

# 《中国涉外民商事诉讼实务之二：涉外民商事案件》

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## 1、 定义

在中华人民共和国法律下，涉外民商事案件指具有外国当事人、法律事实或标的等因素的民商事案件，包括：

- 当事人一方或双方是外国人、无国籍人、外国企业或组织；
- 产生、变更或者消灭民事关系的法律事实发生在中华人民共和国领域外；
- 标的物在中华人民共和国领域外。

涉及香港、澳门特别行政区和台湾地区当事人的民商事纠纷案件参照涉外民商事案件的相关规定。

## 2、 指定管辖

2002年2月，最高人民法院颁布了《关于涉外民商事案件诉讼管辖若干问题的规定》（以下简称《规定》）。根据《规定》，第一审涉外民商事案件由下列人民法院管辖：

- 国务院批准设立的经济技术开发区人民法院；
- 省会、自治区首府、直辖市所在地的中级人民法院；
- 经济特区、计划单列市中级人民法院；

- 最高人民法院指定的其他中级人民法院；
- 高级人民法院。

自《规定》颁行以后，最高人民法院先后指定了一批具有涉外民商事案件一审管辖权的中级和基层人民法院。

### 3、 管辖权

根据《中华人民共和国民事诉讼法》和最高人民法院颁布的司法解释，涉外民商事案件应当由如下人民法院管辖：

| 管辖权    | 管辖法院  |
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| 一般地域管辖 | 对公民提起的民事诉讼，由被告住所地或经常居住地人民法院管辖；<br>涉外民商事案件中被告没有提出管辖权异议并且应诉答辩的，视为其承认该人民法院为有管辖权的法院。  |
| 特殊地域管辖 | 因合同纠纷或者其他财产权益纠纷，对在中华人民共和国领域内没有住所的被告提起诉讼的，由如下地点人民法院管辖：<br>合同签订地或者履行地；<br>标的物所在地；<br>被告可供扣押的财产所在地；<br>侵权行为地；<br>被告的国内代表机构住所地。 |

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| <p>专属管辖</p>    | <p>因在中华人民共和国履行中外合资经营企业合同、中外合作经营企业合同、中外合作勘探开发自然资源合同发生纠纷提起的诉讼，由中外合资、合作公司的注册地点的中华人民共和国人民法院管辖；</p> <p>因不动产纠纷提起的诉讼，由不动产所在地人民法院管辖；</p> <p>因港口作业中发生纠纷提起的诉讼，由港口所在地人民法院管辖。</p> |
| <p>协议管辖</p>    | <p>涉外合同或者涉外财产权益纠纷的当事人，可以用书面协议选择与争议有实际联系的地点的人民法院管辖；</p> <p>如果选择中华人民共和国人民法院管辖的，不得违反《中华人民共和国民事诉讼法》关于级别管辖和专属管辖的规定。</p>  |
| <p>仲裁管辖</p>    | <p>申请承认或执行涉外仲裁裁决的，由被申请人住所地、财产所在地人民法院管辖；</p> <p>申请撤销我国涉外仲裁裁决，由仲裁机构所在地有权受理涉外商事案件的人民法院管辖；</p> <p>申请确认涉外仲裁条款或仲裁协议效力的，由仲裁机构所在地、仲裁协议签订地、申请人住所地、被申请人住所地中级人民法院管辖。</p>         |
| <p>申请承认与执行</p> | <p>案件应当由被申请人住所地或者财产所在地人民法院管辖；</p>   |

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| 行外国<br>法院民<br>商事判<br>决的管<br>辖 | 如果被申请人没有提出管辖权异议，视为其承认该人民法院为有管辖权的法院。 |
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## 4、范围

《规定》只适用于一般涉外民商事案件，不适用于涉外婚姻、家庭纠纷和劳动纠纷。《规定》也不适用于发生在与外国接壤的边境省份的边境贸易纠纷案件，涉外房地产案件和涉外知识产权案件。可以适用《规则》的涉外民商事诉讼范围如下：

- 涉外合同纠纷案件：涉外的国际贸易、投资、金融、保险、融资租赁、担保、证券、期货、信托、合资、经营等方面的合同纠纷案件；
- 涉外侵权纠纷案件：自然人、法人或其他组织在涉外业务过程中发生的财产或利益造损失的纠纷案件；
- 信用证纠纷案件：国际贸易中，涉及信用证开立和履行的纠纷案件；
- 申请撤销、承认与强制执行国际仲裁裁决的案件；
- 审查有关涉外民商事仲裁条款效力的案件；
- 申请承认和强制执行外国法院民商事判决、裁定的案件。

( 本文原文为英文，中文版本由卓纬律师事务所陈曦翻译、刘泽枫律师审校。感谢两位！ )

### 附英文原文：

## Part II Foreign-related Civil and Commercial Cases

### 1. Definition

Under the PRC law, the foreign-related civil and commercial cases refer to any cases involving foreign elements relating to the party, the legal fact or the subject-matter if:

- Any litigation party is a foreign individual, a non-state individual, a foreign legal entity or a foreign organization; or
- Any legal fact that brings forth, changes or terminates certain legal relationship that take place in a foreign jurisdiction; or
- Any subject matter located in a foreign jurisdiction.

If the litigation party, legal fact, or subject matter of a civil and commercial case bears any elements from Hong Kong, Marco or Taiwan, the case shall be deemed as a civil and commercial case relating to Hong Kong, Marco and Taiwan and shall be treated as a foreign-related one.

## **2.Designated Jurisdiction System**

In February 2002, the Supreme People' s Court issued the Rules on Certain Issues Relating to Jurisdiction over Proceedings of Foreign-related Civil and Commercial Cases in order to implement designated jurisdiction over special foreign-related cases in China. In accordance with these Rules, the first-instance jurisdiction of foreign-related civil and commercial cases shall be governed by the following people' s courts:

- People' s courts located in the economic and technological development areas approved by the State Council;
- Intermediate people' s courts located in the provincial capital municipalities, the capital municipalities of autonomous regions and municipalities directly under the Central Government;

- Intermediate people's courts located in the special economic zones and municipalities directly under state planning;
- Other intermediate people's courts designated by the Supreme People's Court; and
- Higher people's courts.

Following these above Rules, the Supreme People's Court successively designated some intermediate and basic people's courts to govern the first-instance jurisdiction over foreign-related civil and commercial cases.

### 3. Jurisdiction

According to the Civil Procedure Law of the People's Republic of China and the juridical interpretations issued by the Supreme People's Court, foreign-related civil and commercial cases shall be governed by people's courts as follows:

| Jurisdiction | Governing Courts |
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| <p>General territorial Jurisdiction</p> | <p>A foreign-related case is governed by the people's court located in the defendant' s domicile place or habitual place of residence.</p> <p>If the defendant in a foreign-related action does not object to the jurisdiction of a people's court and replies the claims, the defendant shall be deemed to have recognized the jurisdiction of such people's court.</p>                         |
| <p>Special territorial jurisdiction</p> | <p>Where an action concerning a dispute over a contract or rights and interests in property is brought against a defendant without a domicile within the PRC, the action may be governed by the people's court of</p> <p>the place where the contract was executed or performed,</p> <p>the place where the subject matter is located, the place where the distrainable property is located,</p> |

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|                               | <p>the place where the tort was committed,</p> <p>the place where the representative office is domiciled if the contract was executed or performed within the PRC,</p> <p>the place where the subject matter is located within the PRC,</p> <p>the place where the defendant has distrainable property within the PRC,</p> <p>or</p> <p>The place where the defendant maintains a representative office within the PRC.</p> |
| <p>Exclusive jurisdiction</p> | <p>A dispute arising from the performance of a Sino-foreign equity joint venture contract, a Sino-foreign cooperative joint venture contract or a contract for Sino-foreign cooperative exploration and development of natural resources shall be governed by the PRC people's courts located in the registration places of the Sino-</p>   |

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|                               | <p>foreign equity joint venture or the Sino-foreign cooperative joint venture.</p> <p>A dispute in relation to real estate shall be governed by the people' s court with jurisdiction over the real estate' s location.</p> <p>A dispute in relation to port construction shall be governed by the people' s court with jurisdiction over the port' s location.</p>  |
| <p>Choice of jurisdiction</p> | <p>The legal parties concerning a contract or rights and interests in property may choose in writing the jurisdiction place if a real connection between their dispute and the location exists.</p> <p>If they choose to come under the jurisdiction of the PRC people's court, such choice shall not violate the provisions concerning level or exclusive jurisdiction under the Civil Procedure Law.</p> |

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| <p>Jurisdiction in relation to arbitration</p>     | <p>An application for the recognition and enforcement of an arbitration award shall be governed by the people' s court in the place where the applicant resides or the place where the property is situated.</p> <p>An application for the revocation of a foreign-related arbitration award made by a PRC arbitration body shall be governed by the people' s court in the place where the arbitration body is located.</p> <p>A dispute in relation to the validity of an arbitration clause or arbitration agreement may be governed by the immediate people' s court in the place where the arbitration organization is located, the arbitration agreement is executed or where the applicant or the defendant resides.</p> |
| <p>Jurisdiction in relation to the recognition</p> | <p>The dispute shall be governed by the people' s court in the place</p>  |

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| and enforcement of civil and commercial decisions made by foreign courts | where the applicant resides or the place where the property is situated. If a defendant does not object to the jurisdiction of a people's court and replies to the claims, the defendant shall be deemed to have recognized the jurisdiction of such people's court. |
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#### 4.Scope

The Rules mentioned above are only applicable to foreign-related civil and commercial cases rather than any foreign-related disputes of marriage, family and/or employment. Clearly, the Rules are not applicable to any cross-border trade disputes taking place in provinces that border the country with which trade is taking place, foreign-related real estate disputes and foreign-related intellectual property disputes. The Rules on Certain Issues Relating to Jurisdiction over Proceedings of Foreign-related Civil and Commercial Cases are applicable to foreign-related civil and commercial suits as follows:

- Foreign-related contractual disputes, which refer to any foreign-related commercial disputes in relation to international sales of goods, services, investments, loans, insurance, negotiable instruments, securities, leases, security, futures, trusts, joint-ventures and company operations, etc;
- Foreign-related tort disputes, which refer to any compensation claimed by an individual, legal entity or other organization for the interest in property damaged in the course of foreign-related business;
- Letter of credit disputes, which refer to any disputes regarding the opening and performance of letters of credit among parties in the course of international trade;
- Application for the cancellation, recognition or enforcement of international arbitral decisions;
- Application for verifying the binding force of foreign-related civil and commercial arbitration clauses; and
- Application for the recognition or enforcement of civil and commercial decisions made by foreign courts.

### 【作者介绍】

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叶强律师于 2011 年加入北京卓纬律师事务所并担任执行合伙人。此前，他曾在中国建设银行工作五年，并在去英国谢菲尔德大学攻读法学硕士学位在广州某律师事务所执业。英国毕业后，叶强律师在全球建筑领域享有卓越声誉的英国梅森律师事务所广州及香港办公室工作两年。此后，叶强律师在广大律师事务所及安华理达律师事务所广州、上海及北京分所执业。

叶强律师的执业领域主要集中于公司、房地产及争议解决等多个领域。他在公司、房地产领域的法律实践主要包括并购、外商直接投资、建筑及房地产投资等内容。此外，叶强律师特别擅长于解决与建筑、公司治理及商业有关的各类纠纷。他曾在多起诉讼、和解及仲裁案件中为客户提供法律帮助，具有丰富的实务经验及专业技巧。叶强律师服务的客户包括花旗、渣打、星展银行、Rose Rock 基金、麦格理投行、Marconi、海德堡、欧司朗、弗兰克、博格、AGC 等多家著名企业。

## 工作语言

普通话、英语、粤语