’s failure to file defense, because China does not have the forcible defense institution for the defendant. Even if in a default judgment, the court cannot simply enter the judgment based on the plaintiff’s case. It will still need to investigate the facts and examine the evidence. If the court finds that the evidence provided by the plaintiff is not sufficient, it may still enter a judgment against the plaintiff even if the defendant is absent from trial.

It should also be mentioned that there is no interim judgment in the contentious procedure. Substantive issues in dispute can only be resolved by final judgment, while procedural issues in dispute that need to be resolved in advance will be decided through court’s ruling. However, Chinese Civil Procedure Law allows the existence of “advance judgment,” which is the judgment regarding part of the facts that have been clear. Chinese scholars think that the advanced judgment is different from the interim judgment. While the interim judgment is a temporary decision regarding disputed issues and is not *res judicata*, the advanced judgment in China is a final decision on part of facts and can be appealed like a full judgment. In practice, advanced judgment is actually rarely used. There is also no consent judgment in China. If the parties reach

an agreement or accept the mediation (conciliation) held in court, the lawsuit shall be terminated by the plaintiff's withdrawal of the complaint or by the court's mediation (conciliation) award. In China, there is also no summary judgment applied to dispose of a case without trial when there is no dispute as to the material facts of the case. The judgment of the simplified procedure is also a judgment made after resolving the substantive disputes through trial. It is only slightly different from the judgment of the ordinary procedure. The judgment of a simplified procedure will be entered immediately in court, while the judgment of an ordinary proceeding is generally entered by serving the judgment on the parties. The content of the judgment for the simplified procedure can also be simpler under certain circumstances.

In China, the composition of bench varies from the type of the procedure. For ordinary procedure of the first instance, the adjudicator must be a collegiate bench. It consists of either judges and people's assessors⁷ or only judges. Members of the collegiate bench must be in odd number. For the simplified procedure, including the small claim procedure, the bench can be a single judge. For most non-contentious procedures, they can be held by a single judge. But for the procedure for cases concerning the voter qualification for the member of the people's congress and other complicated non-contentious procedures, the bench shall also be collegiate.

8. Jurisdictions

The court's jurisdiction in China mainly concerns with the jurisdiction by level of courts and the territorial jurisdiction. The "jurisdiction by level of courts," meaning the specific level of court has the original jurisdiction over a certain case, depends on the claim amount and the influence of the case. According to the CPL, a basic people's court shall have jurisdiction over cases that are not within the jurisdiction of people's courts at other levels (Art. 17); an intermediate people's court shall have jurisdiction over the major cases involving foreign elements, cases that have major impacts in the area of its jurisdiction, and cases under the jurisdiction of the intermediate people's courts as determined by the Supreme People's Court (Art. 18); a high people's courts shall have jurisdiction over cases that have major impacts on the areas of its jurisdiction (Art. 19); the Supreme People's Court shall have jurisdiction over cases that have major impacts on the whole country, and cases that the Supreme People's Court deems should be adjudicated by itself (Art. 20).

⁷ In China, when the case is adjudicated by a collegiate bench, the bench can be composed by a judge presiding at trial and two "people's assessors." The people's assessor is a lay person from the local community who joins the adjudication like a juror. They do not rule on matters of law but can find the facts of the case with the judge. They will participate in the discussion of the case but will not participate in making the judgment. Unlike the juror in the common law system which is elected by the lottery and is only responsible for one case at a time, the people's assessor in China is a part time job that needs to employ people. The person elected as the people's assessor will generally keep this identity for 5 years.

In practice, high people's courts rarely exercise their original jurisdiction and the Supreme People's Court has never heard first trial cases up to now.

Territorial jurisdiction refers to jurisdiction over cases arising in or involving persons residing within a defined territory. In China, the establishment of territorial jurisdiction is based on the defendant's domicile, subject to certain exceptions. According to the CPL, the doctrine of jurisdiction may change from the defendant's domicile to the plaintiff's domicile when the defendant is in custody; the defendant of a personal status case is not in China or missing; the defendant's household registration is cancelled;⁸ or the defendant's domicile is not as clear as the plaintiff's domicile in maintenance cases and divorce cases (Arts. 6, 22). In tort and contract cases, parties are given more jurisdiction choices. Besides courts that are located where the defendants have their domiciles, courts that are located where facts of the case occur have the authority to hear the case as well (Arts. 23, 28). In addition, the jurisdiction over certain types of disputes is specially regulated in law to exclude the domicile doctrine. Such disputes include real estate disputes, port operation disputes and inheritance disputes. The jurisdiction of these disputes is exclusive and cannot be changed by jurisdiction clauses. For real estate disputes, they shall be under the jurisdiction of the court located in the place where the real estate is located (Art. 33 (1)); for disputes concerning harbor operations, they shall be under the jurisdiction of the court located in the place where the harbor is located (Art. 33 (2)); for inheritance disputes, they shall be under the jurisdiction of the court located in the place where the decedent had his domicile upon his death, or where the principal portion of his estate is located (Art. 33 (3)).

Parties of disputes involving property rights are entitled to choose by written agreement to be under the jurisdiction of the people's court in the location which have actual connections with the dispute, provided that the provisions on hierarchical jurisdiction and exclusive jurisdiction are not violated.

⁸ The household registration system, or the *Huji* system (户籍制度), is a special system of China (including Taiwan). It originates from the ancient China. A household registration record (*Hukou*, 户口) officially identifies a person as a resident of an area and includes identifying information such as name, parents, spouse, and date of birth. A *hukou* can also refer to a family register in many contexts since the household registration record is issued per family, and usually includes the births, deaths, marriages, divorces, and moves, of all members in the family. The system serves 3 key functions in China. First, the system registers residents, collects and stores information about the populace, and provides personal identification and certifies relations and residence. Second, the system is the basis for resource allocation and the provision of subsidies for selected groups of the population (mainly the urban *hukou* holders who are a clear minority). This function has shaped much of Chinese economic development in the past half-century by politically affecting the movement of capital, goods, and human resources, heavily favoring the urban centers with investment and subsidies. Third, the system allows the government to control and regulate internal migration, especially rural-to-urban migration. Permanent, large scale migration to urban areas in China, as a consequence, has been relatively small and slow compared to its economic development level. China's urban slums are also relatively small and less serious, compared to those in many other developing nations such as Brazil or India. See Feiling Wang, *Renovating the Great Floodgate: The Reform of China's Hukou System in One Country, Two Societies: Rural-Urban Inequality in Contemporary China* 335–364 (M.K. Whyte, ed., Cambridge, MA: Harvard University Press, 2010).

In China, a court which has accepted the suit can transfer the case *sua sponte* to other courts when it finds the case is beyond its jurisdiction. It shall transfer the case to the people's court that does have jurisdiction over the case. Such transfer, however, can only be applied once. The people's court to which a case has been transferred shall accept the case and shall not transfer the case to another people's court without authorization even if it considers that the transferred case is not under its jurisdiction. It shall report to the higher court of the wrong jurisdiction and wait for the higher court to designate the right lower court to exercise the jurisdiction. The higher court's designation of jurisdiction can also take place when a people's court which has jurisdiction over a case is unable to exercise the jurisdiction for a special reason, or when a dispute over a jurisdiction among people's courts cannot be resolved through consultation.

A defendant, on or before the last day of his or her time to plead, may file an objection to quash filing of the suit on the ground of lack of jurisdiction of the court over him or her. The jurisdiction objection can only aim at the jurisdiction of court of first instance. The jurisdiction of the appellate court is decided by which court becomes the court of first instance, and the parties have no right to raise objection towards the appellate jurisdiction. The jurisdiction objection will be decided in ruling and can normally be appealed unless it is a small claim procedure.

9. Role of the Judge

According to the Judges Law, Chinese judges are the judicial personnel who exercise the judicial authority of the State according to law (Art. 2). They must faithfully implement the Constitution and laws, and serve the people wholeheartedly (Art. 3). The "laws" here not only include the statutes passed by the NPC and NPCSC, but also include the regulations enacted by national administrative departments such as the State Council, and the judicial interpretations enacted by the SPC. As a civil law jurisdiction, there are no precedents in China. However, the SPC establishes the guiding case institution by issuing *the Provisions on Case Guidance* in 2010 to develop Chinese case law. According to this provision, the "guiding case" means "cases whose judgments have come into force after satisfying the following conditions: 1. attracting wide attention from society; 2. the law applied is principled; 3. the case is typical; 4. the case is complicated or is a new type; 5 the case has other guiding function" (Art. 2). The Case Guidance Office of the SPC will choose cases from lower courts and uniformly publish them as the guiding cases. As to the effect of guiding cases, Art. 1 and Art. 7 of the Provision respectively provides that the guiding cases have a "guiding function" for trial and enforcement by courts throughout the country and that courts at all levels "shall refer to the guiding cases" when they are trying similar cases. The exact meaning of the "guiding function," however, remains unclear. There is also no clear direction on how exactly the courts shall "refer to" these

guiding cases. In practice so far, it is a common phenomenon for the local courts to ignore the guiding cases in adjudication. Therefore, as a new institution, the guiding case system is yet to be developed.

10. Evidence

The rule of evidence of civil procedure in China is scattered in the CPL, the Interpretation of the CPL, and the *Several Rules of the Supreme People's Court on Evidence in Civil Procedures* ("RECP") issued by the SPC in 2001. The CPL classifies the evidence into statements of the parties concerned, documentary evidence, physical evidence, audio-visual materials, electronic data, witness' testimony, expert opinions and written records of the inspection. Any evidence that can be adduced to court shall be the evidence that can fall into one of the categories above. On the other hand, as long as the evidence falls into one of the categories above, it can be adduced to court. China does not have the custom of precluding incompetent evidence from trial. The court will examine all evidence provided by parties in trial and will decide whether to adopt it after the evidence examination. The adoption result will not be known until the court finish adjudicating the case. It will be presented in the judgment, along with the court's fact finding and law application.

In China, witnesses seldom appear at trial. Most of the testimony is made into a written statement which will be read by the court clerk at trial. Therefore, although there is no explicit regulation disallowing the testimony from an absent witness to be adduced to court, in practice, the court often refuses to accept it. Even if the witness does attend the trial, the bench may still be reluctant to attach enough importance to his testimony. This is because in China, there is no litigation allowing judges and parties to examine the witness's credibility. The sanction for false testimony also lacks legal basis and is rarely put into practice.

The documentary evidence is the most commonly-used and the most important kind of evidence in Chinese civil procedure. The expert opinion is also usually presented, and there are no regulations limiting the production of expert opinion, except that it will not be adopted if the court asks the expert to come to court but the expert refuses. Like other civil law jurisdictions, the expert publishing the expert opinion should serve the court with a neutral and objective standpoint. The parties, however, can also hire experts as "expert assistant" to help them. Unlike the expert publishing the expert opinion, the expert assistant is on the side of the party who hires him. His opinion will be considered as part of the party's statement rather than the expert opinion.

The inspection is an examination of the disputed object or the place where the dispute took place made by the court under the parties' application or on a *sua sponte* basis. There is no explicit regulation on under what circumstances should the court make the inspection.

The physical evidence and audio or visual reference materials are rarely produced to court in Chinese civil proceedings. Digital data is a new form of evidence added to the CPL in 2012. It refers to information stored in electronic media in the form of e-mail, chatting record, blog, micro-blog, text message, electronic signature or domain name.

Under certain circumstances, the court can collect evidence which the parties do not produce on a *sua sponte* basis. According to Art. 15 of RECP, these circumstances are: the circumstance when the case is concerned with national interests, social public interests, or other persons' legitimate interests; and the circumstance when the evidence to be collected is for the procedural matters that have nothing to do with the substantial dispute, such as the addition of the parties or the suspension of the litigation. According to Art. 17, the parties can also apply for the court's collection of evidence when they have difficulty in collecting them. This includes the evidence which is kept by a national authority and can only be accessed by the court; the evidence which is concerned with state secrets, commercial secrets or personal privacy; and other kinds of evidence that cannot be collected by the parties due to objective reasons.

There is a time limit for adducing evidence. Such time limit can be extended under the parties' application. If a party fails to adduce evidence during the time limit, the court shall ask the party to explain. If the reason is objectively justified, or if the other party does not object to the late submission of evidence, the court shall consider such submission as a timely submission. If, on the other hand, the party fails to adduce evidence in time due to intentional misconduct or gross negligence, the court shall not accept the evidence. But if such evidence is concerned with the basic fact of the case, the court shall still accept the evidence, but it can sermonize or fine the party in accordance with law. If the party fails to adduce evidence due to the fault other than intentional misconduct and gross negligence, the court still need to accept the evidence, but can sermonize the party for his late submission (CPL Art. 65; ICPL Arts. 101, 102).

The RECP regulates a series of provisions on how the court should evaluate the evidence, such as what evidence cannot be solely used as decisive evidence (Art. 69), and what evidential force a certain piece of evidence will have (Arts. 70–76). It also makes a sequence for the evidential force of different types of evidence. According to Art. 77, generally, the documents formulated by state organs or social bodies shall be more forceful than other documentary evidence; the physical evidence, archive files, expert opinions, inspection recordings and the documentary evidence that have been notarized or registered shall be more forceful than other documentary evidence, audio-visual materials and testimonies; the original evidence shall be more forceful than the derivative evidence; the direct evidence shall be more forceful than indirect evidence; the testimony of a witness who has a relation with a side of the party and who is testifying to support that side of party shall be less forceful than the testimony of other witnesses.

11. Ordinary Procedure of First Instance

The ordinary procedure of first instance is the basis of other types of procedures. The litigation process is mainly as follows:

Step 1. Filing of a suit – Court’s examination to the complaint – The acceptance or denial of the suit filing (if the complaint is denied, the plaintiff can appeal)

Step 2. Service of complaints on the defendant by court – Service of pleadings from the defendant in 15 days after receiving the complaints (In China, it is a right, not an obligation, for the defendant to reply to the complaints, therefore it is acceptable for the defendant not to reply)

Step 3. Preparatory proceedings

Step 4. Trial – allegation, examination of evidence, argument, closing statements

Step 5. Judgment

Conciliation can be held by judges through the whole process.

The trial will be conducted under the sequence of the parties’ allegation, the examination of evidence, the parties’ debates and their closing statements. During the process of evidence examination, the court will ask the parties to list their evidence and express their opinion on the evidence listed by the opposing party. The court, however, will forbid the parties to debate and will ask the parties to leave the disputed issues to the debate process. During the debate process, on the other hand, the court will forbid the parties to present evidence again. This causes the unclear link between the evidence and the parties’ case, making trouble in finding the disputed issues between the parties. Therefore, in 2015, the ICPL allows the court to combine the investigation phase and the debate phase with the leave of the parties.

12. Provisional Remedies

In China, the court may make certain temporary orders to protect a party from irreparable damage while a lawsuit or petition is pending. Such orders have interim effect towards the parties until the court issues a final judgment. The provisional remedies have two kinds, one is “perpetuation,” the other is “advance enforcement.” Perpetuation is the preservation of the status quo until final disposition of a matter can occur, while advance enforcement is the realization of claim before final judgment.

The perpetuation regulated in the CPL includes the perpetuation of evidence, the perpetuation of property, and the perpetuation of act. Perpetuation of evidence is a procedure employed to assure that proof will be available for possible use at a later trial. Perpetuation of property is a procedure employed to prevent the losing party from avoiding enforcement of the judgment by disposing his property. The common measure of property perpetuation is to restrict the disposition of the disputed property or object, so that when the judgment becomes effective, there will

be enough property for enforcement. Perpetuation of act is a preliminary injunction to restrain a party from going ahead with a course of conduct or compelling a party to continue with a course of conduct until the case has been decided.

The perpetuation can be made either before the initiation of the litigation or during the litigation. The pre-litigation perpetuation can only be initiated by the parties' application when the situation is so urgent that the applicant of the perpetuation will suffer irreparable damage without an immediate application of perpetuation. The applicant has to provide security. The perpetuation during the litigation, on the other hand, can also be initiated by the court *sua sponte* and only needs security when the court deems it necessary.

The advance enforcement is a special institution with a restrictive application scope. In accordance with Art. 106 of the CPL, it can only be applied to cases involving claims of maintenance, claims of labor remuneration, or urgent circumstances that require enforcement in advance. The urgent circumstances are when and only when it is necessary to cease the infringing act or eliminate the interference immediately; when it is necessary to stop committing an act immediately; when the advance enforcement is to ask payment from insurance company to restore business; when it is necessary to recover payment from social insurance or social relief immediately; or when the life or business will be seriously influenced if the payment is not immediately recovered.

The order of provisional remedies cannot be appealed, but can be applied for reconsideration to the court making the order. Such reconsideration can only be applied once. Neither can the party object to the court's refusal of reconsideration, nor can they ask the court to reconsider again once it has reconsidered its provisional remedy order.

13. Simplified Procedure

The simplified procedure in China is a procedure where certain steps taken in an ordinary procedure may be simplified. According to the CPL, the ICPL and the *Several Rules of the SPC on the Application of the Simplified Procedures in the Adjudication of Civil Cases* ("SPR"), it can only be applied by the basic people's courts to the cases of the first instance. In practice, most cases in the basic courts are tried through the simplified procedure.

For those cases in which the facts are clear, the relations of rights and obligations are definite, and the disputes are minor, the court can adopt the simplified procedure *sua sponte* (CPL Art. 157, para. 1). According to the Art. 256 of ICPL, "facts are clear" means that both parties present similar cases regarding their disputes and are able to provide reliable evidence, and the court does not need to collect evidence to find facts and distinguish right and wrong; "the relations of rights and obligations are definite" means that it is unarguable on who should bear the liability and who should enjoy the rights; and "disputes are minor" means that there is no essential

dispute regarding right and wrong on the case, liabilities, and other subject matters of the litigation. For cases which do not fall into the application scope of statutory simplified procedure, the CPL provides that they can still be tried summarily if the parties agree on applying the simplified procedure (CPL Art. 157, para. 2), and the litigation do not have the situation provided in Art. 257 which makes the simplified procedure inappropriate, such as the situation where the whereabouts of the defendant is unknown, or the situation where either one party or both parties have a large number of litigants in a joint action.

The basic characteristic of simplified procedure is its simplification and convenience compared with the regular procedure. It simplifies the filing of suit, the summoning, the composition of bench, the preparatory proceeding, the trial, and the judgment. For example, it can be tried by a single judge instead of a collegiate bench. The investigation and debate process of trial can be simplified as long as the rights of the parties to make statements are guaranteed. Although judgments made in ordinary procedures are usually entered on a fixed date after the bench finishes its discussion of the case, the judgments in simplified procedures have to be pronounced in court immediately after trial, unless the court thinks it inappropriate to pronounce in court. The facts finding part and the reason part of judgment can also be simplified under certain circumstances. The adjudication time period of ordinary procedure is 6 months, while the adjudication time period of simplified procedure is 3 months.

The court can initiate a simplified procedure *sua sponte*, but the parties can raise an objection to the court. If the court thinks that the objection is justified, the proceeding will be transformed from simplified procedure to ordinary procedure. For cases that shall be tried through ordinary procedure and do not fall into the types of disputes that cannot be tried summarily, the parties can apply for simplified procedure. But the ordinary procedure cannot be transformed to simplified procedure if the trial has already begun.

The small claims procedure in China is a special type of simplified procedure. Therefore, the applicable disputes shall meet both the general requirements of the simplified procedure and the special requirements of the small claims procedure. The small claims procedure can be applied to the monetary case in which the claim amount is lower than 30% of the annual average salary of employees of the relevant province, autonomous region or municipality directly under the Central Government of the previous year. It cannot, however, be applied to the cases concerning with the confirmation of personal status or property status, cases concerning with foreign affairs, cases concerning with the intellectual property, and the cases that need to hire expert for expert opinion (ICPL Art. 275).

The court will conduct the small claim procedure *sua sponte*. The parties have rights to raise objection on the application of small claims proceeding, but the objection shall be raised before trial. If the court thinks of the objection as justified after examination, the proceeding shall be transformed to the general simplified

procedure. Since the decision of the small claim procedure cannot be appealed, in practice the court rarely applies this procedure.

14. Appellate Procedure

Since China implements the “two instances of trial,” the proceeding of second instance is the only appellate procedure and the last instance of trial. The appellate procedure is independent of proceeding of first instance, but it is not a necessary proceeding for all litigations. For cases going through non-contentious procedures and the small claim procedure, there is no second instance of trial; if the parties are satisfied with the adjudication of first instance or fail to appeal within the prescribed time period, the decision made in the proceeding of first instance will become final; if the court of first instance is the SPC, or if the dispute is resolved through conciliation or settlement during the proceeding of first instance, parties also cannot appeal.

By and large, the parties’ right of filing the appeal for the first time is not restricted by any substantive requirements. This is why the appeal in China is called “the appeal regardless of reasons.” The appeal will be granted as long as the application meets the following formal requirements:

(1) The appealed judicial decision should be the appealable judgment or ruling made by the court of first instance. By virtue of law, all judgments for substantive matters of the case can be appealed. The appealable rulings for procedural matters are the ruling on the court’s rejection of docketing the lawsuit, the ruling on the parties’ jurisdiction objection, and the ruling on the court’s dismissal of plaintiff’s accusation;

(2) The appeal is made within the prescribed time. For judgments, the time period is 15 days after the service of judgment; for orders, the time period is 10 days after the service;

(3) The appeal is made to the next higher level of the court. But the appellate pleading shall be serviced to the appellate court through the court of first instance. In China, the parties cannot make a leapfrog appeal. Neither can they ask the original court to adjudicate the appeal;

(4) The appeal is made in written, clarifying the name of the parties, the name of the original court, the case number of the original decision, and cause of action. The appellate pleading shall also state the claim and reason of the appeal;

(5) The appellate fee is paid to the court within the prescribed time. Otherwise the appeal will be considered as being withdrawn.

The CPL provides that the appellate court shall review both the facts finding and the law application of the original court within the scope of the appellate claim (Art. 167). The ICPL, however, provides that the appellate court may exceed the appellate claim if the judgment of the first instance violates prohibitive regulations or does harm to national interest, social interest or other people’s legitimate interest (Art. 323). In addition, the appellate court in China is not restrained from conducting

independent fact finding on the case. The new fact finding can be either based on evidence adduced in the court of first instance, or new evidence adduced in the appellate court.

The appellate procedure shall be conducted by collegiate bench, the members of which shall all be professional judges. People's assessors cannot join the collegial bench of appeal. In principle, the adjudication of appeal shall be made by trial. But if the appellant does not mention new facts or evidence in the appellate pleading and the collegial bench considers it unnecessary to adjudicate the case by trial, the case can be reviewed through written hearing. During the appeal, the appellate court can conduct conciliation like the court of first instance. If a conciliation agreement is reached, the original judgment will be considered as being withdrawn once the agreement instrument is received by the parties. As long as the parties accept the conciliation, the appellate court can even deal with matters that exceed the appellate claim.

15. Adjudication Supervision Procedure

In China, if some serious error listed under the Civil Procedure Law (Art. 200) in a judgment or ruling which has taken effect, the reopening proceedings shall be moved under "Procedure of Adjudication Supervision." It is a procedure established as the supplement of the two instances system to correct wrong effective decisions. It is also called the "reopening procedure" or the "retrial procedure," but there is a difference between the retrial procedure of the civil law system and the adjudication supervision procedure in China. The retrial procedure of the civil law system is a special remedy mechanism established for the protection of private rights. The initiator of the procedure can only be the party of the original proceeding. The adjudication supervision procedure, however, originates from the socialism legal system and is a special remedy mechanism established for the protection of common good. The initiator of the procedure used to be limited to the national organs which have the authority to supervise the adjudication of court. These national organs include the people's procuratorate and the court itself. When the people's procuratorate finds that a legally effective decision has a defect regulated in law that can initiate the adjudication supervision procedure, it can lodge a protest or raise a procuratorial suggestion to the court. The protest will start an adjudication supervision procedure, while the procuratorial suggestion is only a suggestion without any coercive effect to the court. If the president of a people's court at any level discovers that a legally effective decision made by the court he works in indeed contains an error and deems it necessary to have the case retried, he shall refer it to the judicial committee for discussion and decision. If the SPC discovers that a legally effective decision made by a local people's court at any level indeed contains an error, or if a people's court at a higher level discovers that a legally effective decision made by a people's court at

a lower level indeed contains an error, they shall also have the power to reopen the case themselves or direct the people's court at a lower level to reopen the trial.

Nowadays, since the adjudication supervision procedure in China also starts to aim at protecting private rights and individual justice, the CPL allows the parties of the effective litigation to initiate the adjudication supervision procedure too. However, due to the public nature and the original intention of the adjudication supervision procedure, the party's motion for retrying the case cannot directly bring any procedural effect for the case. The court shall examine the application to decide whether the proceeding needs to be initiated. By contrast, if it is the national organ that requires adjudication supervision, the retrial procedure will be directly initiated without needing the court's examination.

Art. 200 of the CPL lists 13 statutory defects that can initiate the adjudication supervision, which can be classified into four categories: factual defects [(1)–(5)(12)], legal defects [(6)], procedural defects [(7)–(11)] and judicial behavioral defects [(13)]. The factual defects are the error in fact finding or evidence adoption and the finding of new evidence or new condition; the legal defects are the wrong application of law; the procedural defects are serious defects that may violate the parties' procedural rights or influence the substantial result of the litigation; the judicial behavioral defects are misconducts made by the trial judge, such as embezzlement, bribes, malpractices.

The reopening of the trial shall be restricted to the defects claimed in the application or protest. If the parties apply for adding or changing the claims and such application exceeds the claim of the original case, the court shall not combine these claims into the adjudication supervision procedure, except that these claims concern with national interest or social interest, or that these claims were mentioned by the party in the original case but were not tried by the original court and cannot form a separate lawsuit. It is worth mentioning that the parties of the adjudication supervision procedure shall be the parties of the original litigation, regardless of whether the adjudication supervision procedure is initiated by the parties, procuratorates or courts.

The reopening procedure shall follow the procedure applied in the defective litigation. This means that if the legally effective decision being reviewed is made in the proceeding of first instance, the reopening proceeding shall be the proceeding of first instance; if the legally effective decision that is being reviewed is made in the appellate proceeding, the reopening proceeding shall be the proceeding of second instance.

If the reopening proceeding follows the procedures of the first instance proceeding, the collegial bench shall also be formed based on regulations for the collegial bench in court of first instance, except that in the reopening proceeding, the case cannot be tried by a single judge like that in the simplified proceeding. The parties can appeal if they are unsatisfied with the result. In principle, the reopening proceeding shall be made in trial, but if the proceeding follows the procedures of

the appellate proceeding, the parties have fully expressed their opinions through other ways and make a written agreement on trying the case through documents, the court can reopen the case through written hearing.

Where the court holds that the decision being reviewed is wrong, it shall modify the original decision. For reopening proceeding following the appellate procedure, if it is easier for the court of first instance to verify facts and eliminate disputes, the court reopening the trial can revoke the defective decision and remand the case to the court of first instance. If any party required to participate in the litigation was missed in the trial of first instance and no conciliation or settlement is conducted in the adjudication supervision procedure, or if it is inappropriate to make a substantive adjudication in the reopening proceeding due to the violation of procedural law in the trial of first instance, the court shall also remand the case to the court of first instance. In principle, the reopening court should make a substantive decision to the case and should not remand the case to the court of first instance.

16. Public Interest Action

The class action in China is so far restricted to actions on public interest. It is therefore called “public interest litigation.” It is newly provided by 2012 amendment of CPL. Art. 55 of the statute provides that “relevant organs and organizations prescribed by law may bring a suit to the people’s court against acts that cause environmental pollution, acts that harm consumers’ legitimate interest and rights, and other acts that undermine the public interest.” The statute arranges the public interest litigation regulation to the “Parties” section to reconcile the contradiction between the plaintiff of public interest litigation and the traditional theory on standing to sue. According to the traditional theory, a party can only file a lawsuit when his own rights are infringed or under the threat of being infringed. The plaintiff of public interest litigation, however, may not sue for his own interest. Therefore, it is necessary to additionally regulate public interest litigation in the “Parties” section as an exception of allowing the third party standing.

According to Art. 55 of the CPL, only “relevant organs and organizations prescribed by law” can become the plaintiff of public interest litigation. The CPL itself does not authorize any organ the power to file public interest litigation. So far only the *Marine Environment Protection Law of the People’s Republic of China* amended in 2013, the *Environmental Protection Law of the People’s Republic of China* amended in 2014, and the *Interpretation of the SPC on Several Issues concerning the Application of Law on Environmental Civil Public interest litigations* promulgated in 2015 has vested certain organs and organizations to be the plaintiff of public interest litigation. In 2014, the 4th plenary session of 18th CPC Central Committee passed the *Decision of the CPC Central Committee on Major Issues concerning with Comprehensive Promotion of the Rule of Law*, releasing a series of legal reform. The decision mentions to “explore the establishment

of systems for procuratorates to raise public interest lawsuits," suggesting that the procuratorate will become a competent plaintiff of public interest litigation in the future. In response, the NPCSC issued the *Decision on Authorizing the Supreme People's Procuratorate to Launch the Pilot Program of Initiating Public Interest Actions in Certain Areas*, authorizing the procuratorate the right to initiate public interest litigation.

So far, Art. 55 is the only regulation on public interest litigation in CPL. The regulation is criticized to be too abstract to put into practice. ICPL makes up the shortage, using eight articles (Arts. 284–291) to illustrate detailed procedures of the public interest litigation, including the acceptance of the complaint by court, the jurisdiction of court, the mediation (conciliation) and settlement in the litigation, the withdrawal of the plaintiff, and the preclusive effect of the judgment.

In order to be accepted by court, the public interest litigation shall not only satisfy the normal requirements of filing lawsuit (which are having clear defendants, having specific claims, and being within the jurisdiction of the court which receives the pleadings), but also satisfy a special requirement on evidence. The plaintiff has to establish a prima facie case on the defendant's violation of public interest. When the court accepts the case, it shall notify relevant administrative departments in written within 10 days. Other organs and organizations that have the capacity to file the litigation can apply for participation of the litigation before the trial and become co-plaintiffs if the court grants. During the public interest litigation, the parties are still able to make settlement or accept conciliation from the court. The settlement or conciliation agreement, however, shall be publicized for no less than 30 days. After the publication, the court shall examine whether the agreement infringes the public interest. The plaintiff still has right to withdraw the case, but such right will be restricted if the oral argument has finished. The court will not grant withdrawal after the oral argument.

The judgment of public interest litigation is preclusive to later public interest litigations of the same cause of action. If any organ or organization which is qualified as the plaintiff of the public interest litigation initiates another public interest action for the same case after the judgment of the former public interest action takes effect, the court shall make a rule of not accepting such action, except as otherwise provided by law. However, the acceptance of a public interest action by the court does not prevent the victim of the same case from initiating another suit to the court.

17. Litigation Costs

The litigation costs in China are the costs which should be paid to the court for the litigation. According to Art. 118 of the CPL, the litigation costs are classified into the case handling fee and other litigation expenses. In 2006, the State Council promulgated the *Measures on the Payment of Litigation Costs* ("MPLC"), providing more detailed regulation on the litigation costs. According to Art. 7 of this regulation, the case handling fees shall be paid in not only the procedure of first instance, but also the

appellate procedure and the adjudication supervision procedure. According to Art. 8, for cases applying special procedures, cases in which the court rules to reject the acceptance of the case, dismiss the accusation or appeal due to procedural matters, and cases in which the party appeals for the rulings on the rejection of the acceptance of the case, the dismissal of the accusation due to procedural matters or the objection of jurisdiction, the party does not need to pay for the case handling fee.

According to Art. 13, the rate of the case handling fee varies from the type of the case. If the case occurs due to the dispute on property rights and interests, the case handling fee shall be calculated on a regressive rate in proportion to the amount of the litigation claim. With the increase of the litigation claim amount, the proportion will decrease. For each divorce case, 50 Yuan up to 300 Yuan shall be paid. If property partition is involved, and the total amount of properties does not exceed 200,000 Yuan, no additional fee shall be paid; for the part more than 200,000 Yuan, the fee shall be paid at the rate of 0.5%. For each case on the infringement of personality, 100 Yuan up to 500 Yuan shall be paid. If compensation for damage is involved, and the compensation amount is not more than 50,000 Yuan, no additional fee shall be paid; for the part of more than 50,000 Yuan up to 100,000 Yuan, the fee shall be paid at the rate of 1%; for the part of more than 100,000 Yuan, the fee shall be paid at the rate of 0.5%. For each civil case on intellectual property right, if there is no disputed amount or price, 500 Yuan up to 1000 Yuan shall be paid; if there is any disputed amount or price, the fee shall be paid at the rate for property cases. For each labor dispute case, 10 Yuan shall be paid. For other non-property case, 50 Yuan up to 100 Yuan shall be paid.

The “other litigation expenses” includes the application expenses for non-contentious procedures and intermediate measures in trial or enforcement, the expenses for summoning witness, experts or interpreters, and the expenses for copying case files and legal instruments. The standard of the application expenses is regulated in MPLC, while the expenses for summoning witness, experts or interpreters, which are the traffic expense, accommodation expense and other relevant compensation for the coming to court, are charged by the court on behalf of the witness, experts or interpreters in accordance with the national expense standards for these expenses. The expenses for copying shall be charged in accordance with the actual cost of copying.

The litigation costs shall be borne by the party that loses the lawsuit, unless the party that wins the lawsuit bears the costs at his free will. Where the party concerned partially wins the lawsuit and partially loses it, the court may, at its discretion, decide on the amounts of litigation costs to be borne by the parties respectively. Where the parties reach a settlement or accept a conciliation by court, the litigation costs shall be borne through the negotiation between the parties or decided by court if the negotiation fails.

Where a party concerned really has difficulties in paying litigation costs, he may apply to the court for the judicial relief of postponement, reduction or exemption

of the litigation costs. The exemption of litigation costs, however, may only apply to natural persons.

The amount of the litigation costs will be determined and recorded at the end of the judgment. The parties cannot solely appeal for the litigation costs. They can, however, ask for reconsideration. If the party has objection to the decision on litigation costs, he may apply to the president of the court that makes the decision for reconsideration. If the party agrees with the decision but thinks that the calculation of the litigation costs is wrong, he may apply to the court that makes the decision for reconsideration. If there is really any error in the calculation, the court that makes the decision shall correct it.

18. Enforcement

In China, the main structure of enforcement is provided by Part III of the CPL with 35 articles ranging from Art. 224 to Art. 258. The supplement regulations are Art. 462 to Art. 521 of the ICPL, the *Interpretation of the SPC on Some Issues of the Application of the Enforcement Procedure of the CPL* implemented in 2009, and the *Regulations on Some Issues on the Enforcement of the People's Court (For Trial Implementation)* implemented in 1998. The enforcement organ is the enforcement bureau established in the court of all levels. They are responsible for the enforcement of civil decisions and the property part of criminal decisions that have become legally effective.

The enforcement basis should be an effective legal instrument. According to Art. 463 of ICPL, the effective legal instrument to be enforced shall meet the following conditions: (1) the subjects of rights and obligations are definite; (2) the content involving the payment is specific. This mainly includes the effective decisions made by court; the decisions made by foreign courts or arbitration organizations and acknowledged by Chinese court; the decisions made by the administrative organs; the debt instruments made by notary organs; the arbitration awards and mediation instruments made by the arbitration organization.

The initiation of the enforcement can either be made by the party's application or made by the court's *sua sponte* transferring the decision to the enforcement bureau. According to para. 2, Art. 19 of the *Regulations on Some Issues on the Enforcement of the People's Court (For Trial Implementation)*, the court can only transfer to the enforcement bureau the legal instruments concerning with the payment of alimony, child support or elder support, the decisions concerning with civil sanctions, and the civil part of the criminal decisions.

The enforcement measures mainly include inquiring, detaining, freezing, transferring, and selling off the properties of the person subject to enforcement. Where the judgment is a compulsory eviction from a building or a plot of land, the president of a people's court shall sign and issue a public announcement to order the person subject to enforcement to perform his obligations within a designated period

of time. If the person fails to do so within the designated time, the enforcement officer can force him to leave. The court can also adopt or notify relevant units to assist to adopt measures such as restricting going board, making records on the credit system, and publishing non-performance information to push the enforcement.

If a party or any interested party considers that the enforcement is in violation of legal provisions, he may raise a written objection to the court in charge of the enforcement. If the objection is tenable, the court shall rule to cancel or correct the enforcement; and if the objection is untenable, the court shall rule to reject the objection. If the party or interested party is not satisfied with the ruling, he may apply for reconsideration to the court at the next higher level within 10 days after the ruling is served.

If, during the course of enforcement, a person who is not involved in the case thinks that he has a substantive right towards the subject matter of the enforcement and that the enforcement is infringing this substantive right, he can raise a written objection to the court making the enforcement. If the objection is tenable, the court shall rule to suspend the enforcement on the subject matter; and if the objection is untenable, it shall be rejected. Where the person raising the objection or the party of the enforcement is not satisfied with the ruling, if the objection is concerned with an error in the original decision, he shall apply for a adjudication supervision procedure; if the objection is irrelevant to the original decision, he may file a lawsuit to the court making the enforcement within 15 days after the ruling is served.

19. ADR

The main forms of the ADR in China are the conciliation outside court and the arbitration. The arbitration is quite popular in the commercial area, while the conciliation outside court is not quite commonly used due to the fact that the court can also conduct conciliation and can form an enforceable conciliation instrument, while the conciliation instrument made outside the court has to be confirmed by the court before it becomes enforceable.

In contemporary China, conciliation can be held by industry associations, organizations, commissions, professional mediators and conciliation centres. Among them only the People's Conciliation Commissions are regulated by legislation and linked up with judicial proceedings. The *People's Conciliation Law of the People's Republic of China* adopted in 2010 refers to the People's Conciliation Commissions as "mass-based organizations legally formed to settle disputes among the people" (Art. 1). The Commission conducts the "people's conciliation" by "persuading the parties to reaching a conciliation agreement on the basis of equal negotiation and free will to solve the dispute between them" (Art. 2). Only the agreement made under the conciliation of the People's Conciliation Commission can go through a proceeding called "judicial confirmation" in court to be accepted as an enforceable instrument.

There are mainly two types of arbitration in China: one is the commercial arbitration, the other being the labour arbitration. The two types of the arbitration are of different

nature and conducted by different arbitration organizations. The labour arbitration does not need arbitration agreements to initiate. It is a mandatory proceeding for labour disputes to go through before they are brought to the court. In this sense, it cannot be considered as an ADR. The commercial arbitration, on the other hand, is an arbitration conducted by the commercial arbitration commissions under the written arbitration agreement made by the two parties. The award made by the commission is enforceable and cannot be appealed. In other words, a valid arbitration agreement has legal effect to exclude the judicial litigation as dispute resolution. Even if one of the parties hides the arbitration agreement from the court to file a suit and get accepted, the court shall still dismiss the suit at the request of the other party, unless the agreement is invalid or the other party fails to raise the objection. Such finality of the arbitration regulated in statutes is consistent with the international treaties⁹ China has signed.

20. Role of Academia

The legal scholars in China play an important role in legislation. Take the 2012 amendment of the CPL as an example. Before its enactment, multiple seminars were held between the legislators, the judges from the SPC, and the scholars to discuss the details of it. The scholars' suggestions are important reference for the legislators and even the state rulers. Their opinions are also influential for judicial interpretations and other regulations. Judges, on the other hand, show less interest into the scholars' work. Few, if any, judges will quote scholars' ideas in their judgments. They often think that the scholars' research is too theoretical to be linked with the real world of law and does little help for judicial practice. However, judges are accustomed to consulting legal scholars for opinions when trying a complicated case. The parties also often submit legal professors' opinions of the case as evidence to support their cases. It should be noted that the opinions on how to try the case are not considered as expert opinion, but as a simple support for the party's statement that shall not weigh too much. The court also often hires professors to give speeches or lectures to the judges to improve judicial skills.

21. Comparative and Cultural Observations

By and large, the civil procedural system of China belongs to the civil law system. The current civil procedural system is not a self-generating product, but a combination of imported laws and local circumstances. The modern civil procedure of China did not emerge until the early 20th century and still have difficulties in merging with Chinese tradition culture. When the Qing Dynasty introduced the western procedural

⁹ China has so far joined two conventions on international arbitration. One is *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, the other is *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*.

regulations into its legal code, the Empire was already in its final stage. The law was only put into practice for a few decades before the Dynasty was overturned. Since then, China had been in a constant status of war and had no space for the implementation of civil procedure law. Without the chance of constant practice, the civil procedure with modern elements from western countries had never succeeded in merging into China as a widely known and accepted procedural culture. This situation was maintained until 1949, when the PRC, which held a hostile attitude towards all western ideology, was established. The former statutes were naturally abolished and the new legislation put its basis on the socialist legal ideology learning from the Soviet Union. The procedural regulations, however, did not refer much from the Soviet Union, but considered more on the Chinese local characteristics and the CCP's policies. For example, considering the Chinese culture and the CCP's policy on harmony, the law paid more attention on conciliation and less focus on the procedure. Therefore, although using the law of Soviet Union as reference, the civil procedure of China shares little links with the law of Russia, especially the law of Russia after 1989.

After the 1980s, however, China once again turned to the western concepts of law during its judicial reform. Since then, China has been continually learning modern procedural systems from western countries. It not only introduces modern procedural concepts and institutional structures from Germany and Japan, but also learns evidential law, ADR and commercial adjudication from the USA. The American style of legal education and the formation of lawyers and judges also influence the judicial practice and legal culture of China. The transplantation from both the civil law system and the common law system may have blurred the affiliation of Chinese civil procedure law, but the outlook of Chinese civil procedure still belongs to the civil law system.

22. International Matters and BRICS Cooperation in Civil Procedure Perspectives

In China, for international matters, the signed international conventions and treaties are superior to the national law, unless the provisions are the ones on which China has announced reservations. There are a number of bilateral treaties on the civil legal assistance between China and other countries such as France, Italy and Korea. So far, China has signed bilateral treaties on legal assistance for civil matters with 30 countries.¹⁰ Without conventions or treaties, if the foreign country has a reciprocal relationship with China, the court may also recognize and enforce the judgment, as long as it does not contradict the basic principles of the China's law or the national, social, and public interest of China. Besides bilateral treaties, China also signed the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* and the *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*.

¹⁰ See the website of the Department of Judicial Assistance and Foreign Affairs (Dec. 20, 2016), available at http://www.moj.gov.cn/sfxzws/node_219.htm.

China has always been treasuring the cooperation with the BRICS countries. There are civil legal assistance treaties with Brazil and Russia. China also establishes a BRICS Dispute Resolution Centre in Shanghai, specially dealing with commercial dispute resolutions between the BRICS countries. On March 28th, 2015, a BRICS Chief Judge Forum was held in Sanya, China, for the discussion of the judicial protection for environment. The top judges signed a statement to promote judicial cooperation, raising cooperation among the five member countries to a new level.

Conclusion

The civil procedure law of China is undoubtedly still in its initial stage of development. The government and the society are gradually accepting the modern concepts of procedure law, and the Chinese legislation keeps learning from western institutions. The 2012 amendment and the 2015 Interpretation of Civil Procedure Law shows a positive tendency of the development of Chinese civil procedure. Meanwhile, with the globalization of economy, the international cooperation of China, especially with the BRICS countries, will certainly become more and more frequent.

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