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in 35 jurisdictions worldwide

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CONTENTS

Introduction Robert S Peckar <i>Peckar & Abramson, PC</i>	3
Brazil Júlio César Bueno <i>Pinheiro Neto Advogados</i>	4
Canada Bruce Reynolds, Sharon Vogel and Yvan Houle <i>Borden Ladner Gervais LLP</i>	16
Chile José Manuel Larraín <i>Larraín Rencoret & Urzúa Abogados</i>	24
China Wang Jihong, Lin Li, Jiang Jie, Miao Juan and Ma Yuhong <i>Grandway Law Offices</i>	31
Colombia Santiago Jaramillo-Caro <i>Gómez-Pinzón Zuleta Abogados</i>	38
Czech Republic Gabriel Achour and Jakub Záměsly <i>Achour & Hájek sro</i>	44
Denmark Henrik Puggaard, Lene Lange and Kristian Skovgård Larsen <i>Lett Law Firm</i>	51
Dominican Republic Laura Troncoso Ariza and Mairéní Silvestre Ramírez <i>OMG</i>	58
Egypt Ahmed Amin and Farah El Nahas <i>Shalakany Law Office</i>	64
Finland Aimo Halonen <i>Mäkitalo Rantanen & Co Ltd</i>	69
France Isabelle Smith Monnerville and Julien Maire du Poset <i>Smith Violet</i>	74
Germany Jörg Gardemann and Alexander Herbert <i>Buse Heberer Fromm</i>	83
Ghana David Ofosu-Dorte, Isabel Boaten and Ferdinand Adadzi <i>AB & David</i>	89
India Sunil Seth and Vasanth Rajasekaran <i>Seth Dua & Associates</i>	94
Japan Miho Niunoya <i>Atsumi & Sakai</i>	101
Lebanon Rana Kahwagi and Karim Khalaf <i>Alem & Associates</i>	106
Lithuania Jovitas Elzbergas, Valentas Mitrauskas and Donatas Lapinskas <i>Motieka & Audzevičius</i>	112
Luxembourg François Collot Kleyr <i>Grasso Associés</i>	118
Mexico Roberto Hernández-García <i>Comad, SC</i>	125
Netherlands Leendert C van den Berg <i>Severijn Hulshof advocaten</i>	130
New Zealand Garth Sinclair and Michael Gartshore <i>Webb Henderson</i>	135
Nigeria George Etomi, Efeomo Olotu and Ivie Ehanmo <i>George Etomi & Partners</i>	143
Poland Andrzej Tokaj and Przemysław Kastyak <i>Magnusson Kancelaria Prawnicza</i>	148
Qatar Marcus Boeglin, Veijo Heiskanen, Marc Sukkar, Matthias Scherer and Domifille Baizeau <i>Lalive in Qatar LLC</i>	154
Russia Vladimir Lipavsky <i>Ost Legal</i>	160
Saudi Arabia Hani Al Qurashi, Rami Al Qulaiti and Saeed Basuhil <i>Hani Qurashi Law Firm in cooperation with Kilpatrick Townsend</i>	166
Singapore Christopher Chuah and Tay Peng Cheng <i>WongPartnership LLP</i>	171
Sweden Andreas Magnusson, Charlotta Wälsäter and Per Vestman <i>Foyen Advokatfirma AB</i>	178
Switzerland Michael E Schneider, Matthias Scherer, Bernd Ehle and Sam Moss <i>Lalive</i>	184
Taiwan Helena H C Chen <i>Formosan Brothers, Attorneys-at-Law</i>	190
Turkey Ziya Akıncı and Cemile Demir Gökyayla <i>Akıncı Law Office</i>	196
Ukraine Timur Bondaryev, Svithana Teush and Volodymyr Grabchak <i>Arzinger</i>	203
United Arab Emirates Thomas Philip Wilson, Rabih Tabbara and Scott Hutton <i>Kilpatrick Townsend Legal Consultancy</i>	211
United Kingdom Stacy Sinclair <i>Fenwick Elliott LLP</i>	217
United States Robert S Peckar and Michael S Zicherman <i>Peckar & Abramson, PC</i>	226

China

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Grandway Law Offices

1 Foreign pursuit of the local market

If a foreign designer or contractor wanted to set up an operation to pursue the local market what are the key concerns they should consider before they took such a step?

A foreign contractor or designer may want to take the following factors, among others, into consideration before it sets up a local office in China:

- a suitable legal vehicle for its China office, that is, a wholly foreign-owned enterprise (WFOE), Sino-foreign equity joint venture (EJV), Sino-foreign cooperative joint venture (CJV), representative office, etc;
- the location of the office in respect of concerns relating to tax, local foreign investment policies, business environment, etc;
- Chinese tax law and local policies;
- Chinese regulatory procedures for setting up the China office and estimated timeline;
- Chinese foreign exchange law;
- Chinese customs law; and
- Chinese labour law, as well as immigration law in respect of foreign managers and employees.

Aside from the factors described above, as a precondition to carrying out business in the local market, a foreign designer or contractor must hold certain relevant qualifications. However, the application for acknowledgment of such qualifications is usually time-consuming and difficult. So, as a short cut, it is advisable for the foreign contractor or designer to acquire an equity interest in a local contractor or designer who holds the required qualifications. However, there is an exception in the design field. A foreign designer is allowed to participate in the scheme design phase without the relevant qualifications.

2 Licensing procedures

Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences for working without a licence?

If a foreign designer or contractor sets up a local subsidiary in China, the subsidiary must obtain the relevant qualifications and permits before it engages in the concerned business. Failure to obtain such qualifications or permits may result in the construction or design contract being deemed void under Chinese law, an administrative penalty against the local subsidiary and, in the most serious cases, the business licence of the subsidiary may be revoked.

If foreign-invested construction companies enter into contracts beyond their qualification or licence, fines may be imposed of between 2 per cent and 4 per cent of the project's contract price. They may also be ordered to cease operations for rectification. In the event of aggravating circumstances, their qualification certificate may be revoked and illegal proceeds may be confiscated.

Foreign-invested construction design companies may face administrative penalties including fines, an order to cease operations for rectification, degrading and, in aggravating circumstances, revocation of their qualification certificate and confiscation of illegal proceeds.

If foreign designers directly engage in construction scheme design business or cooperate with qualified Chinese designers to undertake preliminary design and construction drawing design business, neither the designer nor its employed designers are required to have Chinese qualifications.

However, please note that if foreign designers bid for construction scheme design business, they should be members recommended by the industry associations of their locality or country. The lists of recommended designers provided by the industry associations or organisations should be confirmed by the project owners.

If foreign designers cooperate with domestic qualified designers to jointly undertake construction preliminary design or construction drawing design, such foreign designers shall provide documents such as a design permit or licence issued by the competent authority of their countries or by their industrial organisations or associations.

3 Competition

Do local laws provide any advantage to domestic contractors in competition with foreign contractors?

Chinese law does provide certain advantages to domestic contractors in competition with foreign contractors.

As described in questions 1 and 2, there are strict limitations on the scope of projects a construction WFOE is permitted to undertake in China. In addition, compared with their Chinese counterparts, construction WFOEs are subject to stricter requirements in connection with incorporation and operation in China, including requirements on the registered capital, qualification criteria and number of technical personnel and professionals.

Regardless of these stricter requirements, in practice, foreign construction companies have found it difficult to enter into the local market because of the high-level technical skills, professional teams and low labour cost available to the domestic contractors. However, foreign designers are welcome in the local market. Considering that the Chinese laws and regulations have opened a window for the foreign designers to enter into the design field, now may be a perfect time for foreign design companies to develop their market in China. In addition, foreign project management companies should not ignore potential opportunities in the construction field in China. The project management of domestic contractors was criticised for decades for the out-of-date management system and lack of international cooperation experience. Those attacks were exaggerated to some extent because of a series of failures of overseas projects during those years. As a result, many local companies, especially some large state-owned companies, are eager to adopt new, advanced and practical management methods and are willing to import those methods from or cooperate with foreign project management companies. Project management may be the next new profit-increasing field in the near future.

4 Bribery

If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable? Are bribe-givers and bribe-takers prosecuted and, if so, what are the penalties they face? Are facilitation payments allowable under local law?

Bribery is strictly forbidden according to Chinese law, and if a contractor enters into a contract illegally, the contract shall be deemed void ab initio with no binding effect on either of the parties. The bribe-givers and the bribe-takers may be prosecuted and imprisoned, subject to the Criminal Law. However, the penalties may differ from case to case depending on the bribe amount and the criminal circumstances. Additionally, the identity of the bribe-giver and bribe-taker will affect the penalties as well. Those who have state functionary responsibilities will face more severe punishment. Facilitation payments are not allowed under local law either, and they are treated as bribery under the Criminal Law.

5 Political contributions

Is the making of political contributions part of doing business? If so, are there laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties?

No.

6 Other international legal considerations

Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business in your jurisdiction?

The following issues should be noted:

- there are certain limitations on the scope of construction projects a foreign-invested enterprise can undertake;
- concerning qualification matters, in practice, it takes more time and effort for a foreign-invested enterprise to apply for the contracting qualifications and foreign designers' firms can rarely obtain design qualifications in China; and
- when undertaking projects through a government procurement procedure, contractors should give priority to purchasing products, constructions and services produced in China.

7 Construction contracts

What standard-contract forms are used for construction and design? Must the language of the contract be the local language? Are there restrictions on choice of law and the venue for dispute resolution?

The Chinese government has issued standard-contract forms for construction and design.

The standard-contract forms for construction include:

- the standard form of construction contract GF-2013-0201 jointly issued by the State Administration for Industry and Commerce and the Ministry of Housing and Urban-Rural Development in 2013; and
- the standard form of construction contract attached to the standard forms of construction bidding documents jointly issued by the State Development and Reform Commission and eight other ministries and commissions in 2007.

In addition, along with the ever-increasing number of foreign contractors entering China and Chinese contractors undertaking construction projects overseas, FIDIC standard forms of contract are being used in China.

The standard contract forms for design are the standard forms of construction engineering and design contracts for civil construction projects and the standard forms of construction engineering and design contracts for professional construction projects jointly issued by the State Administration for Industry and Commerce and the Ministry of Housing and Urban-Rural Development in 2010.

The standard-contract forms are drafted in Chinese, but there is no such requirement that the contract be written in the local language. Meanwhile, the standard-contract forms provide opportunities for the parties to choose the governing law and means to resolve the disputes. Generally speaking, foreign contractors and designers are apt to choose the China International Economic and Trade Arbitration Commission (CIETEC) for dispute resolution in China.

Until recently, use of the above-mentioned standard forms was merely recommended. However, use of the standard contract forms is now mandatory under the newly adopted Regulation for the Implementation of the Law on Bid Invitation and Tendering. According to article 15 of this Regulation, a project requiring a bidding process in domestic law shall employ the standard contract form issued by the State Development and Reform Commission in conjunction with the relevant administrative and supervisory departments. However, the theory and practice of this new requirement has been heavily criticised.

8 Payment methods

How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?

Contractors, subcontractors and vendors are usually paid by cheque, remittance or electronic means. Workers are paid by remittance, electronic payment or cash. Please note that in China, workers cannot be paid by cheque.

Generally, frequency for payments is stipulated in contracts. The standard frequency for payments to contractors and subcontractors are usually according to milestones and workers must be fully paid monthly.

9 Contractual matrix of international projects

What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?

Chinese construction projects are mainly operated through the model where owners directly enter into a contract with the contractors. In recent years, project management, engineering procurement and construction (EPC), infrastructure concessions, and other models have been increasingly well received. As a popular general contract model, EPC has often been applied in major nuclear power and oil projects. With the recent publication of a model version for the standard general contract of design and construction, EPC will surely be applied more widely in the engineering construction field.

10 PPP and PFI

Is there a formal statutory and regulatory framework for PPP and PFI contracts?

The Chinese government encourages PPP and private capital to enter into the infrastructure area traditionally controlled by the government. Therefore, there has been speedy expansion and application of PPP including build-operate-transfer (BOT), transfer-operate-transfer (TOT) and build-transfer (BT) models. In contrast, the legal system for concessions is lagging behind. At present, China does not have unified legislation on concessions. Relevant requirements are dispersed and exist in the form of local regulations and rules as well as ministerial regulations. Regulations and practices in different industries and areas are inconsistent with each other. The establishment of the legal concession system will still take some time. Meanwhile, the existing land-use rights system poses material barriers for the application of PPP, which is popular in Hong Kong and other areas.

In 2010, the State Council published Certain Opinions on Encouraging and Guiding the Healthy Development of Private Investment (the New 36 Opinions), which allow private capital to enter into several monopoly sectors including the infrastructure area,

municipal public utilities, the construction of policy-based housing, finance service sector, etc. The New 36 Opinions are supported by detailed implementation measures issued by 43 ministries, commissions or departments of the State Council. By mid-June 2012, more than 17 detailed implementation measures were published. Those new policies are the guidelines, to a certain extent a regulatory framework, for private investment.

11 Joint ventures

Are all members of consortia jointly liable for the entire project or may they allocate liability and responsibility among them?

A contractor, especially a foreign designer who is planning to pursue the market in China, may seek to set up a joint venture to undertake a project. The joint venture is usually established based on a joint venture agreement (JVA), which shall be submitted to the project owner in the tendering procedure. All rights and obligations of each member of the joint venture must be stipulated in the JVA. However, regardless of whether the JVA allocates liability and responsibility among all members of the joint venture or not, all members shall be jointly liable for the entire project to a third party. Any third party is entitled to sue a member of consortia or the joint venture. That is to say, the agreement on the liability and responsibility is only binding among the joint venture members. Accordingly, any member who incurs any liability and responsibility in excess of the degree or amount stipulated in the JVA, is entitled to obtain compensation from the other members of the joint venture.

12 Tort claims and indemnity

Do local laws permit a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party, even when the first party is negligent?

A contracting party may be indemnified against all acts, errors and omissions caused by the other party even when the first party is negligent. But the first party shall be liable for its loss within the scope of its negligence.

In the construction field, a contractor is entitled to require compensation from the owner if the owner provides designs with defects, materials with quality defects caused by the failure to comply with mandatory standards or designates subcontractors to subcontract professional projects directly. The contractor shall be liable only for the loss caused by his or her own fault or negligence.

13 Liability to third parties

Where a contractor constructs a building that will be sold or leased to a third party, does the contractor bear any potential responsibility to the third party? May the third party pursue a claim against the contractor despite the lack of contractual privity?

Generally, because of the lack of contractual privity, a contractor bears no potential responsibility to a third party. The buyer or lessee can only make damage claims against the seller or lessor based on their respective contracts. However, under Chinese Tort Law, the contractor and the owner of the building shall be liable for the third-party damage due to collapse of the building. After the owner and the contractor have paid compensation, they can claim against other parties liable for the collapse. This means that if the collapse causes damage to the third party, the third party can pursue a claim against the contractor directly.

14 Insurance

To what extent do available insurance products afford a contractor coverage for: damage to the property of third parties; injury to workers or third parties; delay damages; and damages due to environmental hazards. Does the local law limit contractors' liability for damages?

Usually, the following insurance products are available in the domestic insurance market: all risks insurance, construction equipment insurance, third-party liability insurance and industrial injury insurance. The damages to the project itself are covered by the all risks insurance and the injuries to the workers are covered by the industrial injury insurance, while any damage to a third party's properties and injuries to a third party are covered by the third-party insurance.

Normally, it is impossible to obtain an insurance policy that covers the delay damages for delay in the construction since delay occurs in nearly every project. In respect of damages due to environmental hazards, the insurance policies differ from one project to another. According to the local law, the contractor's liability to damages is not limited.

15 Labour requirements

Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?

Chinese laws do not require a minimum amount of local labour to be employed on a particular construction project, but many foreign contractors are willing to employ local labour because of the low labour cost in China at present. Even so, a foreign contractor must consider how many foreigners will be allowed to enter into China for a particular project.

16 Local labour law

If a contractor directly hires local labour (at any level) for a project, are there any legal obligations towards the employees that cannot be terminated upon completion of the employment?

According to the Chinese Labour Contract Law, contractors must enter into employment contracts with their employees (either Chinese or foreign) when they hire them directly. Generally speaking, employment contracts for construction projects are based upon the completion of certain work, therefore, they are not fixed-term contracts. When the contracts expire, if one of the following circumstances is present, among other things, contractors will have to perform their duties under the contract and may not terminate the contract until the circumstance disappears:

- where employees exposed to risks of occupational disease have not had health checks before leaving their posts, or suspected occupational diseased patients are in the course of diagnosis or medical observation;
- where employees who contracted a disease during the course of employment or were injured during their employment are confirmed to have lost all or part of their ability to work;
- where sick or injured employees are within the prescribed medical period;
- where female employees are pregnant, in the process of giving birth or nursing; or
- where the employees have been working continuously for the company for no fewer than 15 years and there are fewer than five years before they reach their mandatory retirement age.

Additionally, it is worth noting that the contractors will have to make statutory severance payments to employees when the employment contracts expire or are terminated due to completion of work, unless Chinese law permits otherwise in the specific situation. In general, the severance payments are calculated based on seniority and the employee's monthly salary (including bonus) prior to the termination or expiration of the employment contract.

If a contractor considers the handling of its labour issues too complicated and would prefer to avoid the potential risks, he or she may enter into a contract with a project management company or a labour service company. Thereafter, the contractor can hire local labour through the project management company or the labour service company.

17 Close of operations

If a foreign contractor that has been legally operating decides to close its operations, what are the legal obstacles to closing up and leaving?

A foreign contractor (in the form of a joint venture or a WFOE) must have fully performed its mandatory and contractual obligations as well as paid up all its debts before it closes its operations in China. If foreign contractors have unpaid debts, the creditors may file a claim with the court to seize their property in China. The foreign contractor must give severance payment to its employees to terminate the unexpired employment relationship.

In the case of a WFOE, it will need to go through the liquidation and winding-up procedure for the purpose of closure. The liquidation procedure may become time-consuming and burdensome where the subsidiary has complicated liability issues or tax issues.

18 Payment rights

How may a contractor secure the right to payment of its costs and fees from an owner? May the contractor place liens on the property?

Construction payments to contractors are often delayed. The Chinese government takes many measures to deal with this situation. Apart from giving greater priority to contractors' payments rather than reimbursement of bank loans by legislation and judicial interpretation, the Chinese government requires the proprietors to provide advance payments and guarantee of payments by administrative means.

Meanwhile, Chinese law requires that if the project owner fails to make payment within the stipulated timeline, the contractor may demand payment within a reasonable period of time. If the project owner fails to make the payment at the end of such a period, the contractor may enter into an agreement with the project owner to liquidate the project, and may also petition the People's Court to auction the project in accordance with the law, unless such a project is not fit for liquidation or auction by its nature. The construction project price shall be paid as a priority out of proceeds from the liquidation or auction of the project.

19 Contracting with government entities

Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

No.

20 Statutory payment protection

Where major projects have been interrupted or cancelled, do the local laws provide any protection for unpaid contractors who have performed work?

Chinese law provides the following protection for contractors in the this situation.

According to the relevant judicial interpretations, when a project has been interrupted or the construction contract has to be terminated because of a force majeure event, the owner has the obligation to pay the contractor for the work duly performed in accordance with the contract.

In accordance with the PRC Contract Law, if the project is interrupted or delayed due to any reason attributable to the owner, the owner should adopt measures to make up for or reduce the losses and compensate the contractor for its losses and expenses due to slow

down, stoppage, moving or transferring of machinery and overstock of materials and components. Meanwhile, the contractor may liquidate the project or petition a court for auction of the project unless the project is not by its nature fit for liquidation or auction. The contractor is entitled to be paid as a priority out of proceeds from the liquidation or auction of such project.

In addition, judicial interpretations provide special protection for an unpaid subcontractor who performed actual work. The unpaid subcontractor is allowed to file an action against the project owner despite the lack of contractual privity, and the owner shall be liable to the unpaid subcontractor regarding the overdue payment. However, a potential precondition, namely that the work be a qualified project, must not be ignored in such a circumstance.

21 Force majeure and acts of God

Under local law are contractors excused from performing contractual obligations owing to events beyond their control?

Under Chinese law, contractors are not civilly liable if the contract cannot be fulfilled or the other party incurs losses due to force majeure. If a contractual obligation cannot be fulfilled due to force majeure, the obligation may be exempted in whole or in part depending on the effect of the force majeure. However, if the force majeure occurs after a delayed fulfilment, the obligations of the party concerned may not be exempted.

Any party that is unable to fulfil its contractual obligations due to force majeure shall notify the other party in a timely manner in order to reduce the potential losses brought upon the other party, and shall provide evidence thereof within a reasonable period of time.

22 Courts and tribunals

Are there any specialised tribunals that are dedicated to resolving construction disputes?

No.

23 Dispute review boards

Are dispute review boards (DRBs) used? Are their decisions treated as mandatory, advisory, final or interim?

Terms on DRBs have been provided in some contracts, but there are no specifics on the formulation, procedural rules and effect of their decisions, with the result that DRBs are rarely used.

24 Mediation

Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where are the mediators coming from? If not, why not?

The practice of voluntary participation in professionally organised mediation is rare because mediation results produced by such organisations are not binding. However, some arbitration institutions are working with industry associations and exploring the possibilities of such practice. Mediators are usually experts within the community, such as architects, engineers, designers, lawyers, officials of the competent authority, etc.

25 Confidentiality in mediation

Are statements made in mediation confidential?

The confidentiality of statements made in mediation depends on the willingness and agreement of each party. Generally, the mediation parties would bind themselves to a confidential agreement.

26 Arbitration of private disputes

What is the prevailing attitude towards arbitration of construction disputes? Is it preferred over litigation in the local courts?

Arbitration is accepted by the mainstream community for features such as its speed, confidentiality, good atmosphere, international acknowledgement and strong execution, as well as the opportunity for the parties to select arbitrators with expertise in the related field. Moreover, unlike the rulings of the local courts, arbitration decisions are perceived to be more objective and less prone to local protectionism. Indeed, CIETAC has been praised by many parties.

27 Governing law and arbitration providers

If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

Where a foreign contractor as a party to a contract (design consultation contracts and project cost consultation contracts included) insists that the disputes be resolved by international commercial arbitration, arbitration by CIETAC is a common choice. CIETAC is one of the major permanent commercial arbitral authorities in the world, with increasing recognition both inside and outside China. The local arbitral authorities at the provincial level or lower are usually rejected by foreign contractors due to local protectionism concerns.

For the past few years, some well-known international arbitral authorities such as the International Chamber of Commerce, the Hong Kong International Arbitration Centre, the Stockholm Chamber of Commerce, and the Singapore International Arbitration Centre have been working to increase their profiles in China.

28 Dispute resolution with government entities

May government agencies participate in private arbitration and be bound by the arbitrators' award?

Yes.

29 Arbitral award

Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

China is a member of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), so in principle an arbitral award issued to any member of the New York Convention may be recognised and enforced in China. However, China has made reservations under two circumstances: where the disputed matter is beyond the scope of arbitration and where acknowledgement of the execution of the award is in violation of China's public policy.

According to article 3 of the Arbitration Law of the People's Republic of China, '[t]he following disputes may not be arbitrated: marital, adoption, guardianship, support and succession disputes; and administrative disputes that shall be handled by administrative organs as prescribed by law'. There are no specific explanations of 'public policy'. In current practice, China is very cautious of rejecting foreign arbitral awards on the ground that Chinese public policy would be violated if they were to be enforced.

30 Limitation periods

Are there any statutory limitation periods within which lawsuits must be commenced for construction work or design services and are there any statutory preconditions for commencing or maintaining such proceedings?

According to the General Principles of the Civil Law in China, article 135, '[e]xcept as otherwise stipulated by law, the limitation of action regarding applications to a people's court for protection of civil rights shall be two years.' Also, article 137 stipulates that:

A limitation of action shall begin when the entitled person knows or should know that his rights have been infringed upon. However, the people's court shall not protect his rights if 20 years have passed since the infringement. Under special circumstances, the people's court may extend the limitation of action.

Besides, the limitation period regarding the contractor's priority to receive the construction cost is six months and must begin on the actual or promised completion date of the construction project.

As to the second question, four conditions must be met when commencing a civil proceeding:

- the plaintiff must be a citizen, legal person or any other organisation that has a direct interest in the case;
- there must be a definite defendant;
- there must be specific claim or claims, facts and cause or causes for the suit; and
- the suit must be within the scope of acceptance for civil actions by the people's courts and under the jurisdiction of the people's court where the suit is heard.

If the plaintiff withdraws the suit after it has been accepted by the court, the statutory limitation period shall be discontinued and a new limitation shall be counted from the time of the discontinuance. This means the statutory limitation period may be extended for two years from that time.

31 International environmental law

Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

China is a signatory to the Stockholm Declaration of 1972. China incorporated an environmental protection clause into its Constitution in 1978, enacted the Environmental Protection Law in 1979 and formulated a series of environmental and wildlife protection laws thereafter, including, in particular, the following:

- the Water Pollution Prevention Law;
- the Air Pollution Prevention Law;
- the Noise Pollution Prevention Law; and
- the Environmental Law on Solid Waste Pollution.

In promoting both infrastructure and housing construction, project owners and contractors shall abide by these laws and regulations to prevent water, air, noise and solid waste pollution or to prevent an adverse effect on wildlife. In particular, the Administration Rules on Construction Projects Concerning Environmental Protection provide that the environmental impact assessment shall be carried out before the commencement of construction and that the pollution prevention facility shall be designed, constructed and used at the same time as the project itself (*Santongshi*). When the construction project is completed, environmental protection facilities shall also be inspected and accepted. Recently, China has released a series of regulatory documents providing national environmental standards for construction materials such as paint, cement and ceramic tiles in an effort to phase out harmful and environmentally unfriendly materials.

32 Local environmental responsibility

What duties and liability do local laws impose on developers and contractors for the creation of environmental hazards or violation of local environmental laws and regulations?

In China, the laws and regulations on environment protection have inherited the principle that 'polluter controls' that is, the polluter shall bear the obligation to eliminate and control the pollution and harm caused to the environment by waste gas, waste water, waste residue, dust, radioactive substances, noise and so on. Moreover, according to the Tort Liability Law of the People's Republic of China, for damages caused by pollution of the environment, the polluter shall bear tort liability. In summary, environment pollution generated in the course of using real property in China will result not only in the obligation to prevent and control the pollution, but also in tort liability, which includes cessation of the infringement, removal of obstacle and compensation for loss.

33 International treaties

Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

At present, China has signed bilateral investment protection agreements with over 100 countries.

According to the Ministry of Commerce, 'investment' refers to all kinds of property invested in the territory of one contracting party by the other contracting party according to the effective laws during the time of investment, which include:

- chattels and real property, as well as all property rights such as mortgages, pledges, usufructs and other similar rights;
- corporate shares, stocks and shareholdings in other forms;
- claims and claims to any performance with a financial value;
- copyright, industrial property rights, proprietary technology and business reputation; and
- concessions, including concessions to explore, extract and exploit natural resources.

The form of investment property does not affect the nature of the investment.

Update and trends

In 2004, the Supreme People's Court promulgated Interpretation on the Application of Law in the Trial of Project Construction Contract Disputes, after which many local courts enacted similar judicial instructions based on trial practices. In September 2012, the Beijing People's High Court also issued Explanation of Some Difficult Problems on Project Construction Contract Disputes (the Explanation), which widely influenced dispute resolutions in construction contracts in Beijing. For example, the Explanation explains that the construction contract would be regarded as invalid if the parties fail to obtain the Construction Project Planning Permit and the Construction Land Planning Permit. This is not specified in the Supreme Court's interpretation. However in the circumstance of invalidity, the parties can still apply for payment as if the contract is valid. The Beijing Arbitration Commission and CIETAC may also be influenced by the Explanation in dealing with construction contract disputes.

34 Tax treaties

Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

Up to April 2013, China has entered into double taxation treaties with 99 countries over the world including Belgium, France, Germany, Japan, the United Kingdom and the United States. China also has tax arrangements with Hong Kong and Macao whereby a contractor may have the chance to avoid double taxation.

35 Currency controls

Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

The Foreign Exchange Management Rules of the PRC promulgated by the State Council and regulations and regulatory documents enacted by the State Administration of Foreign Exchange as well as the People's Bank of China provide for relevant systems for exchange, settlement, sale and purchase of foreign currencies.

There are no laws and regulations on foreign exchange controls that obstruct foreign currency exchange in China, but foreign currency circulation is prohibited. Transactions cannot be priced or settled in foreign currency unless otherwise provided by law. Provisions for current accounts, capital accounts and other accounts are distinct in terms of the exchange, settlement, sale and purchase of foreign currencies.



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36 Removal of profits and investment

Are there any controls or laws that restrict removal of profits and investments from your jurisdiction?

A foreign investor's right to remit profits and investments abroad is protected in China. According to article 19 of the Wholly Foreign-Owned Enterprise Law, 'foreign investors may remit abroad lawful profits obtained from a WFOE, other legitimate incomes and funds after liquidation'. Nonetheless, before remitting, foreign-invested enterprises must pay taxes on their profits generated in China in

accordance with the Law on Enterprise Income Tax and other laws and regulations. Where the provisions differ from those of double taxation treaties that China has entered with the recipient country of the remittance, the provisions of such treaties shall prevail. Also, before a foreign investor withdraws its investment from China, it should complete all the formalities on liquidation and winding-up in consideration of the actual conditions of the foreign-invested enterprises in accordance with the Company Law, the Law on Chinese Foreign Joint Ventures and other relevant laws and regulations.



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