

Special Edition: China & Hong Kong

# soundings

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## The Maritime Court system in China – a changing landscape?

The increase in the volume of China's international trade in recent years has resulted in the rapid increase of maritime disputes in China. Since 1984, China has set up a comprehensive network of maritime courts to deal with maritime disputes. The number of regional maritime courts has over the years increased from 5, when they were first set up, to 10. The courts are situated from north to south, respectively in Dalian, Tianjin, Qingdao, Shanghai, Ningbo, Wuhan, Xiamen, Guangzhou, Beihai and Haikou. Each of the regional maritime courts may also set up branches at local port areas within their respective jurisdictions.

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# The Maritime Court system in China continued

The maritime courts have jurisdiction over cases of a maritime nature including disputes in relation to sea transportation, accidents at sea, maritime administrative disputes, and port operation disputes. In an effort to speed up the judicial process judges are also encouraged to issue judgments within a set time period from the commencement of proceedings.

A party that is not satisfied with the judgment or ruling handed down by a maritime court has the right to file an appeal before the provincial higher court where the maritime court is located. The appeal must be filed within 30 days (for a foreign party), or 15 days (for a Chinese party), from the date the written judgment or ruling is served.

## Evidence

According to the Maritime Court Guidelines issued by the Supreme Court, the relevant court handling the case will decide on whether evidence originating from abroad needs to be notarised, legalised and/or certified as appropriate, before the evidence can be adduced as evidence in a Chinese court. In most cases however, the opposition parties will raise objection in relation to the submission of foreign evidence without it first being notarised

and legalised. The Court would, in the circumstances, invariably order that the formalities be followed.

This is the reason that in most cases, licensed Chinese surveyors are used to conduct surveys in China. Foreign experts/surveyors are used in appropriate cases to help local surveyors on technical issues and opinions of foreign experts can be incorporated into the report issued by local surveyors to avoid the formalities in relation to submission of foreign evidence.

## Obtaining pre-judgment security from the Defendant

In China, there are various ways to obtain pre-judgment security in respect of a maritime claim.

(i) By arresting a ship, cargo or bunkers

Under the Chinese Maritime Procedure Law, which came into force on 1st July, 2000 a ship can be arrested as security for a maritime claim. The arrest of a ship is regarded not as an action in rem but as a procedure of preservation of a maritime claim. Similar to the situation of a ship arrest, a claimant may apply to arrest the cargo carried by a ship, her bunkers and necessaries if

the cargo or bunkers are owned by the defendant.

At the time of his application, the claimant is required to lodge security with the court. This is to provide security for the defendant should the arrest be deemed to be wrongful. The usual practice is that security equivalent to 30 days hire will need to be provided before the court is prepared to issue a warrant of arrest.

(ii) By attaching other properties of the defendant

In China, it is also possible for a claimant to obtain a property preservation order under the Civil Procedure law to attach other properties of the defendant that can be found in China; such property includes money in a bank account. This is particularly useful if a foreign party wants to obtain security for a claim against a non-ship owning entity whose assets can be located in China.

It is also worth mentioning that the Chinese Maritime Procedure Law also stipulates that a ship can be arrested in China for security to satisfy a foreign judgment or award if the parties are bound by a foreign jurisdiction or arbitration clause.





## Are foreign law and jurisdiction clauses recognised in China?

**A recent decision of the Shanghai People's High Court concerned a charter party dispute between Sinotrans Shipping Agency Ltd. of Guangzhou and Lu Qin (Hong Kong) Co. Ltd.**

In this case the Shanghai People's High Court overruled the decision of the Shanghai Maritime Court and held that a Chinese court did not have jurisdiction over a dispute arising under a charter party that contained an effective foreign law and jurisdiction clause. The clause in this case provided that English law would apply although the arbitration would be resolved in Hong Kong.

At first glance, the decision is of no surprise to legal practitioners in China. The Courts in China have always recognised a foreign law and

jurisdiction clause if one or more parties involved in a contractual dispute are legal entities incorporated outside China. The case itself however raised some interesting issues particularly as under Chinese Arbitration Law an "effective arbitration" clause is one which includes the name of the arbitration organisation agreed to resolve the dispute. Consequently if the clause was deemed to be "ineffective" ie because it did not name the arbitral organisation agreed to resolve the dispute - then the Chinese court would have jurisdiction over the case.

In *Sinotrans Shipping Agency Ltd. v. Lu Qin (Hong Kong) Co. Ltd.*, the Shanghai People's High Court held that:

- (i) the effectiveness of an arbitration clause should be decided in accordance with the law of the parties' choice. In this case, the applicable law was English law;
- (ii) the arbitration clause in question was effective and enforceable under English law.

As a result the Courts in China did not have jurisdiction over the dispute.

## Message from the Managers

This edition of Soundings is focused very much on the changing maritime court system in China and recent legal developments that have occurred both in Shanghai and in Hong Kong. The Managers' Hong Kong office is dedicated to providing legal assistance to Members based in Hong Kong and mainland China.

The claims executives within the office have a broad array of experience to assist Members in the region. This assistance includes advisory services on charterparty or other contractual documents along with many years experience in managing complex litigation and providing invaluable assistance in the management of those claims.

The executives are also predominantly bi-lingual which provides Members with added assistance on claims matters. The office is headed by John Morris. The claims team whose photos are set out are (from left to right) Do Young Kim, Peter Lau, Christopher Roberts, Helen Huang, Felix Lai, John Morris, Kelvin Lam and Danny Ng.



## The Judicial system in Hong Kong and an update on recent developments

**The Hong Kong Special Administration Region was set up on 1st July, 1997 following the resumption of Chinese sovereignty. Under the “One Country, Two Systems” policy, the laws previously in force in Hong Kong have been maintained. The separate nature of the Chinese and Hong Kong legal system is also reflected by the independence of the Hong Kong Judiciary. Cases, both criminal and civil, are heard from start to finish in Hong Kong.**

The Court of Final Appeal was established in Hong Kong in July 1997 and has the power of final adjudication in Hong Kong.

### **Reciprocal enforcement of arbitral awards and civil judgments**

#### (i) Arbitral awards

Although both China and Hong Kong recognise the New York Convention, the Convention only deals with enforcement between “different” contracting states. In order to deal with this, an agreement was entered into between China and Hong Kong which permits the enforceability of Hong Kong awards in China and vice versa.

#### (ii) Civil judgments

Pursuant to an Agreement on Reciprocal Enforcement of Judgments in Civil and Commercial Matters, (“the Agreement”) civil judgments made by the courts in Hong Kong can be enforced in China and vice versa provided certain conditions are satisfied.

These conditions are:

1. The judgment in question is a money judgment on disputes arising from business agreements.
2. The parties have expressly agreed to submit to the sole jurisdiction of the courts of Mainland China or Hong Kong.
3. In the case of Chinese judgments, the Agreement only applies to judgments made by the Intermediate People’s Courts and above as well as those Courts designated to exercise jurisdiction in foreign related civil and commercial cases.
4. In the case of Hong Kong judgments, only the judgments of the District Court and above are covered by the Agreement.
5. The Agreement only applies to final judgments issued by the courts.
6. The Agreement also provides for grounds for refusal of enforcement, which are similar to those under the existing law of Hong Kong.

### **Recent reforms to the Hong Kong Civil Procedure Rules**

In Hong Kong, new rules of the High Court were introduced in 2009 as a result of the Civil Justice Reform. Many of the new rules have their origin in the Civil Procedure Rules of the UK (“the CPR”) which were introduced in 1999 following the Woolf Reforms. Hong Kong however has not adopted the CPR in full but has only adopted some of what they consider to be the more effective measures introduced by the CPR.

The new rules aim to increase cost-effectiveness of practice and procedure to be followed in relation to proceedings before the Court and to ensure that a case is dealt with as expeditiously as is reasonably practicable. This is done by expanding the general case management power of the Court, eliminating unnecessary interlocutory applications and encouraging parties to use alternative dispute resolution procedures.

The new rules also encourage the exchange of relevant documents and information before and at the early stage of the legal proceedings. The Court is encouraged to specify sanctions that will be imposed should a party fail to comply with the Court’s direction. Both parties are required to state their positive cases and are no longer free to plead inconsistent alternative versions of fact unless they have reasonable grounds for so doing. These new measures are aimed at encouraging early settlement. The new rules have also introduced a new settlement mechanism - called Sectioned Offer and Payment - that allows any party to make settlement offers with costs consequences should the offer not be bettered at or after trial.

### **The UK Defence Club**

Thomas Miller Defence Ltd, 90 Fenchurch Street, London, EC3M 4ST  
tel: +44 207 283 4646 fax: +44 207 204 2131  
email: [tmdefence@thomasmiller.com](mailto:tmdefence@thomasmiller.com) web: [www.ukdefence.com](http://www.ukdefence.com)