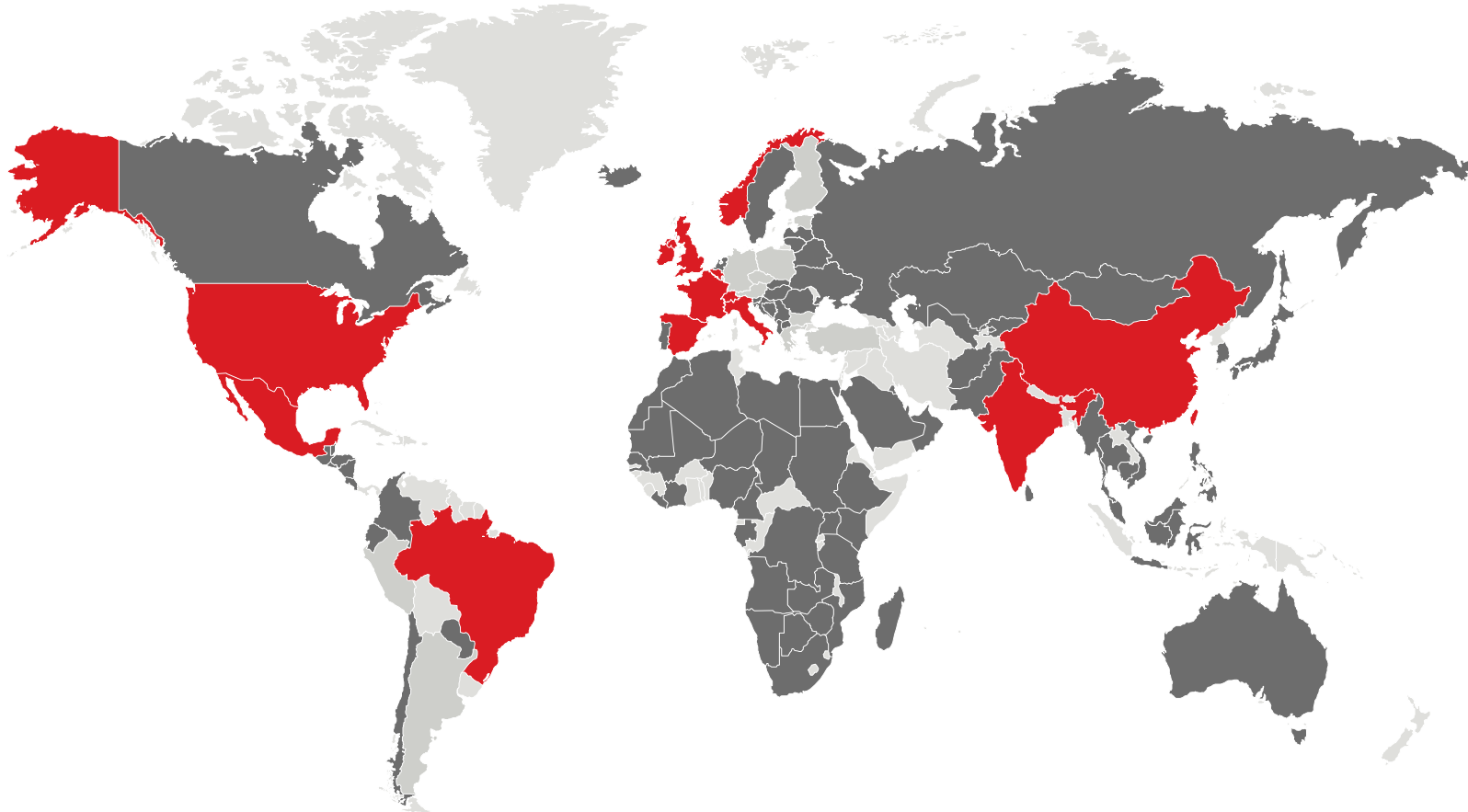


# Product Liability: Handling disputes in China

Thursday, 13 September 2018



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**PRODUCT LIABILITY:**  
*Handling Disputes in China*

**Jan Holthuis, Li Jiao, Buren N.V.**

*September 2018, BLM Offices, London*

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# Original Premium Income Property Insurance Firms

(January – June 2018) Unit: 10,000 \$

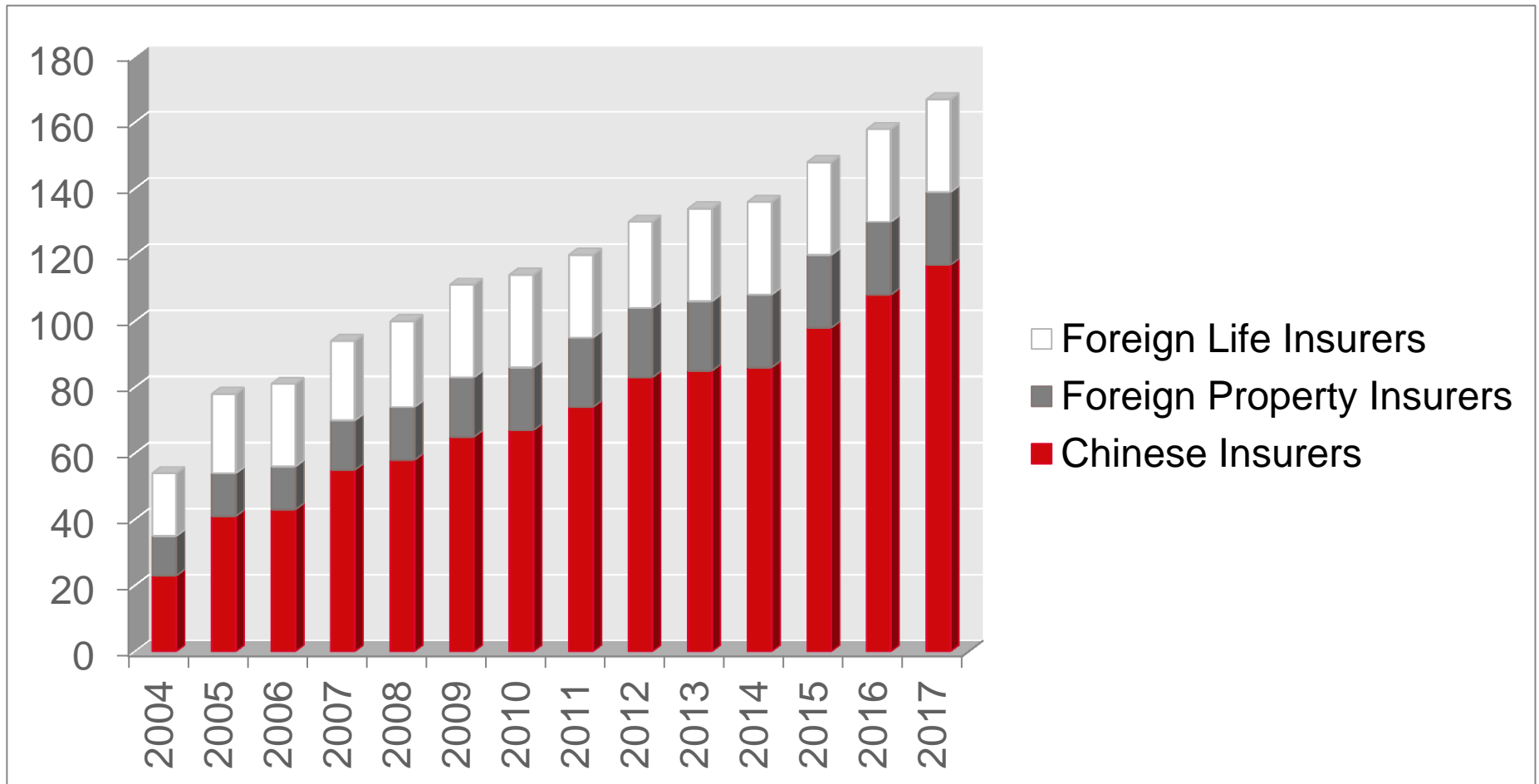
<b>Top 5 Chinese Insurers</b>	<b>OPI</b>	<b>Top 5 Foreign Insurers</b>	<b>OPI</b>
PICC	2,991,853.61	AXA Tianping	41,408.54
Ping An	1,736,813.66	Cathay Insurance	19,835.41
CPIC	882,794.88	Groupama - AVIC	19,014.93
China Life	515,001.13	Libertymutual	13,536.58
China United	340,153.30	AIG	13,040.28

# Original Premium Income Life Insurance Firms

(January – June 2018) Unit: 10,000 \$

<b>Top 5 Chinese Insurers</b>	<b>OPI</b>	<b>Top 5 Foreign Insurers</b>	<b>OPI</b>
China Life	5,262,566.43	ICBC - AXA	265,605.18
Ping An	4,010,814.19	Evergrande Life	199,151.17
CPIC	1,899,639.83	AIA	190,940.33
China Taiping	1,188,156.19	Cigna & CMB	119,484.32
Taikang	1,056,003.35	Citic - Prudential	111,257.94

# Number of Chinese Compared to Foreign Insurers



# China's Insurance Market Supervisors

In March 2018 the China Insurance Banking Regulatory Commission (CIBRC) was formed by merging China Banking Regulatory Commission (CBRC) and China Insurance Regulatory Commission (CIRC)

- CIBRC is reporting directly to the State Council, however the function of making important laws and regulations is delegated to the People's Bank of China
- CIBRC headed by GUO Shuqing who engaged in “regulatory windstorm” to resolve, among others, existing problems on unclear responsibilities, cross regulation, hidden debt and shadow banking



## **Guo Shuqing**

- *Considered one of China's most experienced financial services professionals*
- *Former governor of the CBRC and Shandong province*



# FDI Restrictions Gradually Lifted by 2018

<b>Insurance activity</b>	<b>Restrictions before 2018</b>	<b>Restrictions after 2018</b>
Set up of a foreign invested insurance company	Prior Representative Office during two years	No requirement
Maximum Foreign Equity in Non-Life Insurance Companies	No restrictions	No restrictions
Maximum Foreign Equity in Life Insurance Companies	Maximum foreign equity stake of 50%	Maximum foreign equity stake 51% in 2018 and National treatment by 2021
Insurance Brokerage Firms	Only allowed to operate in the areas of large-scale commercial, international maritime, aviation, and transportation insurance brokerage	National treatment
Insurance intermediaries (agents, loss adjusters)	Maximum foreign equity stake of 25%	National treatment

# Tianjin Port Explosion (12 August 2015)





# Tianjin Port Explosion

- 3<sup>rd</sup> largest man-made insured losses (estimated at +/- USD 3.0 billion), 110 firefighters, 55 residents died, 8 missing, 798 injured. Thousands of containers and cars (Volkswagen, Toyota, Land Rovers, others) damaged
- Insurance claims on wide range of different policies: property damage, business disruption, personal accident, life, commercial medical, group accidental injury, car Insurance, accident health insurance, liability insurance, cargo insurance, warehousing, fire, safety production liability
- Issues:
  - *Extent of losses (lack of data)*
  - *Goods in transit (was particular policy on risk at time of explosion?)*
  - *Double insurance and contribution (Chinese and foreign insurers involved)*
- Report China State Administration of Work Safety (February 2016): Serious regulatory violations by Ruihai International Logistics Co. Ltd., government inspections lax, chemicals stored without license (corruption), laws were not implemented, officials disciplined, some imprisoned
- Insured to reassess and diversify supply chain to manage risks in China

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# Databases available on Chinese Manufacturers

## National Enterprise Credit Information Publicity System: <http://gsxt.gdgs.gov.cn/>

- General information: company name, registered address, shareholders, registered capital, legal representative
- Financial information: paid-in capital, total assets, turnover, debt, paid taxes, pledges executed, pledge on IP rights, records of administrative penalties

The screenshot displays the National Enterprise Credit Information Publicity System (国家企业信用信息公示系统) website. The main profile is for Chengde Shipbuilding Co., Ltd. (荣成市神飞船舶制造有限公司), a limited liability company. Key details include:

- 统一社会信用代码: 91371082793948386A
- 法定代表人: 程波
- 登记机关: 荣成市市场监督管理局
- 成立日期: 2006年10月17日
- 注册资本: 42800.000000万人民币
- 营业期限自: 2006年10月17日
- 营业期限至: 2031年10月16日
- 经营状态: 在营(开业)企业
- 住所: 荣成市石岛朝阳西路818号

The '股东及出资信息' (Shareholders and Contribution Information) section shows one shareholder:

序号	股东名称	股东类型	证照/证件类型	证照/证件号码	详情
1	荣成小树投资有限公司	企业法人	企业法人营业执照(公司)	91371082MA3CM9KR6A	详情

The '主要人员信息' (Key Personnel Information) section lists:

- 董建秀: 董事
- 程波: 执行董事兼经理

# Chinese databases available on manufacturers

## Supreme Court Database

### Dishonest Persons List:

<http://zxgk.court.gov.cn/>

- Name of the defendant, court case number, legal representative of the defendant, claim (amount in RMB), status of enforcement
- Name of the defendant, court case number, legal representative of the defendant, claim (amount in RMB), status of enforcement.
- Outstanding court orders indicate financial problems or bad faith
- **NOTE:** In the event of unenforced court orders these companies have limited access to funding and subsidy schemes, legal representatives are banned from travel





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# Rule of Law with Chinese Characteristics

- Judicial independence under the leadership of the CCP:

*Supreme People's Court is accountable to the NPC and its Standing Committee*

*Local courts accountable to the local counterparts of the NPC*

*National Bar Association administrated by the Ministry of Justice*

- January 2017: SPC Chief Justice Zhou Qiang stated:

*“China's courts must firmly resist the Western idea of judicial independence and other ideologies which threaten the leadership of the ruling Communist Party”*

- Chinese lawyers oath:

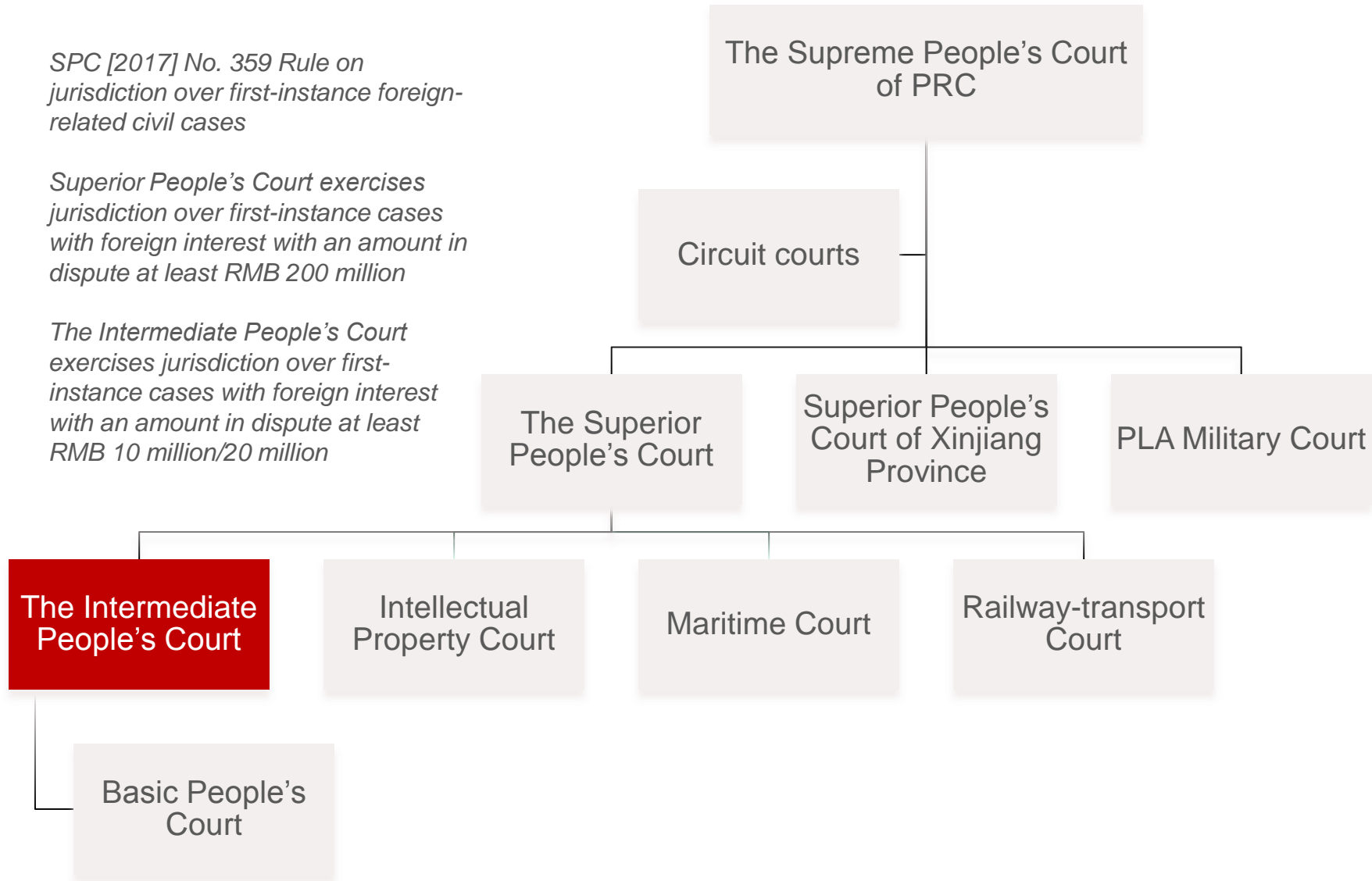
*“I wish to be a licensed lawyer in the People's Republic of China. I promise that I will faithfully perform the sacred mission of legal workers regarding socialism with Chinese characteristics, be loyal to the motherland and the people, uphold the leadership of the Communist Party of China and the socialist system, uphold the dignity of the Constitution and law, practice law for the people, work hard and diligently, act in good faith and be honest, protect the legitimate rights and interests of parties, ensure the correct enforcement of law, maintain social fairness and justice, and make diligent efforts for the socialist cause with Chinese characteristics.” (Notice No. 19 [2012] of the Ministry of Justice)*

# China's Court System

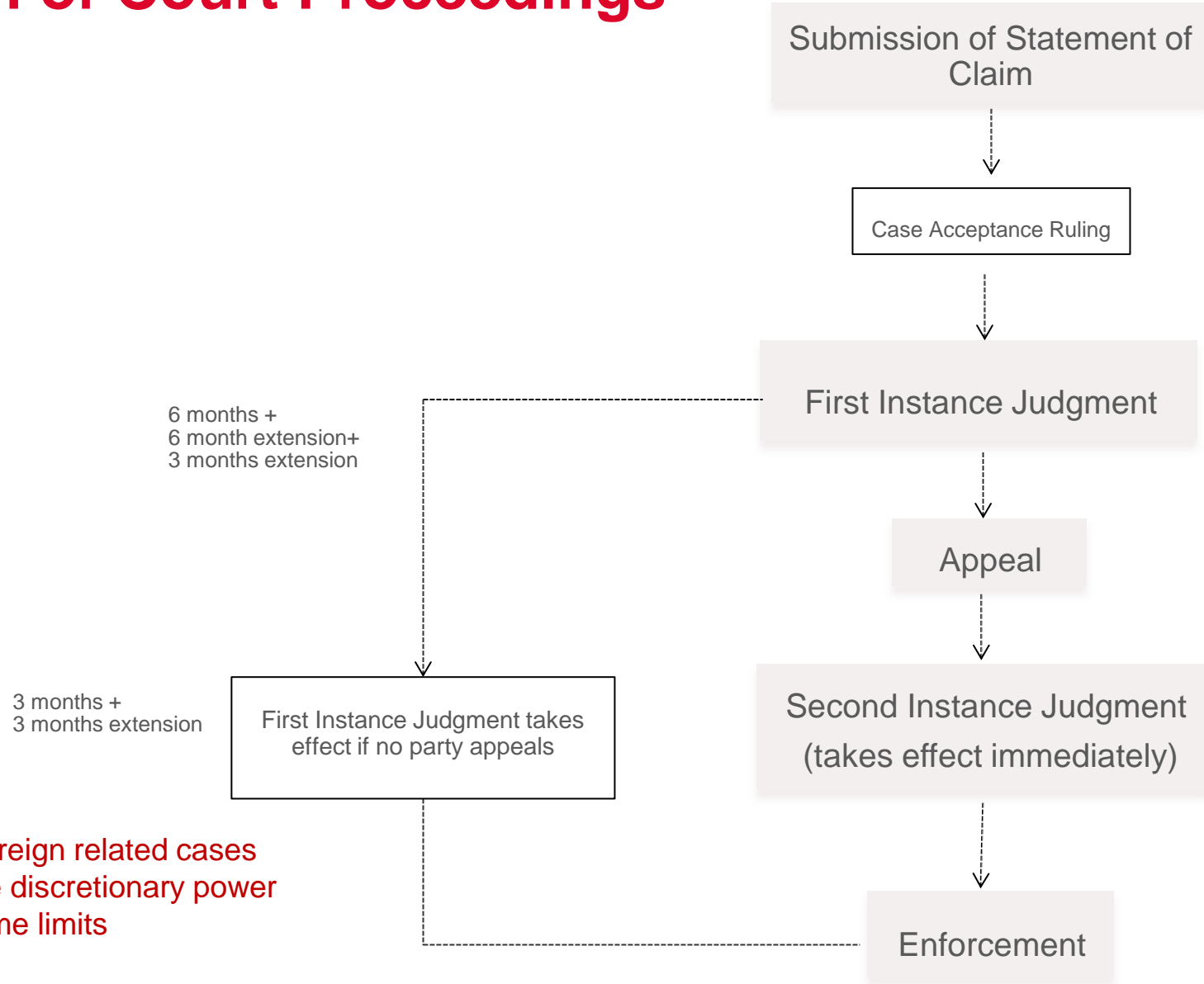
*SPC [2017] No. 359 Rule on jurisdiction over first-instance foreign-related civil cases*

*Superior People's Court exercises jurisdiction over first-instance cases with foreign interest with an amount in dispute at least RMB 200 million*

*The Intermediate People's Court exercises jurisdiction over first-instance cases with foreign interest with an amount in dispute at least RMB 10 million/20 million*



# Duration of Court Proceedings



**NOTE:** in foreign related cases judges have discretionary power to extend time limits

# Status Product Liability Litigations

- Rising product liability claims initiated by foreign importers and subrogated insurers, but still dwarfed by the number of foreign-related maritime insurance cases
- SME manufacturers do not purchase export product liability insurance (too expensive and profits are not good nowadays). SMEs fight foreign liability claims for survival
- Increasing experience of Chinese judges in hearing foreign-related commercial cases, but growing disparity among regions (first tier cities most professional judiciary)
- Developing legal regime applicable to product liability and subrogation claims, but some inconsistency among laws and unambiguous sections
- Dishonest disclosures (Art.16 of the Insurance Law): insurers' right to rescind the insurance contract when the policy holder breaches the duty of honest disclosure (All insurers have a large fraud investigation department)

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**MADE IN CHINA**



**MADE IN GERMANY**



# Product Liability under Chinese Law

Product Quality Law (PQL) of the People's Republic of China:

- **Manufacturers' liability** to personal injury or damage to property due to the defects of products, unless exceptions applied (article 41 PQL)
- **Sellers' liability** to compensate if contribute to or cause personal injury or damage to the property (article 42 PQL)
- **Victims' right to claim** against either producers or sellers: a right to recoup paid out damages between producers and sellers (article 43 PQL)

Article 46: Definition of product defects (art 46 PQL)

- Unreasonably threatens the safety of a person or property
- Non conformity to national or trade product standards

# Legal Actions

	<b>Claim based on contract (A)</b>	<b>Claim based on tort (B)</b>	<b>Subrogation Claim</b>
<b>Claimant</b>	Contracting party (Purchaser/Importer)	Party suffering damages caused by the defective product	Insurer
<b>Defendant</b>	Contracting party (Supplier/Exporter)	Party responsible for defective product (manufacturers/ sellers)	A/B
<b>Limitation Period</b>	4 years	3 (2) years	A/B
<b>Establishment of Liability</b>	Constitution of breach	Product defect, loss and causation	A/B
<b>Remedies</b>	Direct losses and benefits receivable (e.g. loss of profits); rules of foreseeability applied	Unclearly defined law, property damages, pure economic losses	A/B
<b>Forum Shopping</b>	Possible	Not possible	A/B

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# Subrogation of Claims

- Subrogation right obtained after the insured is compensated by the insurer
- Necessity to conclude a separate assignment agreement in practice (?)
- Focus of Chinese judges:
  - Is the policyholder the right holder in the assigned claim?
  - Is the alleged defective product covered by the insurance policy?
  - Is the compensation paid pursuant to the insurance policy?
  - Is the compensation paid pursuant to the governing law?

# Limitation Period

- Periods / Starting dates
- Interruption: Letter of Demand
- Practical issues:
  - Correctly identify the responsible party
  - Include Chinese version of Letter of Demand
  - Letter of Demand issued by Chinese local counsel
  - Manage the whole process in compliance with Chinese evidence rules
  - How to handle the defendant's unresponsiveness?



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# Evidence Rules

- Documentary evidence shall be presented in its original form. Any photocopy or reproduction that cannot be verified against an original document or item shall not be used independently as a basis for confirming the facts in any case (articles 69-70 Civil Procedure Law)
- Foreign evidence: to be notarized, legalized, translated (Article 11,12 of Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings)
- The generally applied strategy is that in legal proceedings the Chinese counterpart will deny or misrepresent all facts and documents which are not supported by original documentary evidence
- In general Court judges mistrust lawyers statements and only rely on original documentary evidence
- Judges express opinions in an early stage through personal phone calls and indicate whether evidence is satisfactory or not

# Burden of Proof

- Burden of proof in civil cases rests on the plaintiff as a matter of principle unless otherwise provided by the law.
- If the party that bears the burden of proof fails to produce sufficient evidence to support his allegations, he could face unfavorable consequences.
- Standard of proof for civil proceedings as “high probability”.
- Where both parties concerned produces contradicting evidences to prove a same fact but neither has enough evidence to rebut the evidence of the other party, the people’s court shall determine which evidence are obviously more forceful than the other evidence by taking the case into consideration, and shall affirm the evidence that are more forceful.

# Organization of Evidence

- Defective part / product
- Product source: contract, invoice, shipment documents etc. (originals)
- Insurance policy/payment of insurance premiums/ compensation
- Well-recorded settlement of claim process
- Correspondence between the insured and manufacture to rule out any possible set-up between the said parties
- Defect/losses/causation: expert reports
- Losses: invoices, proof of necessity and reasonableness
- Identity documents

# Evidence on Defect, Causation and Loss

- General requirements: authenticity, relevance and legality
- Evidence formed outside China: notarization and legalization by the China Embassy (more substantive review)
- Chinese translation is required (by a local translation agency recognized by the court)
- View of Chinese court on the probative value of evidence:
  - Evidence originated from authorities > private organizations > claimant itself
  - Documents > photo, video & audio
  - Hardcopy > e-copy

# Defense Arguments

- Deny the product source
- Contract for work, not manufacturer responsible for defective product
- Product conforms with regulatory and/or statutory requirements
- Claimant failing to meet the burden of proof
- No definite causation between defect and loss
- Losses unreasonably high according to Chinese standards



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# Foreign Expert Reports - Format

- To include the following parts as required by Chinese rules for a Judicial Authentication Report:
  - Names or titles of the party which gives the instruction and the nature of the authentication instructions
  - Authentication materials
  - Basis of the appointment and scientific or technological means adopted
  - Details of the authentication process
  - A definite authentication conclusion
  - Qualifications and signatures of experts and the official seals of authentication institutions

# Foreign Expert Reports - Credibility

- Practicability of forensic investigation by Chinese domestic institutions (for instance: university professors, government related experts, experts listed on the court list of accredited experts)
- Did the defendant agree on/object to the choice of experts?
- Qualification and accreditation of experts (official certificates)?
- Can a complete evidence chain be built?
- Provide evidence on the admissibility and value of such reports issued by such experts in their own jurisdiction
- Conduct judicial authentication on the defective product (if possible to be shipped to China)
- Clear conclusion in the report as to causation and loss
- Expert to attend the hearing as expert witness where necessary

# Foreign Expert Reports - Practice

- Court judges struggle to verify the credibility of foreign experts
- Objections to expert reports produced by experts entrusted solely by one party (also in the domestic cases) generally seriously considered by the court judges
- Court judges may assess the “unreasonable danger” based on other factors (reasonable use or purpose of a product, reasonable expectation of a common consumer, et cetera)

*UK surveyors / loss adjusters are considered to be very professional and certified. Their reports are taken very seriously by insurers and foreign courts. However, in China there are too many “experts”, fraud documents and exaggerated damage reports, so judges consider expert reports to be less valuable and look at direct documentary evidence.*

*Foreign expert report might conclude that the default likely has caused the loss (so on the “balance of probabilities” the liability is established). However, such conclusion is challenged in Chinese courts as it seems the expert still has doubts.*

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# Loss in Law

- Damages based on Contract (article 113 Contract Law): Positive Damage

*“compensation for losses shall be equal to the losses caused by breach of contract, including benefits receivable after the performance of the contract.”*

- Article 41 of Product Quality Law

*“If a defect in a product causes physical injury or damage to property other than the defective product (hereinafter referred to as third party property), the producer shall bear liability for compensation.”*

- Article 20 and 47 of Tort Law

*“Compensation shall be made in accordance with the damages suffered by the infringed party as a result therefrom; where it is difficult to determine the losses of the infringed party, and the perpetrator(s) has/have obtained gains, compensation shall be made in accordance with the gains obtained; where it is difficult to determine the gains obtained by the perpetrator(s), the court shall determine the compensation amount in accordance with the actual circumstances.”*



# Loss in Practice

Direct loss and consequential loss:

- Key in the determination of loss is documentary evidence
- Loss due to business disruption can be granted if well construed
- Loss of goodwill is only awarded in very exceptional cases

Other factors to be taken into account by the Court judges:

- Is the manufacturer covered by adequate insurance?
- Price of the product in relation to the damage (however not key important)
- If the manufacturer might bankrupt: social unrest due to employees unemployment

If the case is to be settled between insurers:

- Foreign and large Chinese insurers listen first and assess the evidence, smaller insurers might likely fight the claim (loss-ratio in China is not good)

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