PART FIVE

JUDICIAL PROCEDURE OF CHINA

A. CIVIL JUDICIAL PROCEDURE

Trial process of civil litigation in China includes four types of procedure which are ordinary procedure of first instance, procedure of second instance, procedure of trial supervision and procedure of execution.

Procedure of first instance. it is the most basic procedure during trying a civil case, also the most complete one. It has five stages including bringing a suit and accepting a case, preparations for trial, beginning of a trial and courtroom investigation, courtroom debate, and evaluation and declaration.

Bringing a suit. According to article 108 of the Civil Procedure Law, the following conditions must be met when a suit is brought: the plaintiff must be an individual, legal person or any other organization that has a direct interest in the case, there must be a specific defendant, there must be a concrete claim, a factual basis, and a cause for the suit, the suit must be within the scope of acceptance for civil lawsuits of the people's courts and within the specific jurisdiction of the people's court where it is filed. It is impossible to bring a suit unless four of the conditions are all met. A plaintiff can raise a civil case in written or oral form. Thereby, the written form is the principal. The written form means the submission of a bill of complaint which shall clearly set forth the following: (1) the name, sex, age, ethnic status, occupation, work unit and address of each person who is a party to the case or, if a party is a legal person or any other organization, its name, address and legal representative's or principal leading personnel's name and position. The parties includes both the complaint and the defendant. Assistance can be applied when it is necessary to set forth the work unit and address of a party. the principal leading personnel of the " other organization" refers to its representative or runner. (2) the claim of the lawsuit and the facts and grounds on which the lawsuit is based. And (3) any evidence and its source, as well as the names and addresses of witnesses. The said evidence and its source includes any one which has been submitted or can

be submitted. If it is to provide any testimony, the name and address of the witness shall be made clear in order to facilitate the investigation by the court and order the witness to testify in the court.

Review and acceptance. After the plaintiff lodges a suit in written or oral form in court, the court where it is filed shall review the suit according to the law and then handle it according to specific circumstances concerned. Two approaches will be adopted: one is to find whether the four conditions of bring a suit are met and decide the admission of the case, the other is to find whether the bill of it is complete. To ensure the realization of the claim right of the litigant, as article 111 of the Civil Procedure Law stipulates, the court must accept the lawsuit filed in conformity with the provisions of the Law. If some of the conditions are failed to meet, revision and supplement shall be allowed. According to article 112 of the Civil Procedure Law, when the court orders that the complaint be rejected, if the complainant has an objection against the order, he may file an appeal. When the court finds after review that it meets the requirements for acceptance, it shall file the case within seven days and notify the parties concerned; if the complaint does not meet the requirements for acceptance, the court shall within seven days order that the complaint be rejected. The period of 7 days is for the court to complete its review and decide the admission of the case. It is laid down clearly not only for the court to have enough time of consideration, but also to guarantee the realization of the litigant's rights.

After the suit is started, the defendant may raise an independent claim according to the legal form and procedure against the plaintiff which is named counterclaims and shall be dealt with together with the original claim.

Preparations for trial. (1) Examination of the procedure of bringing of the suit and the content of the bill of it. The completeness of procedure concerning the filing of suit will be reviewed, and it shall be made sure that the bill of it is pertinent to the fact or reasoning on the claim and is without anything impertinent to the case or negative to the rights and interests of the personality of the other side. If the filing procedure is not complete, or the content of the bill lacks something or containing some error, the plaintiff shall be ordered to revise or supplement it within fixed period of time. (2) Service of the legal documents and litigant documents. The court shall notify the plaintiff with a notice of acceptance and send a notice for response to the suit to the defendant after its acceptance of the case. The notice shall not only inform both sides of the litigants of the acceptance of the suit by the court, but also inform them the litigant rights and duties which otherwise can also be done orally through a face-to-face way. (3) Reading and investigation of the materials concerned.

Preparations for the courtroom trial. (1) To notify the litigants and other participants involved. According to law, it shall be done 3 days earlier before the commencement of the trial. The period of 3 days is a legal one and can not be lessened, so the litigants and other participants in the action can make their preparations and appear in the court on time. When there is a third party joining in, the litigants include him besides the plaintiff and the defendant. Other persons involved in the action can be determined basing upon the specific case. The litigant to take a part in the trial can be notified by court notice or court summon, but other participants shall only by court notice. (2) The trial of the case held publicly shall be posted. (3) The secretary sees to the appearance of the participants and declaration of the discipline in the court.

Courtroom investigation. Through this stage, decide the issues at odds between two sides of the suit.

Courtroom debate. During this period, the litigants and their agents can support and oppose the fact or legal issues and demonstrate their reasoning. But the content of the debate has to be pertinent close to the issues within the investigation. During the debate, the inter-inquiry shall be allowed if necessary. Through the courtroom debate, the litigant can examine and testify the contentious issues one by one, in order to find the objective reality and based upon which the justice and proper implementation of the law can be made available. Court debates shall be conducted in the following order: (1) presentation of oral statements by the plaintiff and his agents; (2) response by the defendant and his agents; (3) presentation of oral statements or defense by the third party and its agents; and (4) debate between the two sides. The debate between the two sides shall be pursued directly towards the specific issues at odds, and the presiding judge shall testify the contentious issues. During the direction of the debate, the judge shall ensure the equality in the debate among the plaintiff, defendant and the third party. As to person who is not good at words, introduction and enlightening can be available through the way of making the focuses in the debate clear. At the end of the court debate, the presiding judge shall ask each side to present his final arguments, with the plaintiff going first, then the defendant, and then the third party. At last, the presiding judge declares the end of the court debate. According to article 128 of the Civil Procedure Law, “At the end of the court debate, a judgment shall be made according to law. Where conciliation is possible prior to the rendering of a judgment, conciliation effort may be conducted; if conciliation proves to be unsuccessful, a judgment shall be made without delay. ”

Deliberation and pronouncement of the judgment. It is the last trial period during

which the fact of the case and the laws applicable are determined and the judgement pronounced. (1) Deliberating of the collegial panel. At the end of the court debate, once the litigants are not willing to accept or fail to arrive at he conciliation, the presiding judge shall declare the pause of the trial, then the judges and the secretary enter into the deliberation room for the deliberation. During this course, the judges are to research and determine the clarity of the facts basing on which to find the justice and apportion the responsibilities, and finally decide the laws applicable and the burden of the case fee. Members of the collegial panel have equal rights during this course and shall observe the principle that the minority shall defer to the majority. Diverging opinions in the deliberation must be entered in the transcript.

The transcript shall be signed by the members of the collegial panel and attached to the archives of the suit. (2) Pronouncement of the judgement. According to article 134 of the Civil Procedure Law, the people's court shall publicly pronounce its judgment in all case, whether publicly tried or not. Upon pronouncement of a judgment, the parties must be informed of their right to file an appeal, the time limit for appeal and the court to which they may appeal. Upon pronouncement of a divorce judgment, the parties must be informed not to remarry before the judgment takes legal effect.

Withdrawal of complaints. A plaintiff may apply to withdraw his complaints before judgment is pronounced and when the suit is being handled, which is circled around the claim and anti-claim. However, some fact and reason shall be provided for the withdrawal of the complaint. The fact and reason mush be within the legal capacity of the litigants. The application in accordance of law can be approved by the court, otherwise it will be disallowed by an order on the basis of principle of legality.

Default judgment. After the commencement of the suit, when one party refuses to appear in court, the court can make judgment by default in order to keep the litigant order and legal authority. This system includes the rules concerning the ground of facts, the objectives applicable the legal effect and so on. Initially, the ground of facts. If a defendant has been served with a legal subpoena from a people's court and refuses to appear in court without justified reason, or if he walks out during a court session without the permission of the court, the facts constitute the ground for the default judgement according to the civil procedure Law. And the service with a legal subpoena is the performance of the fixed legal procedure of the court, whereas the refusal to appear in court and walking out during a court session belongs to the failure of the litigants to carry out the legal procedure. The judgement by default must be made basing on the facts above. Without being served with a legal subpoena or failure to comply with the subpoena because of justified reason, there is nothing to regard as refusal to

appear in court and the default judgment can not be made. Secondly, the objective of the default judgment. This kind of decision can be applied to both parties of the suit. Thirdly, the legal effect of it. It is equal to that with appearance of both parties. The party who do not appear in court still have the right to appeal during the appealing period against the default judgment and when the opponent party appeals, it can become the party in the appeal suit. Similarly, the judgment of the court of second instance is also the final one and has the legal effect upon both sides of the suit. But if it can be proved by any litigant that the default judgment is a result of lack of the service of legal subpoena or failure of appearance in court with justified reason, it do not have the same legal effect as the normal one for the violation of legal procedure. As a result, when the appeal is made against the judgment on first instance level, the suit will be sent back to resume the trial; and for the suit not appealed, or on the second instance level, re-trial will be done.

Suspension of the proceedings. A lawsuit shall be suspended, if it involves any of the following circumstances: (1) One of the parties dies and it is necessary to wait for his heritor to make clear whether he would participate in the proceedings. (2) One of the parties has lost the capacity to engage in litigation and his agent ad litem has not been designated yet. When any litigant who is declared according to law non-capacity or limited-capacity, it is necessary to have an agent ad litem act for him. If it is timely to identify the agent ad litem capable of exercise of the rights and taking responsibilities concerned, the trial can continue; otherwise, there shall be a period to identify the agent ad litem, and no deputy for the litigant to take the litigation, suspension of the trial will be administered. (3) The legal person or any other organization as one of the parties has terminated, and the person succeeding to its rights and obligations has not been determined yet. The legal person or any other organization can cease because of mixture or dissolution. After the ceasing, the legal person as result of mixture or the liquidation organ will take the action instead, so if it has not yet identify the taker of the rights and duties, suspension of the proceeding happens. As to the other organizations, the liquidation organ for the ceased organization will act as a party in the suit concerned, or the original principals do so if there is no such organ existing so that generally an action without party to take rights and duties rarely exists. However, if the original principals are not able to take part in the action for some reason, it is still necessary to suspend the proceeding until the legal representative or quasi-representative is identified.(4) one of the parties is unable to participate in the proceedings for reasons of force majeure. The force majeure for the suspension of the proceedings is the traffic interruption not for the litigants' reason but because of the sudden occurrence of the natural disasters, war or things like that which lead to

the incapacity of the litigants to take part in the action. (5) the current case is dependent on the results of the trial of another case that has not yet been concluded. During the trial of a civil case, sometimes it is found that the case on hand depends on the results of the trial of another case, so it shall be suspended until the conclusion of the other case. Among others, the so called “another case” can be criminal case or administrative case. And as to case concerning patent tort, if another case is to decide the validity of the patent, the former shall be paused waiting for the decision of the latter. (6) other circumstances arise that warrant the suspension of the lawsuit.

Form of orders is utilized for suspension of the proceedings. The proceedings shall resume after the causes of the suspension have been eliminated and upon the application by the litigants or the court’s positive order according to its function. When the proceedings are resumed, the order to suspend the action before is regarded invalid.

Conclusion of a lawsuit. In some cases, the proceedings can not be accomplished completely and can be concluded instead of continuation. As this is concerned, according to article 137 of the Civil Procedure Law, a lawsuit shall be concluded, if it involves any of the following circumstances: (1) the plaintiff dies without an heir, or the heir waives his right of litigation; (2) the defendant dies without estate and without a person who should succeed to his obligations; (3) one of the parties in a divorce case dies. (4) one of the parties in a case involving claims for overdue alimony, support for children or elders or a claim for the termination of adoptive relationship dies.

Conclusion of the lawsuit is procedural issue which is within the powers of the court. The court can produce this order and from the date of service of it the lawsuit is concluded. The litigants have no right to complain about it.

Appeal. Article 147 of the Civil Procedure Law stipulates: ” If a party refuses to accept a judgment of first instance of a local people’s court, he shall have the right to file an appeal with the people’s court at the next higher level within 15 days from the date on which the written judgment is served. If a party refuses to accept an order of first instance of a local people’s court, he shall have the right to file an appeal with a people’s court at the next higher level within 10 days from the date on which the written order is served. “ Thus, if a party refuses to a judgment or order of first instance of a court, he shall have the right to file an appeal with the court at the next higher level with the legal period. Any appeal mentioned above shall be accepted, once it is raised, whether in the court of the first instance or in the court of the second instance, as long as it is in accordance with the conditions of bringing a

suit.

TRIAL of the APPEALED CASE

Scope of the trial. As article 151 of the Civil Procedure Law stipulates, “With respect to an appealed case, the people’s court of second instance shall review the relevant facts and the application of the law. “ So, the scope of the trial of the appealed case shall be the appellant requests of the party, and the content of consideration is factual and legal issues concerned. Because of this we find that it is the trail of both facts and laws which shall pursued centering the appellant requests. So, it is different from either kind of whole trial based on the examination of the decision of the court of first instance or the limited trial within the scope of appellant requests, and indeed it is pursued trough the examination of the factual and legal issues concerning the appellant requests.

Judicial form. According to article 152 of the Civil Procedure Law, “When handling an appealed case, the people’s court of second instance shall form a collegial panel and conduct a hearing. Having verified the facts of the case by consulting the files, making necessary investigations and questioning the parties, if the collegial panel considers that it is not necessary to hold a hearing, it may make a judgment or order without a hearing.”

Place of the trial. According to para.2, article 152, “A people’s court of second instance may try an appealed case in its own court or in the place where the case originated or where the people’s court which originally tried the case is located. “ So, the court of second instance can decided the place for the trial basing on specific case, it can be the resident place of the court itself, place where the case occurred or the resident place of court of first instance. As to the place where the case occurred usually is the place of the litigants’ residence. It is conducive for the court of second instance to verifying the fact and truth and settlement of the disputes between parties on time by pursuing the trial at the place close concerned.

Period of the trial. As article 159 of the Law stipulates, period of the court of second instance for the appealed case differs between judgements or orders. Para.1 of article 159 reads, in trying an appealed case against a judgment, the court shall make a final judgement within three months after the case was filed as one of second instance. Any extension of the term necessitated by special circumstances shall be subject to the approval of the president of the said court. The so-called “ a final judgement within three months” refers to the period from the establishment of the case as one of second instance to the producing and service of the final judgement. As to what special circumstances shall or can lead to the extension of the

period, and how long it is, there is no legal clarity or legal list in detail, so it is authorized to the president of the said court to determine considering the specific circumstances and guaranteeing the quality of the trial. According to para.2 of the same article, In trying an appealed case against an order, the court shall make a final order within 30 days after the case was filed as one of second instance.

Decision of the trial of second instance. According to para1 of article 153 of the Law, the court of second instance shall handle it respectively according to different conditions. (1) Rejection of the appeal and sustaining of the original judgement. As long as the facts were clearly ascertained and the law was correctly applied in the original judgment, the appeal shall be rejected by judgement and the original judgement shall be sustained. (2) If the law was incorrectly applied in the original judgement, the judgment shall be amended according to law. If the fact found by the original court is clear but the law was incorrectly applied, the court of second instance shall confirm the fact found in the original judgement and at the same time correct the result according to law. In practice of the justice, the wrong applications of law include the cases as follows: initially, original judgement or order violated some specific legal provision clearly; secondly, original judgement or order failed to apply some specific law which shall be applied and resulted in wrong decision; thirdly, the original judgement or order is wrong as a result of application of the law which should not be applied by the judge; fourthly, the law applied in the original judgement and order had been cancelled by the authority concerned clearly; fifthly, a law which has been promulgated but not come into effect yet is applied; sixthly, the local regulation or administrative regulation which is not in accordance with the national law is applied. Any case whose legal application is wrong and results in wrong decision shall be corrected according to law. Correction according to law means correct part of or whole to the original decision in accordance with law. (3) If in the original judgment the facts were incorrectly ascertained, the judgment shall be rescinded and the case remanded by an order to the original people's court for retrial. (4) If the original judgment is a result of a violation of the prescribed procedure the case shall be remanded by an order to the original people's court for retrial. For example, a case which should handled by a collegial panel but was dealt with by a single judge; failing to withdraw as a person who should especially a judge; the litigant who should appear in court failed to do so with lack of court summon; failing to change the not qualified participants; it was the secretary who acted as a judge and so on. All of these constitute the violations of the prescribed legal procedure. If in the original judgment a violation of the prescribed procedure may have affected the correctness of the judgment, the judgment shall be rescinded and the case remanded by an

order to the original people's court for retrial. The decision of retrial of the original court is still the decision of the first instance. The litigant still have the right to refuse the judgement or order concerned and appeal again them. (5) A court of second instance shall use orders in all cases of appeal against the orders made by the court of first instance. The judgement or order of the court of second instance is the final one and comes into effect upon the service of them to the parties.

Procedure for trial supervision. It is also called retrial procedure. According to the Civil Procedure Law, in a legally effective judgement or order, if the court finds a definite error, or the litigants thinks there is an error basing the on the legal fact and reason, or the people's procuratorate find there is legal fact and reason with shall lead to retrial, the court itself shall determine, the litigants can apply for, and the procuratorate shall command the court's retrial. Procedure for trial supervision is not necessary for all civil cases, but one of remedial procedure which is set specially for the remedy of the wrong in the legally effective judgements and orders of the court.

Procedure of execution. If the party who lost the suit whose decision including the content of execution fail to perform his duty according to the decision, the winning party has a right to apply to the court for execution within legal period.

B. CRIMINAL JUDICIAL PROCEDURE

The criminal judicial procedure is procedure for the court, the procuratorate and the public security organs (including the state security organs), together with other litigant participants, to deal with the criminal responsibilities of the accused person according to law. Generally speaking, there are four parts included in it: filing a case, investigation, initiation of public prosecution and criminal trial.

1. Filing a case

According to the Criminal Law, the public security organs or the People's Procuratorates shall, upon discovering facts of crimes or criminal suspects, and the public security organs, the People's Procuratorates or the People's Court shall, upon the considerations of the reports, complaints, information or confession, determine to file the criminal cases for investigation or trial. It is called filing a case which is conducive to ascertainment and punish the crime and guarantee of the citizen's legal interests. Meanwhile, filing of case can help to evaluate the social situation of public security and to make proper

policy decision.

Conditions of filing. According to article 86 of the Criminal Procedure Law, there are two conditions necessary for the filing: Initially, there are facts of a crime. That is to say, what to be investigated is the conduct of crime according to criminal law and there shall be some fact materials proving that the crime has already happened. Secondly, there is criminal responsibility should be investigated. Both conditions are necessary, and once they are met, a case shall be filed. Otherwise, if it believes that there are no facts of a crime or that the facts are obviously incidental and do not require investigation of criminal responsibility, it shall not file a case and shall notify the complainant of the reason. If the complainant does not agree with the decision, he may ask for reconsideration.

According to article 15 of the Criminal Procedure Law, in any of the following circumstances, no criminal responsibility shall be investigated and no case will be filed: if the limitation period for criminal prosecution has expired, in spite of the existence of the crime; if an exemption of criminal punishment has been granted in a special amnesty decree; if the crime is to be handled only upon complaint according to the Criminal Law, but there has been no complaint or the complaint has been withdrawn; if the criminal suspect or defendant is deceased; or if other laws provide an exemption from investigation of criminal responsibility.

Jurisdiction of the filing. The Chinese Criminal Procedure Law stipulates the jurisdictions and functions of the public security organs, the People's Procuratorates or the People's Court clearly. (1) The public security organs can file a case directly. According to para.1 of article 18 of the Law, investigation in criminal cases shall be conducted by the public security organs, except as otherwise provided by law. The legal exception includes: State security organs shall, in accordance with law, handle cases of crimes that endanger State security, performing the same functions and powers as the public security organs (article 4); some cases shall be placed directly on file for investigation by the People's Procuratorates (para2 of article 18); the security departments of the Army shall exercise the power of investigation with respect to criminal offences that have occurred in the Army and crimes committed by criminals in prison shall be investigated by the prison (article 225). (2) Cases shall be filed directly by the People's Procuratorates includes crimes of embezzlement and bribery, crimes of dereliction of duty committed by State functionaries, crimes involving violations of a citizen's personal rights and infringement of a citizen's democratic rights and other grave crimes committed by State functionaries by taking advantage of their functions and powers. (3) As to cases which can be filed directly by the People's Court, according to para.3 of article 18 of the Law, they are called private prosecution cases including: initially,

the cases handled only upon complaint; secondly, cases for which the victims have evidence to prove that those are minor criminal cases, for example the cases of deliberate hurt (minor one), bigamy, abandonment, interference with communication freedom, illegally intrusion into other person's house, production or selling the fake or less qualified goods (except the crimes which damage the social order or state interests seriously), violation of the protection of intellectual property, the crimes laid down in the chapter 4 and 5 of the Criminal Law, the crimes which will lead to a punishment less than that of three years of imprisonment and other minor crimes; thirdly, cases for which the victims have evidence to prove that the defendants should be investigated for criminal responsibility according to law because their acts have infringed upon the victims' personal or property rights, whereas, the public security organs or the People's Procuratorates do not investigate the criminal responsibility of the accused.

2. Investigation

According to article 89 of the Criminal Procedure Law, with respect to a criminal case which has been filed, the public security organ shall carry out investigation. Investigation is the basic and independent part stage of the criminal proceedings, it is a necessary one that case of public prosecution shall go through. The case of public prosecution can not be initiated or tried unless it go through this procedure. The purpose and task of it is to find and collect the evidences according to legal procedure to find the criminal facts, to identify and ascertain the criminal suspect, and to adopt the coercive measures to prevent the criminal found on the spot or criminal suspect from continuing to commit crime or avoiding the investigation, prosecution and trial, so as to safeguard the smooth progress of the criminal prosecution proceedings.

Basing on the provision of the Criminal Procedure Law, the investigation organs during their performance of their duties shall take some special investigation actions according to law including questioning of the witnesses and victims, inquest and examination, search, seizure of material evidence and documentary evidence, expert evaluation and wanted orders.

Interrogation of the criminal suspect. It must be conducted by the investigators of a People's Procuratorate or public security organ. During an interrogation, there must be no fewer than two investigators participating and it shall be conducted orally. A criminal suspect who need not be arrested or detained may be summoned to a designated place in the city or county where the criminal suspect stays for interrogation, or he may be interrogated at his residence. However, the interrogators shall produce their papers issued by a People's

Procuratorate or a public security organ. Interrogation of the criminal suspect must be conducted within 24 hours after the detention or arrest, and if it is found that the person should not have been detained or arrested, he must be immediately released. During the interrogation of the criminal suspect, a record shall be made which will note the questions, answers and circumstances of participation of other persons truthfully. The record of an interrogation shall be shown to the criminal suspect for checking; if the criminal suspect cannot read, the record shall be read to him. If there are omissions or errors in the record, the criminal suspect may make additions or corrections. When the criminal suspect acknowledges that the record is free from error, he shall sign or affix his seal to it. The investigators shall also sign the record. If the criminal suspect requests to write a personal statement, he shall be permitted to do so. During the interrogation of the criminal suspects, it is strictly forbidden to extort confessions by torture, enticement, deceit or question mentioning names. The criminal suspect has a right to accuse the person who conducts torture, and if there is a crime constituted in the case, the criminal responsibility shall be investigated.

3. Initiation of public prosecution

When a People's Procuratorate considers after full examination of the case transmitted by the public security organs as a result of the conclusion of investigation for prosecution or the case handled by itself as a result of conclusion of investigation, that the evidence gathered during the investigation period is already reliable and sufficient, and the conduct of the criminal suspect leads to criminal responsibility which shall be investigated, it shall initiate the public prosecution in the court. This is the public prosecution, power of which is within the jurisdiction of the People's Procuratorate. And it if the important stage in the criminal judicial proceedings.

Jurisdiction of the cases. According to article 141 of the Criminal Procedure Law, the People's Procuratorate shall initiate the public prosecution in the People's Court at the same level as its and shall not do it at higher level. If the Procuratorate has accepted case not within the jurisdiction of the court at the same level, basing on the conditions of the specific case, it shall report the suit to other Procuratorate at the next higher or lower level by which to initiate the public prosecution in the People's Court at the corresponding level and with the jurisdiction.

Conditions of the public prosecution. There are there: first, the facts of the crime of the criminal suspect are made clear. The "facts of the crime" include the facts proving the guilty of the criminal suspect but general delinquency, those deciding the burden or no burden

of the criminal responsibility of the criminal suspect, and those shall affect the gravity (lighter, mitigated or heavier) of the punishment of the criminal suspect. Second, the evidence is reliable and sufficient. Third, there is criminal responsibility should be investigated according to law. The public prosecution by the Procuratorate shall not be made unless all of the three conditions are met.

The bill of the prosecution. To file a public prosecution, the People's Procuratorate shall produce the bill of prosecution according to the Criminal Procedure Law and the Document Formats of Criminal Prosecution issued by the Supreme People's Procuratorate.

Decision not to initiate a prosecution. After the full examination of the case transferred by the public security organ as a result of the conclusion of investigation with a recommendation to initiate a prosecution or the case as a result of the conclusion of investigation by itself, the Procuratorate shall make a decision not to transfer the case to the People's Court for trial if it finds there is circumstance provided in law with effect that the suspect shall not be investigated for criminal responsibility, or the case is minor and the offender need not be given criminal punishment or need be exempted from it according to the law, or the case does not meet the conditions for initiation of a prosecution after supplementary investigation has been conducted twice. This is one of the results of the examination of the case by the Procuratorate which is of the legal effect of ending the litigation.

According to the Criminal Procedure Law, there are three categories of decision not to initiate prosecution, that provided by law, that as result of consideration and that because of existence of doubt. (1) That provided by law. There are six circumstances leading to this: if an act is obviously minor, causing no serious harm, and is therefore not deemed a crime; if the limitation period for criminal prosecution has expired; if an exemption of criminal punishment has been granted in a special amnesty decree; if the crime is to be handled only upon complaint according to the Criminal Law, but there has been no complaint or the complaint has been withdrawn; if the criminal suspect or defendant is deceased; or if other laws provide an exemption from investigation of criminal responsibility. Among them, the conduct of the criminal suspect is not regarded as guilty, or shall not be investigated for criminal responsibility, or cannot be investigated for that, so it does not meet the conditions for public prosecution. (2) That as a result of consideration. That is, if the People's Procuratorate finds the case is minor and the offender need not be given criminal punishment or need be exempted from it according to the law, the decision not to initiate a prosecution shall be made. (3) That because of existence of doubt. With respect to a case for which

supplementary investigation has been conducted, if the Procuratorate still believes that the evidence is insufficient and the case does not meet the conditions for initiation of a prosecution, the Procuratorate may decide not to initiate a prosecution. According to article 140 of the Criminal Procedure Law, in cases where supplementary investigation is to be conducted, it shall be completed within one month. Supplementary investigation may be conducted twice at most. “The evidence is insufficient” refers to that the evidence decisive in the case bears doubt and cannot be verified, the there is no necessary evidence to prove the necessary constitutive element of a crime, the conflict between the evidences cannot be resolved reasonably, or there is other possibility deduced from the evidence which can not be excluded.

Procedure of the decision not to initiate prosecution. First, a decision not to initiate prosecution is made; second, the said decision shall be announced publicly and be delivered to the person and organ concerned; third, the seizure or freeze of the property or things of value seized or frozen shall be cancelled; fourth, the People’s Procuratorate shall transfer the case to the competent organ for handling; fifth, reconsideration and review upon the opinions from public security organ sometimes will be made.

4. Criminal Trial

The criminal case, after being filed by the Procuratorate for public prosecution or by the private prosecutor in the court, enters into the trial stage. And it is the criminal trial that decides the last consequence of the litigation, the effect of investigation of criminal responsibility and the realization of the national specific power of criminal punishment.

Principle of trial in public. According to article 11 of the Criminal Procedure Law, cases in the People’s Courts shall be heard in public, unless otherwise provided by this Law. It is one of the basic principles of Chinese criminal trial.

Cases not to be heard in public. As article 152 of the Criminal Procedure Law provides, cases as follows shall not be heard in public: (1) cases involving State secrets; (2) private affairs of individuals; (3) cases involving minors. No cases involving crimes committed by minors who have reached the age of 14 but not the age of 16 shall be heard in public. Generally, cases involving crimes committed by minors who have reached the age of 16 but not the age of 18 shall also not be heard in public. In addition, according to the judicial interpretation by the Supreme People’s Court, cases involving commercial secrets indeed argued by the litigants shall be decided not to be heard in public by the court.

System whereby the second instance is final. Article 10 of the Criminal Procedure

Law stipulates: ” In trying cases, the People’s Courts shall apply the system whereby the second instance is final.” So, a criminal case shall come to end after at most twice of trials by two levels of the People’s Court respectively. As a final judgement, litigants cannot appeal against the ruling by the People’s Court of the second instance, nor can the People’s Procuratorate protest against it according to the appeal procedure.

Trial procedures. According to the Criminal Procedure Law, there are four types of trial procedures: (1) Procedure of first instance. It is the procedure by which the People’s Court makes trial of the cases filed by the People’s Procuratorate for public prosecution or by the private prosecutor for private prosecution for the first time. (2) Procedure of second instance. It is the procedure by which the People’s Court makes trial of the cases appealed or protested. (3) The special procedure for review. There is procedure for review of death sentences and that of the People’s Court for review of the punishment below the prescribed punishing line according to para.2 article 63 of the Criminal Law. (4) Procedure for trial supervision. If some definite error in a legally effective judgement or order is found, then the case shall be put into retrial.

C. ADMINISTRATIVE JUDICIAL PROCEDURE (JUDICIAL REVIEW OF ADMINISTRATION AND LEGISLATION)

Criteria of administrative trial. According to article 52 of the Administrative Law, “ In handling administrative cases, the People’s Court shall take the law, administrative rules and regulations and local regulations as the criteria. Local regulations shall be applicable to administrative cases within the corresponding administrative areas. In handling administrative cases of a national autonomous area, the people’s courts shall also take the regulations on autonomy and separate regulations of the national autonomous area as the criteria. “ So, the sources of trial in China are laws, regulations and rules.

As the laws, administrative rules and regulations, local regulations and regulations on autonomy and separate regulations belong to different level in the framework of Chinese legal system and have different status and effect, they are of different affection to the administrative trial. What is more, the legal norm at lower level shall be in harmony with provision at higher level, it is pre-requisite for its legal effect. So, in handling the administrative cases, the People’s Court shall apply laws in such an approach as considering and deciding the legality of the specific administrative act in a context of whole framework of legal norm.

Regulations for references. According to para.1 of article 53 of the Administrative Procedure Law, “In handling administrative cases, the People’s Courts shall take, as references, regulations formulated and announced by ministries or commissions under the State Council in accordance with the law and administrative rules and regulations, decisions or orders of the State Council and regulations formulated and announced, in accordance with the law and administrative rules and regulations of the State Council, by the people’s governments of provinces, autonomous regions and municipalities directly under the Central Government, of the cities where the people’s governments of provinces and autonomous regions are located, and of the larger cities approved as such by the State Council. “ As it is provided, regulations have different legal status from laws, regulations and rules. They are inferior to the laws, regulations and rules. So the regulation referred are not the ground for the administrative trial by the People’s Court, but the reference.

Scope of accepting cases. In accordance of article 11 of the Administrative Procedure Law, the People’s Courts shall accept suits brought by citizens, legal persons or other organizations against any of the following specific administrative acts: (1)an administrative sanction, such as detention, fine, rescission of a license or permit, order to suspend production or business or confiscation of property, which one refuses to accept; (2) a compulsory administrative measure, such as restricting freedom of the person or the sealing up, seizing or freezing of property, which one refuses to accept; (3) infringement upon one’s managerial decision-making powers, which is considered to have been perpetrated by an administrative organ; (4) refusal by an administrative organ to issue a permit or license, which one considers oneself legally qualified to apply for, or its failure to respond to the application; (5) refusal by an administrative organ to perform its statutory duty of protecting one’s rights of the person and of property, as one has applied for, or its failure to respond to the application; (6) cases where an administrative organ is considered to have failed to issue a pension according to law; (7) cases where an administrative organ is considered to have illegally demanded the performance of duties; and (8) cases where an administrative organ is considered to have infringed upon other rights of the person and of property. Apart from the provisions set forth in the preceding paragraphs, the people’s courts shall accept other administrative suits which may be brought in accordance with the provisions of relevant laws and regulations.

Procedure of administrative trial. In the procedure of administrative trial, the evidence burden is placed upon the defendant (administrative organ). Apart from this, it is basically similar to that of civil trial.

D. ARBITRATION PROCEDURE

Legal basis. Arbitration in China is pursued according to Civil Procedure Law of the People's Republic of China and Administrative Procedure Law of the People's Republic of China. And after the Arbitration Law was promulgated on 31 August. 1994, it becomes the main legal basis for arbitration. The Arbitration Law has eight parts: general provisions, arbitration commission and arbitration association, agreement for arbitration, arbitration procedure, application for canceling arbitral ruling, enforcement, special provision on arbitration involving foreign interests and supplement provisions. To be concrete, the main content is: First, contractual disputes between citizens of equal status, legal persons and other economic organizations and disputes arising from property rights may be accepted for arbitration by arbitration organ. Resort to trial or arbitration, no way to both of them, and the arbitration award is final. After the award is given, the arbitration commission or the people's court shall not accept the re- application of the suit concerning the same dispute by any of the parties concerned. (article 2, para.1 of article 9) For the arbitration award is final and the procedure is simple and convenient, it is less time costing and economical. According to the standard of Fee Rules of the Beijing Arbitration Committee, the cost for arbitration acceptance of a case is equal to that for the litigation of it in court. For the arbitration award is final, so the expenditure for the whole arbitration course is less than cost as a suit in court. Second, there is no jurisdiction by forum level or territorial jurisdiction for arbitration, and it is independent from administrative organ. Arbitration shall be conducted independently according to law, free from interference of administrative organs, social groups or individuals. Third, generally, arbitration is not held in public. And the ruling may not record the facts and reasons on the request of the parties, which is conducive to the establishment of the confidence between the parties. At the end, the compulsory enforcement can be applied for with the People's Court toward the ruling of the arbitration. After the decision of arbitration is made, "The parties concerned shall execute the arbitral award. If one of the parties refuses to execute the award, the other party may apply for enforcement with the people's court according to the relevant provisions of the Civil Procedure Law. The people's court with which the application is filed should enforce it. "(article 62) The Arbitration Law has reformed importantly the domestic economic arbitration system in China, endowed it features such as freewill of the parties and flexible and convenient procedures, which is of importance for the settlement of economic disputes justly and on time, ensuring of the legal interests of

the parties, maintaining the social economic order and guaranteeing the healthy development of the socialist market oriented economy.

Arbitration organs. There are three categories of arbitration organ in China: arbitration organ of foreign economic and trade, arbitration of marine affairs and domestic arbitration organ.

Foreign economic cooperation and trade arbitration committee. It referred specially to the China International Economic and Trade Arbitration Commission (CIETAC) under China Council for the Promotion of International Trade, which was founded on 31 March. 1956, named Arbitration Committee of Foreign Trade early and renamed as now in 1980. The headquarters of it is in Beijing, and it has the sub-Commissions in Shenzhen and Shanghai. Among all of the arbitration organs, its procedures are most complete and its achievements most prominent.

The working rules. The basic principles of the CIETAC are those of basing on the facts, according to Law, applying the contracts, with references to international practices and settling disputes independently and justly. For many years, it has applied these principles, heard and settled a lot of cases, satisfying the parties domestic and from abroad. What is more, it also sets consultative committee of experts to deal with difficulty cases.

Arbitration procedure. (1) The parties shall have an agreement for arbitration arrived at before or after the occurrence of the dispute, which is the precondition for arbitration. (2) In applying for arbitration, the parties concerned shall submit the application for arbitration in written. The application for arbitration shall specify the following matters: name and residence of parties concerned, the claimants' claim and the facts and evidence on which the claim is based, indicated person(s) from the list of the arbitration committee as arbitrator(s) by the parties or by the authorized president of the arbitration committee. The application shall have the attachment of evidence materials such as original or copied contracts, agreement for arbitration, communication between the parties. And the fee in advance shall be submitted. (3) The date of hearing shall be determined by the president of the arbitration committee and chief arbitrator or single arbitrator through consultation. Once the date is decided, it shall be notified to the parties. (4) Generally, the hearing is performed in Beijing. (5) Any party can entrust Chinese citizen or alien as his agent by himself orally or in written form. (6) The arbitration can be held orally or in written form. (7) If it is necessary to adopt the custody measure, of evidences, the application shall be submitted to the Intermediate People's Court of Beijing. (8) Whereas a claimant or his agent is absent from the hearing without justifiable reasons, the arbitration tribunal may give the award by default upon the application of the

other party. (9) Where the tribunal consists of three persons, the arbitral award shall be decided by the majority of the arbitrators and the views of the minority can be written down in the record which will be attached to the file. (10) If an award shall be enforced in China and one of the parties refuses to execute it, the other party may apply for enforcement with the People's Court.

Rules of withdrawal. A party has a right to ask for withdrawal of an arbitrator who as he considers has interests with the case, in order to guarantee the independence and justice of the arbitrator. According to the Arbitration Law, an arbitrator shall be withdrawn on his own application or upon the request of the parties concerned, whereas he has some circumstances which may affect the justice of the arbitration. There are two forms of withdrawal: one is that of the arbitrator by himself, which means that the arbitrator dealing with the case gets out of the arbitration on his own initiative if he founds he himself has the legally prescribed reason for withdrawal; the other is that upon the application of the party to the case, which means that if a party finds the legally prescribed reason of an arbitrator for withdrawal, he has a right to apply with the arbitration committee for this. Article 34 of the Arbitration Law stipulates clearly, " An arbitrator shall be withdrawn and the parties concerned have the right to request withdrawal, whereas: (1) The arbitrator is a party involved in the case or a blood relation or relative of the parties concerned or their attorneys. (2) The arbitrator has vital personal interests in the case. (3) The arbitrator has other relations with the parties or their attorneys involved in the case that might effect the fair ruling of the case. (4) The arbitrator meets the parties concerned or their attorneys in private or has accepted gifts or attended banquets hosted by the parties concerned or their attorneys.

Application for withdrawal shall follow certain procedure. (1) Time to file the application. As to the withdrawal on the arbitrator's initiative, there is no prescribed limit in the law, but usually he shall put up the question within 10 days after the establishment of the tribunal. Withdrawal application by a party shall be filed within the legally prescribed period. If the period during which the party has not made such application expires, he will lose the right to do so. Generally the arbitration committees provides: "In requesting for withdrawal, the parties concerned shall state reasons before the first hearing of the tribunal. If the reasons are known only after the first hearing, they may be stated before the end of the last hearing. " (2) Decision for the withdrawal. Either that on the arbitrator's own initiative or on the application of a party concerned according to law, the reason for withdrawal of arbitrator shall be subject to the examination by specific organ or person resulted in a decision. (3) When a

party applies for the withdrawal of arbitrator, he shall illustrate the fact and reason and put up evidence.

Combination of arbitration with conciliation. Combination of arbitration with conciliation is a salient feature of China's foreign-related arbitration. Conciliation shall be conducted on the basis that the parties voluntarily agree to conciliation and the facts of the case and liabilities have been basically clarified and ascertained. It is not the necessary procedure for arbitration, nor proceeding before arbitration of any case. A united conciliation is created in China. That is, when dispute occurs, the Chinese party can apply with Chinese arbitration organ for sending of conciliator and so does the alien party with foreign arbitration organ in order to conduct the conciliation together. Should conciliation succeed, the arbitration comes to an end; otherwise, the arbitration procedure resumes according to the clauses of the contract. The approach of combination of arbitration with conciliation has caused much attention of the counterparts in the world.

Achievements. With the constant deepening of reform and opening and development of the foreign trade, the number of foreign related arbitration cases is obviously increased in the field of foreign economic cooperation and trade in China.

The China International Economic and Trade Arbitration Commission and its Shenzhen Sub-Commission and Shanghai Sub-Commission all experience a trend of obvious increase in annual number of cases being accepted and heard. In 1987, the number of cases being accepted is 139 and that of the cases concluded is 200. In 1995, it becomes 902 and 890 respectively with an increase of 548.9% and 345% for each. As one of the major international commercial arbitration organs, it has grown rapidly to the first place in the world in terms of caseload, and the enormous increase of the cases concluded shows the potential of the CIETAC of handling cases.

Enforcement of award. On 22 April. 1987, China acceded to the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), according to which awards of Chinese foreign-related arbitration organs can be acknowledged and executed in more than 80 State parties. In China, the enforcement of award of foreign-related arbitration organs is conducted according to the New York Convention and the Chinese Civil Procedure Law. Thereby, the court will not consider the merits of the case, but limited procedural issues on the basis of request and evidence put up by the applicant, in order to safeguard the ending and executable effect of the arbitral award and guarantee the efficiency of the settlement of disputes. The experiences show that the domestic or foreign party usually can implement the arbitral award automatically. In few cases, when one party refused to do so,

they also could be enforced by the court on the request of the other party. By the end of 1991, the Hong Kong Supreme Court had accepted and coercively enforced more than 50 of the awards of Chinese arbitration committees upon requests. Canada, America, Japan, Swiss, New Zealand and Thailand has acknowledged and enforced Chinese arbitral awards.

Maritime arbitration organ. China Maritime Arbitration Commission (CMAC) is the only foreign-related permanent maritime arbitration organ in China founded in 1959. According to Chinese law, the cases accepted by it include four types as the legal nature is concerned: (1) Disputes resulted from the contracts such as charter party, bill of lading, maritime insurance, vessel towing and savage. (2) Cases of tort. For example, compensation case for the damage to the facilities on the sea or in the harbor because of collision, or that for the economic damage because of activity on the sea whose facilities affecting the navigation of ships and so on. (3) Disputes on the ownership, such as ownership of the ship or goods, mortgage of ships, priority requests. (4) Other maritime disputes. The practice shows that the mail cases accepted by the Commission are those of collision, bill of lading, charter, contribution in general average, demurrage, sending fee, freightage, damage or difference of goods, body hurt or death and salvage rewarding. The parties come from more than 25 countries or districts including China, Singapore, Norway, Germany, America, Japan, Canada, Poland, India, Brazil, Panama, Hong Kong, etc. Combination of arbitration with conciliation is a feature of China's maritime arbitration. Generally speaking, 1/3 of the cases are concluded by conciliation, while 2/3 are by ruling.

From 1978 to 1995, there are 176 cases accepted by the Chinese maritime arbitration organ and 119 of them had been concluded. And in 1995, 21 cases are accepted and 16 cases are decided, which was the most caseload year since its founding.

Domestic arbitration organ. After the promulgation of the Arbitration Law, governments and units concerned attached much importance to the reconstruction of the arbitration organs. According to statistics, by the end of August 1996, in 210 cities on China where arbitration organs can be constructed, there are 93 cities which had established new arbitration organs, amounting to 45%. It is anticipated that by end of the year, new founded arbitration organs would be up too 120. The established organs have accepted many cases and work well.

Shenzhen Arbitration Committee, after founded in 1995, functions on the basis of facts and laws, attaches importance to contracts, with references to international practices, complies with principles of justice and rationality and provides a forum for the resolution of

disputes associated with contractual and other property rights among citizens, legal persons and other organizations by efficient and impartial arbitration. It has accepted 230 cases including 19 foreign-related ones and with high sum of target.

Beijing Arbitration Committee, after its establishment, with recommendation of organs concerned, has assembled more than 260 experts of law or economic and trade as arbitrators according to law and its functions, all of whom are highly regarded in their respective fields and maintain high ethical standards and plentiful experiences. To strengthen the construction of the arbitrator team, it has provided training for them and established examination system. The Committee also set up a web server to introduce the arbitration system. The information on the web site includes brief introduction of the Committee, arbitration rules, fee schedule and list of arbitrators, both in Chinese and English. As the leader of the Committee said, the content of the site will be enlarged in future, mainly introduce the Chinese civil and commercial laws, economic laws, civil procedure laws and economic arbitration laws, present the development of the Chinese lawyer field and recommend excellent l.

Concentrating on the case handling, Beijing Arbitration Committee has adopted effective measures to guarantee the quality and speediness of the arbitration and made much progress. By 10 October, 1996, the committee had received advisory visits more than 1000 times, and accepted 102 cases; for details, see the form attached below. It is worth noting that from October 1999 to the end of June 2000, the committee had only received more than 20 cases. After the Tianjin Arbitration Meeting, especially the promulgation of Office Bureau of the State Council Document No.22, the number of the caseload gains an obvious increase. This shows that the Document No.22 plays important role in the transition from old arbitration system to new. As the decided cases are concerned, the period from establishment of the arbitration tribunal to the conclusion of the case usually is 50 days or so, which reflects fully the features of arbitration procedure such as being simple, convenient, quickly, secret, and professional.

E. RELEVANT CHARTS

A. Civil Procedure

First Instance
Second Instance
Supervision
Enforcement

B. Criminal Procedure

First Instance
Second Instance
Review procedure for some special cases, like Death Penalty cases
Supervision

C. Administrative Procedure

First Instance
Second Instance
Supervision
Enforcement