

Tsinghua Chinese Law Series

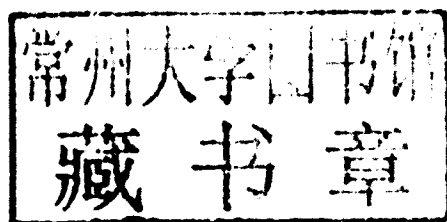
Chinese Civil Procedure and the Conflict of Laws

CHEN Weizuo

Tsinghua University Press

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Beijing

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图书在版编目(CIP)数据

中国民事诉讼法与法律冲突法:英文/陈卫佐著. —北京:清华大学出版社, 2011.8

清华中国法系列教材

ISBN 978-7-302-26191-9

I. ①中… II. ①陈… III. ①民事诉讼法—中国—教材—英文 ②冲突法—中国—教材—英文 IV. ①D925.1

中国版本图书馆 CIP 数据核字(2011)第 137196 号

责任编辑:李文彬

责任校对:王荣静

责任印制:杨 艳

出版发行:清华大学出版社

地 址:北京清华大学学研大厦 A 座

<http://www.tup.com.cn>

邮 编:100084

社 总 机:010-62770175

邮 购:010-62786544

投稿与读者服务:010-62776969, c-service@tup.tsinghua.edu.cn

质 量 反 馈:010-62772015, zhiliang@tup.tsinghua.edu.cn

印 装 者:三河市李旗庄少明装订厂

经 销:全国新华书店

开 本:170×240

印 张:12

字 数:172 千字

版 次:2011 年 8 月第 1 版

印 次:2011 年 8 月第 1 次印刷

印 数:1~3000

定 价:42.00 元

产品编号:041356-01

Preface

The manuscript of the present textbook has been used for a course taught by the author for the LL.M. Program in Chinese Law at Tsinghua University School of Law from 2005 to 2010. The main objective of this course is to provide international students with basic knowledge of Chinese civil procedure and the conflict of laws. In particular, the course expounds civil lawsuits that are filed in accordance with the Chinese code of civil procedure (Civil Procedure Law of the People's Republic of China), other statutes and judicial interpretations, as well as choice of law rules determining the law applicable to civil relationships involving foreign elements. The course provides succinct explanations of essential issues, fundamental principles and particular institutions in Chinese civil procedure and the conflict of laws.

The textbook begins with a survey of the Chinese procedural law and an overview of Chinese civil procedure and then focuses on essential aspects of court jurisdiction and trial procedure in civil matters. In view of the traditional importance of alternative dispute resolution in China, mediation (conciliation) and arbitration are also discussed with corresponding comparisons to civil procedure.

The textbook also discusses issues relating to the conflict of laws, *i.e.* international jurisdiction under the Chinese international civil procedure law, recognition and enforcement of foreign judgments as well as Chinese choice of law rules. Focus is directed toward the Chinese Statute on the Application of Laws to

Civil Relationships Involving Foreign Elements of 28 October 2010, which entered into force on 1 April 2011.

The author owes great thanks to Kevin M. Moore (LL.M., Peking University; Legislative Aide, Oregon Senator Floyd Prozanski; *juris doctor* candidate, Willamette University College of Law) and Thomas Carsten Bork (*stud. iur.*, *Westfälische Wilhelms-Universität Münster*, LL.M. candidate at Tsinghua University School of Law, Beijing) for their great support and many helpful suggestions.

Beijing

28 June 2011

CHEN Weizuo

Table of Contents

Part I Chinese Civil Procedure	1
Chapter One A General Survey of Chinese Procedural Law	3
I. SUBSTANTIVE AND PROCEDURAL LAW	3
II. DIFFERENT TYPES OF PROCEDURAL LAW	4
III. JUDICIAL SYSTEM OF THE PRC	6
Chapter Two An Overview of Chinese Civil Procedure	13
I. SOURCES OF CHINESE CIVIL PROCEDURAL LAW	13
II. BASIC PRINCIPLES OF CHINESE CIVIL PROCEDURE	14
III. BASIC SYSTEMS OF CHINESE CIVIL PROCEDURE	20
Chapter Three Court Competence and Court Jurisdiction in Civil Matters	26
I. COURT COMPETENCE IN CIVIL MATTERS AND ITS RELATIONSHIP TO MEDIATION AND ARBITRATION	26
II. COURT JURISDICTION	30
Chapter Four Litigation Participants	45
I. PARTIES	45
II. AGENTS <i>AD LITEM</i>	53
Chapter Five Evidence	58
I. GENERAL PRINCIPLES	58
II. BURDEN OF PROOF AND THE COURT'S RIGHT TO INVESTIGATE AND COLLECT EVIDENCE	60
III. ORIGINALITY OF EVIDENCE (ARTICLE 68 OF THE CPL)	61
IV. EXPERT EVALUATION (ARTICLE 72 OF THE CPL)	62
V. INSPECTION (ARTICLE 73 OF THE CPL)	62
VI. PRESERVATION OF THE EVIDENCE (ARTICLE 74 OF THE CPL)	62

Chapter Six	Time Periods and Service	65
I.	TIME PERIODS	65
II.	SERVICE	68
Chapter Seven	Property Preservation and Advance Execution.....	70
I.	PROPERTY PRESERVATION.....	70
II.	ADVANCE EXECUTION.....	71
III.	RECONSIDERATION	72
Chapter Eight	Compulsory Measures against Obstruction of Civil Proceedings.....	73
I.	ACTS OF OBSTRUCTION OF CIVIL PROCEEDINGS AND COMPULSORY MEASURES AGAINST THEM	73
II.	COMPULSORY MEASURES (DETAILS).....	76
Chapter Nine	Litigation Costs	77
I.	MAIN PROVISION OF THE CPL ON LITIGATION COSTS	77
II.	MEASURES FOR PAYMENT OF LITIGATION COSTS	77
Chapter Ten	Ordinary Procedure of First Instance.....	79
I.	BRINGING A LAWSUIT AND ENTERTAINING A CASE.....	79
II.	PREPARATION FOR TRIAL	80
III.	TRIAL IN COURT	81
IV.	SUSPENSION AND TERMINATION OF LEGAL PROCEEDINGS.....	83
V.	JUDGMENT AND ORDER.....	85
Chapter Eleven	Summary Procedure.....	87
I.	SCOPE OF APPLICATION	87
II.	PARTIES IN A SUMMARY PROCEDURE	87
III.	OTHER FEATURES	87
Chapter Twelve	Procedure of Second Instance	89
I.	CONDITIONS AND TIME LIMITS FOR AN APPEAL	89

II. APPEAL PETITION	89
III. DEFENSE.....	90
IV. SEVERAL ASPECTS OF THE SECOND INSTANCE	91
V. OUTCOMES OF THE PROCEDURE OF SECOND INSTANCE	91
VI. MEDIATION IN A CASE ON APPEAL	92
VII. FINALITY AND PERIODS	92
Chapter Thirteen Special Procedure	95
I. TYPES OF CASES	95
II. CHARACTERISTICS.....	95
Chapter Fourteen Procedure of Trial Supervision.....	97
I. CONDITIONS FOR A RETRIAL	97
II. PROCEDURE OF TRIAL SUPERVISION	101
III. PROTEST LODGED BY THE SUPREME PEOPLE'S PROCURATORATE OR A PEOPLE'S PROCURATORATE AT A HIGHER LEVEL IN ACCORDANCE WITH THE PROCEDURE OF TRIAL SUPERVISION	102
Chapter Fifteen Procedure of Execution.....	104
I. GENERAL PRINCIPLES	104
II. APPLICATION FOR EXECUTION AND REFERRAL	105
III. EXECUTION MEASURES.....	106
Part II The Conflict of Laws	107
Chapter Sixteen International Jurisdiction under the Chinese International Civil Procedure Law.....	109
I. GENERAL PRINCIPLES OF CIVIL PROCEDURE OF CASES INVOLVING FOREIGN ELEMENTS	109
II. INTERNATIONAL JURISDICTION IN CIVIL MATTERS	111

Chapter Seventeen	Recognition and Enforcement of Foreign	
	Judgments in China.....	113
I.	COMPETENT COURTS FOR APPLICATIONS OR REQUESTS	
	OF RECOGNITION AND ENFORCEMENT OF FOREIGN	
	JUDGMENTS OR WRITTEN ORDERS	113
II.	PROCEDURE FOR RECOGNITION AND ENFORCEMENT OF	
	FOREIGN JUDGMENTS OR WRITTEN ORDERS IN CHINA.....	113
III.	REFUSAL OF RECOGNITION AND ENFORCEMENT OF	
	FOREIGN JUDGMENTS OR WRITTEN ORDERS IN THE	
	PRC	114
Chapter Eighteen	Chinese Choice of Law Rules.....	115
I.	CHINESE PRIVATE INTERNATIONAL LAW (THE LAW OF THE	
	CONFLICT OF LAWS): NOTION	115
II.	HISTORICAL DEVELOPMENT OF CHINESE PRIVATE	
	INTERNATIONAL LAW: TOWARDS CODIFICATION OF	
	CHINA'S PRIVATE INTERNATIONAL LAW	119
III.	CHINESE PRIVATE INTERNATIONAL LAW STATUTE OF	
	28 OCTOBER 2010: THE FIRST PIL CODIFICATION IN THE	
	LEGISLATIVE HISTORY OF THE PRC	138
Addendum 1:	Chinese Statutory Conflict Rules and Conflict	
	Rules Contained in Judicial Interpretations Prior to	
	1 April 2011	162
Addendum 2:	Statute on the Application of Laws to Civil	
	Relationships Involving Foreign Elements of the People's	
	Republic of China	170

Part I

Chinese Civil Procedure

Chapter One A General Survey of Chinese Procedural Law

I. SUBSTANTIVE AND PROCEDURAL LAW

The legal system of the People's Republic of China (hereinafter referred to as "PRC")—like legal systems both of the continental civil law family and the Anglo-American law family—knows the classification of substantive law and procedural law. Substantive law deals with rights and obligations that each legal subject (natural person, legal person or any other organization) enjoys and undertakes, whereas procedural law deals with the enforcement of those substantive rights and obligations. In case of a dispute, procedural law functions as a mechanism to realise and enforce the rights stipulated by substantive law. It is said that "substantive law is concerned with what, whereas procedural law is concerned with how"¹.

The relationship between substantive and procedural law is that between essence and form. Without substantive law, procedural law is of no purpose; without procedural law, substantive law cannot be enforced.

The impact of procedural law is enormous in a country like China, which traditionally lacked a culture of rule of law. In

¹ Zhu Yikun, *China's Procedural Law*, Law Press China, Beijing 2003, p. 1.

traditional Chinese law, not only were civil law and criminal law indistinctly classified, but substantive law and procedural law were not distinguished from one another. As a matter of fact, there was no real procedural law in traditional Chinese law. In recent years, procedural fairness has become a meaningful topic which is beneficial to the construction of rule of law in China.

II. DIFFERENT TYPES OF PROCEDURAL LAW

A. Civil Procedural Law

The code of civil procedure *i.e.* the Civil Procedure Law (hereinafter referred to as “CPL”) of the PRC was adopted at the 4th Session of the Seventh National People’s Congress (hereinafter referred to as “NPC”) on 9 April 1991, amended in accordance with the Decision on Amending the CPL of the PRC adopted at the 30th Session of the Standing Committee of the Tenth NPC on 28 October 2007. The amendments came into effect on 1 April 2008.

B. Criminal Procedural Law

For criminal procedural law, there is a criminal procedural code *i.e.* the Criminal Procedure Law of the PRC, which was adopted by the NPC on 1 July 1979. It was one of the first major statutes enacted as part of the nation’s effort at rebuilding the legal system at the early stage of reform and opening to the outside world.² The

² See Daniel C.K. Chow, *The Legal System of the People’s Republic of China in a Nutshell*, Thomson West 2003, pp. 257-258.

criminal procedure code has been revised extensively by the NPC on 17 March 1996. The revised version became effective on 1 January 1997.

C. Administrative Procedural Law

For the procedures governing administrative litigation, there is the Administrative Litigation Law of 4 April 1989, which entered into effect on 1 October 1990. It provides the basic statutory rules on procedural matters in the area of administrative law. In traditional Chinese law, there has been a concept stating that ordinary citizens could not challenge the legality of concrete administrative acts undertaken by the government. The Administrative Litigation Law was the first Chinese statute of public law character to expressly recognize the right to challenge governmental authority and to allow ordinary citizens, legal persons and other organizations to challenge the legality of concrete administrative acts of governments at various levels.

Besides, the Administrative Review Regulation of 1990, the State Compensation Law of 1994 and the Administrative Penalties Law of 1996 also belong to the major enactments in administrative procedural law.

D. Statutes and Regulations on Alternative Dispute Resolution

In addition to the statutes on litigation procedures, there are also statutes and regulations regarding alternative dispute

resolution (ADR), which are based on non-litigation settlement of disputes by means like mediation and arbitration.

Provisions regarding mediation are contained, for example, in the Organic Rules for People's Mediation Committees of 1989 and in the Measures for Handling Disputes among the People of 1990.

As to arbitration, the Law on Arbitration of 31 March 1994 was adopted by the Standing Committee of the NPC (thus non-basic law), entered into effect on 1 September 1995. Jurisdiction of arbitration institutions has been substantially enlarged under the Law on Arbitration. Arbitration commissions are set up under government organs with higher qualifications for arbitrators. A challenge system is provided in order to ensure the impartiality of arbitrators.

III. JUDICIAL SYSTEM OF THE PRC

A. Judicial Power and Judicial Organs

In the PRC, the judicial power of the State originates in the legislature, *i.e.* the people's congresses at national and local levels as well as their standing committees.

In the PRC, people's courts, people's procuratorates, public security organs, judicial administrative organs, and State security organs are considered the judicial organs. The function of public security organs is to maintain social and public order, and to conduct investigation and the arrest of criminal suspects. The functions of the judicial administrative organs include the administration of prisons, implementing the system of reform and

re-education through labor, and the administration of lawyers and notaries. The functions of State security organs include investigating cases of espionage and special agents. They may also exercise powers of investigation, detention, preliminary examination, and arrest.

B. People's Courts

1. General Principles

In the PRC, the State adjudicative power is exercised by the people's courts.³ Article 123 of the Constitution of the PRC of 1982 (hereinafter referred to as "Constitution") provides that the people's courts in the PRC are the adjudicative organs of the State.

The general people's courts are the Supreme People's Court and the local people's courts at different levels. There are four levels altogether. The presidents at each level are elected by the people's congresses at the corresponding levels, vice-presidents and general judges are subject to appointment by the standing committees of the people's congresses at corresponding levels.

The special people's courts are military courts, railway transportation courts and maritime courts.

Military courts include basic military courts, intermediate military courts and high military courts. They are competent to try criminal cases involving servicemen.

Railway transportation courts include basic railway transportation courts, intermediate railway transportation courts

³ See Daniel C.K. Chow, *The Legal System of the People's Republic of China in a Nutshell*, Thomson West 2003, p. 195

and high railway transportation courts. They are competent to try criminal and civil cases involving railway transportation.

Maritime courts exist only at the intermediate level. They are competent to try maritime cases.

There are two instances of trials: judgments or written orders of a court of first instance may be appealed to the court at the next higher level. The people's procuratorate may also protest the judgment before a court at the next higher level. If there is no appeal or protest within the designated period, judgments become legally effective.⁴ Judgments of second instance and the decisions of the Supreme People's Court are final.

2. Competence

a. The Supreme People's Court

The Supreme People's Court is the highest adjudicative organ of the PRC. Its president (Chief Justice) is elected by the NPC and it is accountable to the NPC and the Standing Committee of the NPC. The term of office of the president of the Supreme People's Court is 5 years with a maximum of two consecutive terms. Vice-presidents and general judges are appointed and dismissed by the Standing Committee of the NPC.

The Supreme People's Court has the following chambers: chamber of putting cases on file (*li'an ting*), criminal chamber (*xingshi ting*), civil chamber (*minshi ting*), administrative chamber (*xingzheng ting*) and chamber of adjudicative supervision (*shenpan jian du ting*).

One of the functions of the Supreme People's Court is

⁴ See Zhu Yikun, *China's Procedural Law*, Law Press China, Beijing 2003, pp. 8-9.